NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

GERALD ARNOLD

Judges

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K. EDWARD GREENE
JOHN B. LEWIS, JR.
JAMES A. WYNN, JR.
JOHN C. MARTIN
JOSEPH R. JOHN, SR.
MARK D. MARTIN
RALPH A. WALKER
LINDA M. McGEE

Emergency Recalled Judge

DONALD L. SMITH[1]

Former Chief Judge

R. A. HEDRICK

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
JAMES M. BALEY, JR.
DAVID M. BRITT
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
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ROBERT F. ORR
SYDNOR THOMPSON
CLIFTON E. JOHNSON[2]

Administrative Counsel

FRANCIS E. DAIL

Clerk

JOHN H. CONNELL

---

1. Recalled 1 September 1995.
2. Retired 30 November 1996.

ADMINISTRATIVE OFFICE OF THE COURTS

Director

DALLAS A. CAMERON, JR.[3]

Assistant Director

ALAN D. BRIGGS[4]

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

---

3. Appointed by Chief Justice Mitchell effective 1 January 1997 to replace Acting Director Jack Cozort, who resumed his duties as Judge of the Court of Appeals 1 January 1997.

4. Appointed by Chief Justice Mitchell effective 6 January 1997.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. Richard Parker	Manteo
	Jerry R. Tillett	Manteo
2	William C. Griffin, Jr.	Williamston
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	SHIRLEY L. FULTON	Charlotte
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EDWARD K. WASHINGTON	High Point

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DONALD L. SMITH[5]	Raleigh

1. Elected and sworn in 3 January 1997 to replace Joe Freeman Britt who retired 31 December 1996.
2. Elected and sworn in 1 January 1997 to replace W. Steven Allen, Sr., who resigned 31 December 1996.
3. Moved from District 20 to District 19B due to redistricting 16 December 1996.
4. Elected and sworn in 2 January 1997 to replace Donald R. Huffman who retired 31 December 1996.
5. Recalled to the Court of Appeals 1 September 1995.

DISTRICT COURT DIVISION

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	H. HORTON ROUNTREE	Greenville
	SAMUEL M. TATE	Morganton
	LIVINGSTON VERNON	Morganton
	JOHN M. WALKER	Wilmington

1. Appointed Chief Judge and sworn in 4 December 1996.
2. Elected and sworn in 6 December 1996.
3. Appointed Chief Judge and sworn in 2 December 1996.
4. Elected and sworn in 2 December 1996.
5. Appointed Chief Judge and sworn in 2 December 1996 to replace George M. Britt who retired 1 December 1996.
6. Elected and sworn in 2 December 1996.
7. Elected and sworn in 2 December 1996 to replace Kenneth R. Ellis who retired 30 November 1996.
8. Elected and sworn in 2 December 1996 to replace William A. Creech who resigned 30 November 1996.
9. Elected and sworn in 2 December 1996.
10. Appointed and sworn in 24 October 1996 to replace William Y. Manson who retired 31 July 1996.
11. Appointed as Chief Judge 3 December 1996 to replace Lowry B. Betts who retired 30 November 1996.
12. Elected and sworn in 2 December 1996.
13. Elected and sworn in 2 December 1996.
14. Appointed Chief Judge 4 December 1996 to replace J. Bruce Morton who retired 30 November 1996.
15. Elected and sworn in 2 December 1996.
16. Elected and sworn in 2 December 1996.
17. Elected and sworn in 2 December 1996.
18. Moved to District 19B due to redistricting 16 December 1996.
19. Appointed Chief Judge 2 December 1996 to replace Michael Earle Beale who was elected to Superior Court.
20. Appointed Chief Judge 3 December 1996 to replace James A. Harrill, Jr., who resigned 30 November 1996.
21. Elected and sworn in 2 December 1996.
22. Elected and sworn in 2 December 1996.
23. Elected and sworn in 9 December 1996.
24. Appointed and sworn in 3 September 1996 to replace Marilyn R. Bissell who retired 1 August 1996.
25. Elected and sworn in 2 December 1996 to replace Daphene L. Cantrell who retired 1 December 1996.
26. Elected and sworn in 2 December 1996 to replace Stephen F. Franks who retired 30 November 1996.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

MICHAEL F. EASLEY

Deputy Attorney General for Administration
SUSAN RABON

Special Counsel to the Attorney General
HAMPTON DELLINGER

Deputy Attorney General for Policy and Planning
JANE P. GRAY

Chief Legal Counsel
JOHN R. MCARTHUR

Chief Deputy Attorney General
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Senior Deputy Attorneys General

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

KATHLEEN M. LEANDRO, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ROBERT A. LEANDRO; STEVEN R. SUNKEL, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR ANDREW J. SUNKEL; CLARENCE L. PENDER, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SCHNIKA N. PENDER; TYRONE T. WILLIAMS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF TREVELYN L. WILLIAMS; D. E. LOCKLEAR, JR., INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JASON E. LOCKLEAR; ANGUS B. THOMPSON, II, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF VANDALIAH J. THOMPSON; JENNIE G. PEARSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SHARESE D. PEARSON; WAYNE TEW, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF NATOSHA L. TEW; DANA HOLTON JENKINS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF RACHEL M. JENKINS; FLOYD VICK, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ERVIN D. VICK; HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; PLAINTIFF-APPELLEES, AND CASSANDRA INGRAM, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF DARRIS INGRAM; CAROL PENLAND, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JEREMY PENLAND; DARLENE HARRIS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SHAMEK HARRIS; NETTIE THOMPSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ANNETTE RENEE THOMPSON; DAVID MARTINEZ, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF DANIELA MARTINEZ; OPHELIA AIKEN, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF BRANDON BELL; ASHEVILLE CITY BOARD OF EDUCATION; BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION; WAKE COUNTY BOARD OF EDUCATION; WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, PLAINTIFF-INTERVENOR-APPELLEES V. STATE OF NORTH CAROLINA; STATE BOARD OF EDUCATION; DEFENDANT-APPELLANTS

No. COA95-321

(Filed 19 March 1996)

1. Constitutional Law § 94 (NCI4th)— school funding system—general and uniform clause—equal opportunities clause

The trial court erred in denying defendant's Rule 12(b)(6) motion to dismiss plaintiffs' claims that the state school funding

system violates the "general and uniform" and "equal opportunities" clauses of Article IX, § 2(1) of the North Carolina Constitution, since the uniformity required is *system* uniformity, as contended by defendant, and not spending or programming uniformity, as contended by plaintiffs; and the Constitution provides no fundamental right to equal educational opportunities, but simply equal access to the public schools.

Am Jur 2d, Schools §§ 5, 216, 252.

De facto segregation of races in public schools. 11 ALR3d 780.

Validity of basing public school financing system on local property taxes. 41 ALR3d 1220.

2. Constitutional Law § 94 (NCI4th)— constitutional right to education—equal access protected—no qualitative standard

The fundamental educational right under the North Carolina Constitution is limited to one of equal access to education, and it does not embrace a qualitative standard; therefore, plaintiffs' claims that the Constitution provides a fundamental right to adequate educational opportunities and that the State violated that right by its system for funding public education should have been dismissed for failure to state a claim upon which relief could be granted.

Am Jur 2d, Schools §§ 5, 216, 252.

De facto segregation of races in public schools. 11 ALR3d 780.

Validity of basing public school financing system on local property taxes. 41 ALR3d 1220.

3. Constitutional Law § 94 (NCI4th)— educational funding—due process and equal protection claims—no fundamental right to adequate educational opportunities

The trial court erred in denying defendant's motion to dismiss plaintiffs' equal protection and due process claims where plaintiffs argued that under the State's educational funding system the opportunities they received were substantially inferior to those offered to children in wealthy school districts since this claim was based on an asserted fundamental right to adequate educa-

tional opportunities, and a constitutional fundamental right to adequate educational opportunities does not exist.

Am Jur 2d, Schools § 45.

De facto segregation of races in public schools. 11 ALR3d 780.

Validity of basing public school financing system on local property taxes. 41 ALR3d 1220.

4. Schools § 51 (NCI4th)— failure of defendant to provide necessary resources—no right to adequate education—no statutory basis for claim

The trial court erred in denying defendant's Rule 12(b)(6) motion to dismiss plaintiffs' claims that the State has violated certain provisions of N.C.G.S. Ch. 115C by failing to provide necessary resources for instructional purposes on an equal basis since statutory claims based on violations of the nonexistent fundamental right to an adequate education must fail; the statutory provisions themselves provide no basis for relief; and some of the provisions under which plaintiffs claim apply only to schoolchildren with special needs. N.C.G.S. §§ 115C-1, 115C-81, 115C-122(3), and 115C-408.

Am Jur 2d, Schools § 216.

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

Appeal by defendants from order entered 1 February 1995 by Judge E. Maurice Braswell in Halifax County Superior Court. Heard in the Court of Appeals 24 January 1996.

This appeal arises from a declaratory judgment action against the State of North Carolina and the State Board of Education (hereinafter collectively, the State) challenging the State's method for financing the public school system. Plaintiffs filed a complaint on 25 May 1994 and an amended complaint on 26 September 1994, seeking a declaration, among others, that North Carolina's public education system, including its system of funding, violates the North Carolina Constitution (hereinafter the Constitution) and various state statutes by failing to provide adequate and substantially equal educational opportunities for all schoolchildren in the state. On 17 October 1994

the trial court allowed the intervention of plaintiff-intervenors, and they filed a complaint on 18 October 1994, seeking declarations that the State has failed to fulfill its duty to establish a general and uniform system of free public schools with equal educational opportunities for all students and that it has failed to fulfill its duty to provide an adequate system of public schools in the urban school districts.

Plaintiffs are five boards of education in low-wealth school districts and twenty individuals in those districts who allege generally that the State has failed in numerous respects to satisfy its obligations under the Constitution and N.C. Gen. Stat. Chapter 115C by maintaining a system for funding public schools that does not take sufficient account of the substantial disparities in wealth among school districts.

More specifically, plaintiffs complain that there is a large gap in educational opportunities between their districts and wealthier ones as demonstrated by their dilapidated school facilities, short supply of textbooks, and limited curricula, among other things, all leading to difficulty in attracting and attaining qualified teachers. The result, they argue, is a lack of adequate educational opportunities reflected in part by low test scores. Plaintiffs assert that the root of the problem is the State's system for funding public education, which delegates to local governments the responsibility for capital expenses and some current school expenses. These funds are raised by property taxes, and plaintiff districts' property tax bases are lower than other counties, requiring greater tax effort. The greater tax effort, however, does not make up differences in per pupil funding, and plaintiffs claim that they still receive less funding per pupil than wealthy districts.

In addition, plaintiffs argue that the State's supplemental funding program for low-wealth school districts does not provide them with funding sufficient to support an adequate education. They also maintain that they do not have access to programs required by the State's Basic Education Program (BEP), set forth in N.C. Gen. Stat. § 115C-81. Thus, the State's funding system, plaintiffs allege, results in inadequate funding, which leads to inadequate and unequal educational opportunities.

Plaintiff-intervenors, six boards of education in urban districts and twelve individuals in those districts, allege generally that the State is failing to meet its constitutional and statutory obligations by "failing to implement a public education system that adequately and

equitably takes into account the educational and resource needs of all students and school districts." They claim that some students in urban districts, especially those who live in or near poverty, "face environmental and other disadvantages that require more educational resources than the State currently provides if they are to receive an adequate education." Other students require special education services, English-as-a-second-language services, and academically gifted services, which require the urban school boards to "divert substantial resources from their regular education programs."

Moreover, plaintiff-intervenors claim that "the State has failed to address sufficiently the high costs and 'municipal overburden' that characterize the urban school districts." They assert that the BEP, even if fully funded, would not meet their needs. In sum, plaintiff-intervenors argue that the State has "failed to provide sufficient resources to enable the urban school boards to provide all of their students with an adequate education," and the school funding system "is inequitable, irrational, arbitrary and capricious, in violation of the North Carolina Constitution and State law."

Defendants filed a motion to dismiss the complaints of both plaintiffs and plaintiff-intervenors (hereinafter collectively, plaintiff parties), asserting defenses, under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6), that the trial court lacked subject matter and personal jurisdiction and that plaintiff parties failed to state any claim upon which relief can be granted. Defendants also requested a transfer of venue to Wake County, which was granted. After a hearing on 9 and 10 January 1995, Judge E. Maurice Braswell denied defendants' motions to dismiss.

Defendants filed a timely notice of appeal of the order denying their motions to dismiss. The parties then filed a joint petition in the Supreme Court for discretionary review, which was denied on 11 April 1995. Subsequently, defendants filed an alternative petition for writ of certiorari in this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. The petition was allowed on 4 May 1995.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Edwin M. Speas, Jr., Special Deputy Attorney General Tiare B. Smiley, and Special Deputy Attorney General Ronald M. Marquette, for defendant appellants.

Parker, Poe, Adams & Bernstein L.L.P., by Robert W. Spearman, Robert H. Tiller, and Heman R. Clark, and Hux Livermon &

Armstrong, by H. Lawrence Armstrong, Jr., for plaintiff appellees.

Smith Helms Mulliss & Moore, L.L.P., by Gary R. Govert, and Hogan & Hartson, L.L.P., by Allen R. Snyder, for plaintiff-intervenor appellees.

ARNOLD, Chief Judge.

Although denial of a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) is immediately appealable, *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982), denial of a motion to dismiss under Rule 12(b)(1) or 12(b)(6) is ordinarily interlocutory and not immediately appealable. *Id.* at 326-27, 293 S.E.2d at 183-84. Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, however, petition for writ of certiorari was allowed in order to review the trial court's order denying the motions to dismiss under G.S. § 1A-1, Rules 12(b)(1), (2), and (6).

The standard for ruling on a motion to dismiss under Rule 12(b)(6) is

> whether the pleading is legally sufficient to state a cause of action. In ruling on the motion, the allegations of the complaint are treated as true, and on that basis the trial court must determine as a matter of law whether the allegations state a claim for which relief may be granted. The " 'issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.' "

Morris v. Plyler Paper Stock Co., 89 N.C. App. 555, 556-57, 366 S.E.2d 556, 558 (1988) (citations omitted). Moreover, a 12(b)(6) motion

> is seldom appropriate "in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail." The motion is allowed only when "there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy."

Id. at 557, 366 S.E.2d at 558 (citations omitted).

As a preliminary matter, we recognize that education is primarily the responsibility of parents, teachers, and state and local school officials, and not of state judges. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 98 L. Ed. 2d 592, 606 (1988) (expressing the same reservations about the role of federal judges in education).

Judicial intervention in educational issues is appropriate only when a constitutional right is " 'directly and sharply implicate[d].' " *Id.*, 98 L. Ed. 2d at 607 (citation omitted).

[1] The State first argues that the trial court erred in denying its Rule 12(b)(6) motion to dismiss plaintiff parties' claims that the school funding system violates the "general and uniform" and "equal opportunities" clauses of Article IX, § 2(1) of the Constitution. The State contends that the structure of its educational system is indeed general and uniform and argues that this Court's decision in *Britt v. N.C. State Board of Education*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. review denied and appeal dismissed*, 320 N.C. 790, 361 S.E.2d 71 (1987), forecloses plaintiff parties' "equal opportunities" claims. We agree.

Article IX, § 2(1) of the present Constitution, as amended in 1970, provides:

> The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

Plaintiffs claim that the State's educational funding system is not constitutionally "general and uniform" because "the quality of the education programs and amounts of funding vary substantially between plaintiff school districts and wealthy school districts." Plaintiff-intervenors similarly argue that the State does not meet its constitutional mandate to provide a general and uniform system of public schools because the "educational financing system fails properly to take account of the significant differences in the educational and resource needs of students and school districts throughout the State."

The State responds that the "general and uniform" language of Article IX, § 2(1) refers to uniformity not in its educational programs or facilities, but in the State's *system* of public education. Plaintiffs argue that the State's emphasis on the organization and administration of the educational system is misplaced, maintaining that the "general and uniform" language "at its origin was understood to require a school system that treated schoolchildren throughout the State with substantial equality." Plaintiff-intervenors similarly claim that the State "miss[es] the essential point of having a 'general and uniform system.' "

Cases interpreting the "general and uniform" clause, however, clearly contradict plaintiffs' arguments. In *Lane v. Stanly*, 65 N.C. 153 (1871), the Supreme Court offered an early examination of the "general and uniform" clause of Article IX, observing that

> it is to be a "system," it is to be "general," and it is to be "uniform." It is not to be subject to the caprice of localities, but every locality, yea, every child, is to have the same advantage, and be subject to the same rules and regulations.
>
> . . . [I]f every township were allowed to have its own regulations, and to consult its own caprices . . . [t]here would be no "uniformity" and but little usefulness, and the great aim of the government in giving all of its citizens a good education would be defeated.

Id. at 157-58. While plaintiffs urge that *Lane* reinforces the requirement of substantial equality, we find that the Court simply interpreted the "general and uniform" provision to ensure a system of public education that was administered uniformly across the state.

In *Board of Education v. Board of Commissioners*, 174 N.C. 469, 93 S.E. 1001 (1917), the Supreme Court reinforced its limited interpretation of the "general and uniform" clause:

> The term "uniform" here clearly does not relate to "schools," requiring that each and every school in the same or other districts throughout the State shall be of the same fixed grade, regardless of the age or attainments of the pupils, but the term has reference to and qualifies the word "system" and is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support.

Id. at 473, 93 S.E. at 1002. We agree with the State that the uniformity required is *system* uniformity, not spending or programming uniformity, as plaintiff parties contend. Their claims pursuant to the "general and uniform" clause of the Constitution should have been dismissed under Rule 12(b)(6).

Plaintiffs also claim that the State's educational funding system fails to provide equal educational opportunities for all children because the opportunities available to them are substantially inferior

to those in wealthy school districts. The plaintiffs in *Britt* made a similar claim, arguing that Article I, § 15 and Article IX, § 2(1) of the Constitution conferred upon them a fundamental right to equal educational opportunity, "that is to say that each student in the State has a fundamental right to an education substantially equal to that enjoyed by every other student in the State, and that the present statutory scheme for financing public education violates that right." *Britt*, 86 N.C. App. at 285, 357 S.E.2d at 434. Rejecting this claim, *Britt* established that the Constitution provides no fundamental right to equal educational opportunities, but simply "equal *access* to our public schools—that is, every child has a fundamental right to an education in our public schools." *Id.* at 289, 357 S.E.2d at 436 (citing *Sneed v. Board of Education*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980)).

To state a valid claim for relief, plaintiffs must therefore distinguish their "equal opportunities" claims from those of the plaintiffs in *Britt*. Plaintiffs argue that their claim is for *substantial* rather than *absolute* equality among school systems. They urge that *Britt* is inapplicable to their case because the Court "did not address itself to a claim for 'substantial equality, rather than absolute equality.' " We disagree.

In *Britt*, the plaintiffs similarly argued that their claim did not require absolute equality among systems, "but rather . . . that the State cannot ignore the relative ability of counties to raise funds when disparities in county wealth deprive students of equal educational opportunity." *Britt*, 86 N.C. App. at 289, 357 S.E.2d at 436. We find plaintiffs' claim in the instant case indistinguishable. The *Britt* Court found that the Constitution contemplated "disparit[ies] between counties as to the financial resources available," *id.* at 288, 357 S.E.2d at 435-36, and concluded that

> if our Constitution demands that each child receive equality of opportunity in the sense argued by plaintiffs, only absolute equality between all systems across the State will satisfy the constitutional mandate. Any disparity between systems results in opportunities offered some students and denied others. Our Constitution clearly does not contemplate such absolute uniformity across the State.

Id. at 289, 357 S.E.2d at 436. The plaintiffs in *Britt* did not argue for absolute equality, but the Court recognized that the equality they sought could only be absolute. The same is true for plaintiffs' equal

opportunities claim, and we find that their claim under the "equal opportunities" clause of Article IX, § 2(1) of the Constitution is foreclosed by our decision in *Britt*. The trial court erred in not dismissing this claim pursuant to Rule 12(b)(6).

Plaintiff-intervenors also attempt to distinguish their "equal opportunities" claim from that in *Britt*, contending that "each North Carolina student, regardless of where he or she lives, has an equal right to funding sufficient to provide him or her with an adequate education. . . . The right the urban plaintiffs seek to enforce, therefore, is not a right to equal *funding*, but a right to equal *opportunity*." Although plaintiff-intervenors' claim might be distinguished from the plaintiffs' unsuccessful claim in *Britt*, the *Britt* Court's analysis of the limited purpose of the "equal opportunities" clause applies with the same force to bar plaintiff-intervenors' claim.

Discussing the origin of the "equal opportunities" clause, added to the Constitution by amendment in 1970, the *Britt* Court declared:

> In our view, the only plausible way to interpret that provision is to relate it to the "separate but equal" phrase of the 1868 Constitution that it replaced. . . . By mandating equal opportunities for all students, the framers of the Constitution and the voters that adopted it were emphasizing that the days of "separate but equal" education in North Carolina were over, and that the people of this State were committed to providing all students with equal access to full participation in our public schools, regardless of race or other classifications. Any other interpretation, we believe, would require drawing inferences and conclusions that not only cannot be supported, but are, in fact, contradicted by the history surrounding the adoption of the Constitution.

Id. at 289-90, 357 S.E.2d at 436. Although plaintiff-intervenors' claim may not mirror that of the plaintiffs in *Britt*, it nevertheless fails to state a claim for relief according to the *Britt* Court's interpretation of the "equal opportunities" clause.

As in *Britt*, both plaintiffs' and plaintiff-intervenors' claims for relief are "premised upon the violation of a right which we have concluded does not exist in the context alleged . . . ." *Id.* at 290, 357 S.E.2d at 436-37. The trial court should have granted the State's motion to dismiss plaintiff parties' equal opportunities claims pursuant to Rule 12(b)(6).

[2] In its second assignment of error, the State argues that the trial court erred in denying its Rule 12(b)(6) motion to dismiss plaintiff parties' claims that they have a fundamental constitutional right to adequate educational opportunities. We agree.

Plaintiff parties claim that the State's system for funding public education violates their alleged fundamental constitutional right to adequate educational opportunities because it has failed to provide the necessary funds. They maintain that although the Constitution does not expressly provide for "adequate" educational opportunities, the framers intended to impose an adequacy standard. The State responds that the Constitution is silent on the issue of "adequate education," and that there is no such constitutional right.

Article I, § 15 of the Constitution provides that "[t]he people have a right to the privilege of education," and the State asserts that this "privilege" simply denotes *access* to education and does not command any qualitative standard. Indeed, our Supreme Court in *Sneed v. Board of Education*, 299 N.C. 609, 264 S.E.2d 106 (1980), examined this constitutional provision along with Article IX, § 2(1), and held: "It is clear, then, that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process." *Id.* at 618, 264 S.E.2d at 113. The *Britt* Court reiterated *Sneed*'s declaration, holding that "[t]he fundamental right that is guaranteed by our Constitution, then, is to equal *access* to our public schools—that is, every child has a fundamental right to receive an education in our public schools." *Britt*, 86 N.C. App. at 289, 357 S.E.2d at 436.

We hold that under *Sneed* and *Britt*, the fundamental educational right under the North Carolina Constitution is limited to one of equal access to education, and it does not embrace a qualitative standard. As in *Britt*, plaintiff parties here "have not alleged that they are being denied an education . . . ." *Id.* Thus, their claims that the Constitution provides a fundamental right to *adequate* educational opportunities, and that the State has violated that alleged right, should have been dismissed for failure to state a claim upon which relief can be granted.

The State contends in the alternative that plaintiff parties' educational adequacy claims present nonjusticiable political questions, and the trial court should have dismissed these claims for lack of jurisdiction pursuant to Rules 12(b)(1) and 12(b)(2). Because we find that plaintiff parties' educational adequacy claims should have been dis-

missed pursuant to Rule 12(b)(6), we decline to address this contention.

[3] The State argues in its third assignment of error that the trial court erred in denying its Rule 12(b)(6) motion to dismiss plaintiff parties' equal protection and due process claims. We agree.

Plaintiffs assert that the State has denied them the equal protection of the laws guaranteed under Article I, § 19 of the Constitution because of the substantial disparities in school funding that result from the State's educational finance system. To trigger strict scrutiny in considering an equal protection claim, "it is necessary that there be a preliminary finding that there is a suspect classification or an infringement of a fundamental right." *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). Plaintiff parties do not claim that they comprise a suspect class, but rather that the State has infringed an alleged fundamental right.

Although plaintiffs' claim on its face simply maintains that the State has violated their fundamental right to education, the substance of their allegation shows that they base their equal protection claim on an asserted fundamental right to *adequate* educational opportunities. They argue that the State violates equal protection because under its educational funding system the educational opportunities they receive are substantially inferior to those offered to children in wealthy school districts. Plaintiff-intervenors claim that the State has denied them equal protection because its supplemental funding scheme irrationally discriminates against school districts not defined as "low wealth" or "small" and fails to provide them with an adequate education. Their equal protection claim is also premised upon the assertion that they have a fundamental right to an adequate education.

Since we found above that a constitutional fundamental right to adequate educational opportunities does not exist, it follows that plaintiff parties' equal protection claims, based on this asserted fundamental right, necessarily fail. The trial court should have dismissed their equal protection claims pursuant to Rule 12(b)(6).

Plaintiff parties also base due process claims upon the assertion that they have a fundamental right to adequate educational opportunities. Plaintiffs argue that this alleged fundamental right "may not be withheld or eliminated except in accordance with due process," as guaranteed under the law of the land clause of Article I, § 19 of the

Constitution. They maintain that under substantive due process analysis, strict scrutiny should be applied to invalidate any limitation on a fundamental right not justified by a compelling State interest. *See In re Moore*, 289 N.C. 95, 101-02, 221 S.E.2d 307, 311-12 (1976) (citing *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147 (1973)). However, we established above that there is no fundamental right to adequate educational opportunities, and absent a properly asserted fundamental right, plaintiff parties' substantive due process claims cannot be maintained.

Plaintiffs claim in addition that "compelling schoolchildren to attend schools without providing adequate educational opportunities is a deprivation of their liberty that requires due process of law under the state Constitution." Plaintiff-intervenors claim both property and liberty interests in education and allege that "[b]ecause the State has failed to provide the individual intervenors with adequate educational programs and facilities, they have been denied due process of law." We find that plaintiff parties' additional due process claims present no genuine controversy, and we reverse the trial court's denial of the State's Rule 12(b)(6) motion to dismiss all of their due process claims.

[4] In its fourth assignment of error, the State contends that the trial court erred in denying its Rule 12(b)(6) motion to dismiss plaintiff parties' statutory claims for relief based upon provisions of N.C. Gen. Stat., Chapter 115C. Plaintiffs allege that the State has violated the requirements of certain provisions of Chapter 115C by failing to provide them with equal access to the BEP and "by failing to assure that plaintiffs receive necessary resources for instructional purposes on an equitable basis." Plaintiff-intervenors similarly claim that by failing to provide necessary resources, the State has failed to meet its statutory obligations under Chapter 115C to provide adequate and equal educational opportunities. The State contends that plaintiff parties' statutory claims are not actionable. We agree.

Plaintiff parties assert that certain provisions of Chapter 115C affirm their alleged constitutional fundamental right to an adequate education, and other provisions must be carried out in accordance with this fundamental right. However, we found above that there is no constitutional fundamental right to adequate education. Therefore, plaintiff parties' statutory claims, all based on violations of this nonexistent fundamental right, necessarily fail.

Moreover, the specific statutory provisions themselves provide no basis for relief. First, G.S. § 115C-1 simply codifies the "general and uniform" and "equal opportunities" clauses of the Constitution, which we found above to provide no cognizable claim, and it affords no additional basis for relief. Next, the BEP, set forth in G.S. § 115C-81, simply directs the State Board to adopt and implement a program of basic instruction in specified areas and declares that the goal of the General Assembly is to provide funds to implement the BEP. Accordingly, it confers no actionable rights upon plaintiff parties.

Plaintiffs' claim under G.S. § 115C-122(3) is likewise without merit. This provision is contained in Article 9 of Chapter 115C, which applies only to schoolchildren with special needs as defined under G.S. § 115C-109. Plaintiffs do not assert, however, that they fall within the purview of Article 9. In addition, plaintiff-intervenors' complaint does not on its face state a claim under G.S. § 115C-122(3). Thus, plaintiff parties' attempts to extract language from this provision and apply it generally, outside the context of Article 9, are not persuasive.

Finally, G.S. § 115C-408 simply declares the State's policy to provide from state revenue the instructional expenses for current operations of the public school system and indicates that "the facilities requirements for a public education system will be met by county governments." As a policy statement, the statutory provision confers no actionable right upon plaintiff parties, and their claims under this statute also fail.

In its last assignment of error, the State argues that the trial court erred in denying its motions to dismiss under Rule 12(b)(1) and (2) for lack of subject matter and personal jurisdiction, claiming as affirmative defenses the doctrine of sovereign immunity, the lack of standing on the part of the plaintiff boards of education, and the contention that the constitutionality of no statute is properly at issue under the Declaratory Judgment Act. Because we reverse the trial court and dismiss both plaintiffs' and plaintiff-intervenors' complaints pursuant to Rule 12(b)(6) for failure to state cognizable claims, we need not consider the State's jurisdictional arguments.

The trial court's order denying the State's motions to dismiss is

Reversed.

Judges LEWIS and WALKER concur.

NORTH CAROLINA BOARD OF EXAMINERS FOR SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS, PLAINTIFF v. NORTH CAROLINA STATE BOARD OF EDUCATION, BOBBY R. ETHERIDGE, SUPERINTENDENT OF PUBLIC INSTRUCTION, NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, GUILFORD COUNTY BOARD OF EDUCATION, DAVIE COUNTY BOARD OF EDUCATION, IREDELL COUNTY BOARD OF EDUCATION, MECKLENBURG COUNTY BOARD OF EDUCATION, COLUMBUS COUNTY BOARD OF EDUCATION, BURKE COUNTY BOARD OF EDUCATION, LAURA SZENASY, JANE IRENE FERREE, ELIZABETH TUTTLE CARTER, PATRICIA YODER, KATHY WIANT, AND BERNADINE ARMSTRONG, DEFENDANTS

No. COA94-1208

(Filed 19 March 1996)

Professions and Occupations § 1 (NCI4th); Schools § 140 (NCI4th)— non-licensed speech pathologists in public schools—appropriate credential under Licensure Act—summary judgment improper

In a declaratory judgment action where plaintiffs sought construction of N.C.G.S. § 90-294(c)(4), which concerns exemptions from the licensing requirements of the Licensure Act for Speech and Language Pathologists and Audiologists, and where plaintiff asserted that persons not qualified under the Licensure Act were being employed in North Carolina's public school system to practice speech pathology, the trial court erred in granting summary judgment for defendants, since defendants were bound by the Licensure Act rather than the *Certification Manual* of the Department of Public Instruction (DPI); N.C.G.S. § 115C-296(a), which gives the State Board of Education control of certifying all applicants for teaching positions, did not equate teachers and speech pathologists; the exclusive authority given the State Board of Education to supervise and administer the public school system was subject to review and limitation by acts of the General Assembly; an exemption from the Licensure Act allowing non-licensed speech pathologists to be employed by the DPI was wholly dependent upon the DPI's issuance of a well grounded credential to the person hired to render speech pathology services; and there was insufficient evidence concerning the DPI's speech credentialing standard in the record from which the trial court could have measured whether DPI's speech pathology certification was a valid and current credential under the Licensure Act.

Am Jur 2d, Summary Judgment § 22.

Judge Greene dissenting.

Appeal by plaintiff from judgment entered 30 August 1994 by Judge Narley T. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 18 October 1995.

Randall, Jervis & Hill, by John C. Randall, for plaintiff appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Barbara A. Shaw, for the State.

SMITH, Judge.

This appeal is from a grant of summary judgment in a declaratory judgment action instituted by the North Carolina Board of Examiners for Speech and Language Pathologists and Audiologists ("Examiners" or "Board of Examiners"). The trial court granted summary judgment for defendants, the North Carolina Board of Education, the Department of Public Instruction (DPI), and individuals employed in public schools as speech pathologists. By its declaratory judgment petition, Examiners seek construction of N.C. Gen. Stat. § 90-294(c)(4) (1993), which concerns exemptions from the licensing requirements of the Licensure Act for Speech and Language Pathologists and Audiologists (the "Licensure Act" or "Act"), N.C. Gen. Stat. § 90-292 to -319. Plaintiff asserts that persons not qualified under the Licensure Act are being employed in North Carolina's public school systems to practice speech pathology; thus the trial court "misinterpreted and misapplied the appropriate statutes" in granting summary judgment for defendants. We agree and reverse.

A speech pathologist is defined by statute as follows:

> "Speech and language pathologist" means any person who represents himself to the public by title or by description of services, methods, or procedures as one who evaluates, examines, instructs, or counsels persons suffering from conditions or disorders affecting speech and language. A person is deemed to be a speech and language pathologist if he offers such services under any title incorporating the words "speech pathology," "speech pathologist," . . . or any similar title or description of service.

N.C. Gen. Stat. § 90-293(5) (1993). In North Carolina, a person practicing speech pathology must either obtain a license from the Board of Examiners, or fall within one of the exemptions provided by N.C.

Gen. Stat. § 90-294. The exemption at issue is § 90-294(c)(4), which reads:

> A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction . . . if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction . . . .

The question which arises is whether DPI is issuing "certifications" to practitioners of speech pathology who do not meet statutory criteria. Plaintiffs maintain persons are being employed within North Carolina local school systems as speech pathologists, who have not been licensed, and who do not fall within the exemptions from licensing provided by the Act.

The party moving for summary judgment bears the burden of showing the absence of any genuine issue of material fact, and entitlement to judgment as a matter of law. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995). In addition, the record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom. *Id.*

Plaintiffs claim that several of defendants have been issued certificates as speech pathologists by DPI, without holding a "valid and current credential" as intended by the Licensure Act. *Id.* To demonstrate defendants' noncompliance with the Act, plaintiffs cite Section .1529 of *Procedures Governing Programs and Services for Children with Special Needs*, Exceptional Children's Services, State Department of Public Instruction (1993 ed.) (hereinafter "Section .1529" or *"Procedures"*). Plaintiffs argue *Procedures* sets a minimum certification standard for a "valid credential," as *Procedures* was purportedly adopted as policy by the State Board of Education. In *Procedures*, the minimum qualifications for certification are described as "certification at the master's level." Inexplicably, Section .1529 is used as authority for this proposition by plaintiffs, without reference to anything clearly denoting its legal force or value. Moreover, there is evidence in the record which indicates that Section .1529 and other related rules were repealed by DPI on 1 July 1986.

Defendants deny they are bound by the express wording of the Section .1529 policy, or the Licensure Act, for three reasons. First,

defendants argue that *Procedures* Section .1529 was amended by the State Board in 1990 through DPI's *Certification Manual, Standards and Procedures for the Certification of North Carolina Professional School Personnel* (1990) (the *"Manual"*). Defendants argue the *Manual* outlines the standard for a valid speech pathologist credential. The *Manual*, in a section named "Qualifying Criteria for Provisional Certification," lists DPI's criteria for granting "provisional" or "continuing" speech pathologist certifications.

Secondly, defendants maintain the ambit of their institutional power extends to making "[determinations of] the qualifications necessary to hold a valid certificate or license to teach in the public schools." Defendants argue this institutional power derives from N.C. Gen. Stat. § 115C-296(a) (1994), which reads: "The State Board of Education shall have entire control of certifying all applicants for teaching positions in all public elementary and high schools of North Carolina . . . ."

And finally, defendants argue:

> The State Board's authority regarding certification of school professionals does not derive from the General Assembly at all. Unlike any other state agency, the Constitution itself grants the State Board plenary authority to regulate the professional qualifications of superintendents, principals, teachers and other specialists in the schools.

We now, in turn, address defendants' arguments.

We are unable to recognize the DPI *Manual* as authority worthy of consideration for two reasons. First, the record is devoid of any evidence that the provisions of the DPI *Manual* were: (1) passed by the State Board, (2) properly established as regulations by DPI, or (3) intended to amend or clarify Section .1529. Needless to say, the function of DPI is to "administer . . . all policies established by the Board [of Education]." N.C. Gen. Stat. 115C-21(b)(1) (1994). DPI may not take any action contradictory to a properly enacted regulation or policy of the State Board of Education. *Id.* Second, the DPI *Manual* describes, treats, and includes speech pathologists as merely a subcategory or type of "Teacher." This attempt to equate practitioners of speech pathology with public schoolteachers is at odds with the applicable statutory framework established by our legislature through the Licensure Act.

Defendants' evidence in the record, and their brief on appeal, repeatedly refer to speech pathologists as "teacher[s] of speech-language impaired students." Defendants claim "entire control of certifying all applicants for teaching positions in all public elementary and high schools of North Carolina." *Ergo*, defendants assume that their power to credential speech pathologists exists inherently in the regulatory authority granted them over teachers. Defendants argue this power derives from N.C. Gen. Stat. §§ 115C-296(a) (1994) and 115C-315(d) (1994).

Neither of these statutes, however, grant defendants the power they claim. N.C. Gen. Stat. § 115C-296(a) provides the "State Board of Education [with] entire control of certifying all applicants for teaching positions . . . ." Section 115C-315 is codified in Article 21, entitled "Other Employees." Section 115C-315 regulates the hiring of Janitors and Maids, and provides for "Certification for Professional Positions." *See* § 115C-315(a), (d). We are not persuaded the legislature intended to equate teachers with speech pathologists. If it had been so intended, enactment of the exemption set forth in N.C. Gen. Stat. § 90-294(c)(4) was unnecessary. We are not convinced the legislature intended to create two rival certification procedures for public school speech pathologists or that either of these statutes supplement, ameliorate or modify the Licensure Act.

In so holding, we adhere to the principles pronounced in *Utilities Comm. v. Electric Membership Corp.*, 3 N.C. App. 309, 314, 164 S.E.2d 889, 892 (1968). There, this Court espoused

> "[w]here one statute deals with the subject matter in detail with reference to a *particular situation* and another statute deals with the same subject matter in *general* and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is *later enacted*."

Id. (quoting 7 Strong, N.C. Index 2d, *Statutes* § 5, p. 73) (emphasis added). Applying this rule, we note that §§ 115C-296 and 115C-315 were enacted, in pertinent part, by our legislature in 1955. *See* 1955 N.C. Sess. Laws ch. 1372, art. 18, § 2 and art. 5, § 4. The Licensure Act, asserted as exclusively controlling by plaintiffs, was enacted much later, in 1975. *See* 1975 N.C. Sess. Laws ch. 773, § 1. Unquestionably, the Licensure Act is more specific to the matter at hand, as the Act applies only to speech and language pathologists and audiologists.

Thus, we agree with plaintiffs that the Licensure Act, alone, governs this dispute.

In addition, it is the obligation of this Court to construe the statutes at hand so as not to defeat or impair their respective objectives. *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975). Were we to read the language of § 115C-315(d) (the "State Board of Education shall have entire control of certifying all applicants for professional positions") as preeminent over the provisions of the Licensure Act, we would eviscerate the purpose of that Act. The Licensure Act exists to delimit the qualifications of all persons performing the functions of a speech pathologist, no matter what the setting. Allowing defendants their definition of §§ 115C-315 or 115C-296 would undo an act of our legislature. Such an action exceeds the scope of our function, which is to interpret, not repeal, statutes. *State v. Bell*, 184 N.C. 701, 705, 115 S.E. 190, 192 (1922).

Finally, defendants claim "exclusive authority to regulate the professional qualifications of persons employed in North Carolina schools" as "the Constitution itself grants the State Board [this] plenary authority." This power is unfettered, the Board of Education asserts, as its "authority regarding certification of school professionals does not derive from the General Assembly *at all.*" (Emphasis added.) Defendants have misapprehended their power under the N.C. Constitution and the Act. Certainly, they are subject to both. Article IX, § 5 of the North Carolina Constitution is unambiguous on this point, as it states: "The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, *subject to laws enacted by the General Assembly.*" (Emphasis added.) Moreover, this Constitutional provision was interpreted by our Supreme Court in *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971), *cert. denied*, 406 U.S. 920, 32 L.Ed.2d 119 (1972). There the Court held that Article IX, § 5 "was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly." *Id.*

The Licensure Act at issue here provides explicit limitations upon the Board of Education and DPI. The Act was passed by our General Assembly in 1975, and is unquestionably constitutionally sound under *Guthrie. Id.*; and *see* N.C. Gen. Stat. § 90-292. Thus, defendants' claims of "plenary power" to regulate speech pathologists are meritless. Exemptions for speech pathologists under the Act, for persons

practicing "under the jurisdiction of the Department of Public Instruction," are conditioned upon the grant of a "valid and current credential" by DPI. *See Bd. of Examiners for Speech v. State Bd. of Education*, 77 N.C. App. 159, 160, 163, 334 S.E.2d 503, 504, 506 (1985) (quoting N.C. Gen Stat. § 90-294(c)(4)).

Since a legislative body is presumed not to have used superfluous words, our courts must accord meaning, if possible, to every word in a statute. *See* 2A Norman Singer, *Sutherland Statutory Construction* § 47.37 (5th ed. 1992). Under this rule of construction, we must assume our legislature assigned an operative meaning to the word "valid." By the terms of § 90-294(c)(4), a certification by DPI is not exempt unless it constitutes a "valid and current credential." *See State Bd. of Education*, 77 N.C. App. at 160, 163, 334 S.E.2d at 504, 506. Valid means "well-grounded; sound." *The American Heritage Dictionary* 457 (2d ed. 1976). Therefore, an exemption from the Act, allowing non-licensed speech pathologists to be employed by DPI, is wholly dependent upon DPI issuing a well-grounded credential to the person hired to render speech pathology services.

In the absence of an express definition of a "valid and current credential" within the Act itself, we turn to the Licensure Act's Declaration of Policy for illumination. The Declaration of Policy set forth in N.C. Gen. Stat. § 90-292 establishes that:

> It is declared to be a policy of the State of North Carolina that, in order to safeguard the public health, safety, and welfare; *to protect the public from being misled by incompetent*, unscrupulous, and unauthorized persons and from unprofessional conduct on the part of qualified speech and language pathologists and audiologists and to help assure the availability of the *highest possible quality* speech and language pathology and audiology services to the communicatively handicapped people of this State, it is necessary to provide regulatory authority over persons offering speech and language pathology and audiology services to the public.

(Emphasis added.) Under the analysis of the *State Bd. of Education* Court, it is evident the Declaration of Policy from § 90-292 exists as more than rhetorical refrain. That Court interpreted § 90-292 as having substantive effect, "requir[ing] an applicant to have in-depth training and education . . . consistent with [the Act's] aim of providing for the 'highest possible quality speech and language pathology services to the communicatively handicapped people of this State.' " *State Bd.*

of Education, 77 N.C. App. at 163, 334 S.E.2d at 505-06 (quoting § 90-292).

Though "highest possible quality" is itself an amorphous characterization, we are guided by the canons of statutory construction in determining the meaning of this phraseology. When statutes relate to, or are applicable to the same matter or subject, they must be construed together, *in pari materia*, to ascertain legislative intent. *See Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984). Based on the foregoing, it is inescapable that the intent of the legislature was to ensure, in every instance, that only qualified persons engage in the practice of speech pathology. A qualified speech pathologist is a person competent to provide high quality speech pathology services to the communicatively disabled. *See* § 90-292. The legislature, through the Act, defined the practice of speech pathology as

> the application of principles, methods, and procedures for the measurement, testing, evaluation, prediction, counseling, instruction, habilitation, or rehabilitation related to the development and disorders of speech, voice, or language for the purpose of identifying, preventing, ameliorating, or modifying such disorders.

N.C. Gen. Stat. § 90-293(7). This description is in essence a floor, establishing a minimum standard for any person providing speech pathology services in North Carolina. Application of these principles, methods, and procedures to the cure of health-oriented disorders implies a requisite level of expertise equal to that necessary to perform the enumerated tasks.

Simultaneously, for the § 90-294(c)(4) exemption to have any meaning whatsoever, the requirements implied by the Act's definition of the practice of speech pathology, and the policy declaration, must be less than the requirements set forth in § 90-295, which sets the standard for permanent licensing by the Board of Examiners. We find the definition of the practice of speech pathology in § 90-293(7) operative as a minimum credentialing standard, as only a person capable of competent, high quality speech pathology services may practice within the public school systems. At the same time, we recognize the requirements for § 90-295 licensure by the Board of Examiners must act as a ceiling—because, for the exemption itself to have meaning, DPI must be empowered under the Act to credential a speech pathologist not otherwise eligible for permanent licensure. This means a valid and current credential will be one which denotes that a person is competent to practice speech pathology, who nevertheless falls

short of the requirements for permanent licensure. However, rendering such an interstitial determination is beyond the power of this Court.

The legislature has not provided us with any enumerated standard for a valid credential under the Licensure Act's DPI exemption. Thus, the only statutory guidance available is the substantive direction and meaning given by the Licensure Act's: (1) Policy Declaration, (2) definition of the practice of speech pathology, and (3) use of the term "valid and current credential" as a prerequisite to the exemption. However, neither party to this case has presented competent evidence, applicable to these statutory standards, which might allow for judgment as a matter of law.

In a declaratory judgment action, the onus is on the litigants to present the court with a focused, concrete problem. *Lide v. Mears*, 231 N.C. 111, 117-18, 56 S.E.2d 404, 409 (1949); and *see* N.C. Gen. Stat. § 1-253 (1983). The right to seek a declaratory judgment does not "license litigants to fish in judicial ponds for advice." *Mears*, 231 N.C. at 117, 56 S.E.2d at 409. On remand, the burden is on the litigants to present evidence from which the trial court may determine the standards being applied by DPI to grant a valid and current speech pathology credential. It is not the court's function to write the State Board of Education's speech pathologist credentials for them. The only role for the trial court on remand will be to measure a State Board of Education credential, properly adopted, against the Licensure Act as interpreted by this Court, and then determine the credential's validity or invalidity. If no such credential exists, then no one employed by the North Carolina public schools practicing speech pathology is exempt, and all must meet the requirements for permanent licensure. *See* § 90-294(c)(4) and § 90-295.

Given the dearth of evidence concerning the State Board of Education's speech pathology credentialing standard in the record, we conclude the trial court could not have properly granted summary judgment. The record is devoid of material facts from which the trial court could have measured whether DPI's speech pathology certification is a "valid and current credential" under the Licensure Act. As such, we find the trial court's grant of summary judgment to be error as a matter of law, and

Reverse and remand.

Chief Judge ARNOLD concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I believe the trial court properly granted defendants' motion for summary judgment. Accordingly, I dissent.

As a general rule "[n]o person may practice or hold himself out as being able to practice speech and language pathology . . . in this State unless such person holds a current, unsuspended, unrevoked license issued by the Board" of Examiners for Speech and Language Pathologists and Audiologists (Board). N.C.G.S. § 90-294(b) (1993) (Licensure Act). There are several persons excluded from this licensing requirement including any:

> person who holds a *valid and current credential* as a speech and language pathologist . . . issued by the North Carolina Department of Public Instruction . . . if such person practices speech and language pathology . . . in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction.

N.C.G.S. § 90-294(c)(4) (1993) (emphasis added).

The issue in this case is whether teachers in the public schools employed on a "provisional" basis to teach speech-language impaired students are required to be licensed by the Board.

The Board concedes that "persons practicing speech pathology in the public schools who hold the *regular, standard, unqualified certification* for speech pathology of the Department of Public Instruction and State Board of Education" are exempt from the Licensure Act. The Board argues, however, that public school "provisional" personnel teaching speech-language impaired students are not exempt from the Licensure Act because these teachers do not have a master's degree in speech and language pathology and therefore do not hold a "valid and current credential as a speech and language pathologist." I disagree.

The Licensure Act provides that in order to obtain a license as a speech and language pathologist from the Board, the applicant must

have a "master's degree in speech and language pathology." N.C.G.S. § 90-295(1) (1993). A person may teach speech-language impaired students in the public schools, however, if they hold a "valid and current credential" issued by the Department of Public Instruction (Department), N.C.G.S. § 90-294(c)(4), an agency of the Department of Education (State Board). N.C.G.S. § 115C-21(b)(1) (1994). Whether the credential issued by the Department is "valid and current" is a matter to be determined by the Department or State Board and is not governed by the Licensure Act. N.C.G.S. § 115C-315(d) (1994) (State Board "shall have entire control of certifying all applicants for professional positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all certificates"); *see* 16 NCAC § 6C .0301 (April 1995) (State Board authorized to make rules for certification of "[a]ny person who desires to obtain employment from a [local educational agency] in a professional position").

In this case, the evidence presented by the defendants and not contested by the plaintiff, reveals that policies promulgated by the State Board and the Department permit a person holding a bachelor's degree in speech and language pathology to be provisionally licensed as a teacher of speech-language impaired students on the condition that the person pursue a master's degree, complete six semester credit hours each year, and complete a master's degree from an approved education program within five years of first being issued the provisional license. *See* 16 NCAC § 6C .0305(c) (Nov. 1994). A license issued consistent with these policies is a "valid and current credential."

STATE OF NORTH CAROLINA v. JAMES DANIEL GINYARD

No. COA95-502

(Filed 19 March 1996)

1. Evidence and Witnesses § 124 (NCI4th)— complainant's sexual encounter with other men—no evidence of consent to sex with defendant—evidence properly excluded

The trial court in a first-degree rape case did not err in refusing to allow two men charged with the same crime as defendant

based on the same set of facts to testify regarding their sexual encounter with the complainant, since testimony that complainant consented to sexual relations with the two men is not evidence of sexual behavior between "complainant and the defendant" within the meaning of N.C.G.S. § 8C-1, Rule 412(b)(1).

Am Jur 2d, Rape §§ 82, 83.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts. 94 ALR3d 257.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense. 81 ALR4th 1076.

2. Evidence and Witnesses § 123 (NCI4th)— no pattern of sexual behavior shown—evidence properly excluded

Testimony by two witnesses in a rape trial that they exchanged crack cocaine for sex with the prosecutrix during the same incident but prior to the time that defendant allegedly exchanged crack cocaine for sex with the prosecutrix did not reveal a pattern of sexual behavior by the prosecutrix so as to be admissible on the issue of consent under N.C.G.S. § 8C-1, Rule 412(b)(3), since evidence of only one incident of the prosecutrix exchanging sex for crack cocaine prior to her alleged exchange with defendant was insufficient to show that the prosecutrix engaged in a pattern of exchanging sex for cocaine.

Am Jur 2d, Rape §§ 82, 83.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts. 94 ALR3d 257.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense. 81 ALR4th 1076.

3. Evidence and Witnesses § 3229 (NCI4th)— alleged attempt to have charges dropped—evidence excluded—evidence not preserved for review—no evidence of inconsistent statement

There was no merit to defendant's contention that he should have been allowed to question the complainant regarding her alleged attempt to have the charges against him dismissed because that attempt was a prior inconsistent statement reflecting on her credibility, since complainant did not answer defendant's question so that the excluded evidence was in the record, and since complainant's mere wish to have the charges against defendant dropped was not in itself inconsistent with her testimony that defendant raped her.

Am Jur 2d, Appellate Review § 614; Evidence § 706; Witnesses §§ 929-951.

4. Evidence and Witnesses § 132 (NCI4th)— earlier allegation of rape withdrawn—exclusion of evidence—error

The trial court in a first-degree rape case erred by not allowing defendant to question the complainant in the presence of the jury regarding the allegation of rape made by complainant five months earlier and subsequently withdrawn, since the trial court erroneously ruled that the evidence was irrelevant under N.C.G.S. § 8C-1, Rule 412, and there was a reasonable probability that the outcome of the trial would have been different.

Am Jur 2d, Rape § 87.

Impeachment or cross-examaination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons. 71 ALR4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons. 71 ALR4th 469.

Judge WYNN concurring.

Appeal by defendant from judgments entered 25 July 1994 in Onslow County Superior Court by Judge James R. Strickland. Heard in the Court of Appeals 24 January 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General James C. Gulick, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defenders Daniel R. Pollitt and Charles L. Alston, Jr., for defendant-appellant.

GREENE, Judge.

James Daniel Ginyard (defendant) appeals from Judgments and Commitments, entered by the trial court on 25 July 1994, sentencing him to life in prison, for first degree rape in violation of N.C. Gen. Stat. § 14-27.2, and three years in prison, for a crime against nature in violation of N.C. Gen. Stat. § 14-177, to run concurrently.

Prior to trial, the trial court held an in-camera review to decide on the State's motion in limine to exclude evidence of the complainant's prior sexual history and her prior allegation of sexual assault. Detective James R. Shingleton (Shingleton) testified that in August of 1993, the complainant alleged that she was dragged into the woods and raped by two white guys and later changed her story, stating that the rape was actually by two black guys, with whom she was smoking crack. After the complainant's inconsistent statements and Shingleton's statement to the complainant that he did not believe her story, the complainant admitted to Shingleton that the rape never occurred. Later Shingleton stated that he "assumed" the rape never occurred and the complainant testified that she never told Shingleton that the rape did not occur.

Oscar Mitchell (Mitchell) and Melvin Wardrick (Wardrick), who were indicted for rape on the same facts which formed the basis of defendant's indictment, both testified that on 13 December 1993, at about 6:30 p.m. the complainant offered to have sex with them in exchange for crack cocaine. Both men agreed, but neither one actually completed the act. Both testified that others were present with them at this time and that their encounter with the complainant occurred inside a trailer and that the complainant smoked crack throughout the entire encounter. Both testified that defendant was not present, however.

At the close of this evidence, the trial court determined that the above evidence was inadmissible, because defendant did not prove that the complainant's prior allegation of rape was false, thus any evidence of that allegation is inadmissible under Rule 412, and in any

event "the probative value of any testimony as to false accusations by the complainant is greatly outweighed by the danger of unfair prejudice and confusion of the issues." The trial court also concluded that the testimony of Mitchell and Wardrick was not evidence of "a pattern of sexual behavior so distinctive and so closely resembling the defendant's version" as to make it relevant.

At trial, the complainant testified that defendant and several other men, whom the complainant did not know, raped her on 14 December 1993, in the early morning hours. During December 1993 the complainant was using illegal drugs and the complainant testified that on 13 December 1993, she had used cocaine early in the day. After a fight with her husband, the complainant left home, between 12:00 and 1:00 a.m., to go for a walk. The complainant left home with the intention of getting drugs, but later changed her mind. Before she could return home, "three guys jumped" her and "dragged" her into a trailer near Market Street. Inside the trailer, the men attacked and raped her vaginally, orally and anally. "At one point, . . . something was lit and [the complainant] turned around and . . . saw what [the guys] looked like." In particular, the complainant described a man with a gray eyelash and gray eyebrow. After the attack, the complainant testified that she was left alone in the trailer, and she got dressed and went home. The complainant further testified that she had not been in the Market Street vicinity earlier on the day of 13 December 1993. The complainant did not immediately tell her husband about the rape. She later contacted the police and told Officer Shelly Partain (Partain) about the rape, giving a description of a man with a gray eyelash and gray eyebrow. On his re-cross examination of the complainant, defendant asked "[o]n Monday of this week did you make a statement to the police in which you said I, [the complainant], decided to drop all charges in my case." The trial court sustained the State's objection to this question and allowed the State's motion to strike the question from the record. There was no other evidence presented regarding any attempt of the complainant to drop the charges against defendant.

Detective Adelmund (Adelmund), who investigated the crime scene, found six, recently used condoms, along with lighters and condom packages inside the trailer in which the complainant alleged that she was raped. Adelmund also found a beer can, which he opined was used to smoke crack cocaine, which contained poor quality fingerprints that Adelmund was never able to match. The trailer is known

to police as a type of crack house, and it is not unusual to find evidence of crack use or condoms inside the trailer. Adelmund finally testified that the evidence he found inside the trailer "could . . . be consistent with tricking for crack," where a female exchanges sex for crack cocaine.

Defendant presented evidence that the complainant knew the defendant and the others accused of raping her, including testimony that the complainant purchased a cellular phone for one of the other men charged with the 13 December rape. This was corroborated by a store clerk who testified that although she could not actually remember the sale, her records revealed the sale of a cellular phone to the complainant on 12 December 1993. Several witnesses testified that the complainant had been in the Market Street vicinity earlier in the day on 13 December 1993 and that complainant had been seen talking to defendant, whom the complainant had earlier stated that she did not know.

Paul Guillory (Guillory) testified that he gave defendant money for beer on 13 December and defendant never returned with the beer. Defendant testified that he met the complainant and talked to her on 13 December 1993, when she told him that she would have sex with him if he would supply her with crack cocaine. Defendant testified that he used the money that Guillory gave him to buy crack cocaine for the complainant. Defendant further testified that he and the complainant went inside the trailer and the complainant smoked crack in a beer can, after which the two had sex. Defendant stated that he and the complainant were alone and that he left her in the trailer after their encounter. It is not disputed that defendant has a white eyebrow and eyelash, nor that the complainant has identified him as one of her attackers. Defendant testified that although he earlier stated that he was with the complainant at 9:00 p.m. on 13 December, he was actually with her, earlier, at 7:30 that night.

The issues are whether the trial court erred in its (I) exclusion of testimony regarding the complainant's actions in trading sex for crack cocaine; (II) exclusion of evidence that the complainant allegedly requested the police to drop the charges against the defendant; and (III) exclusion of evidence that the complainant had made a prior accusation of rape that the investigating officer believed was false and that was subsequently withdrawn by the complainant.

I

Evidence of a complainant's prior sexual behavior which:

> (1) Was between the complainant and the defendant; or
>
> . . . .
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged *or* behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; . . .

is admissible in a rape prosecution. N.C.G.S. § 8C-1, Rule 412 (1992) (emphasis added). Rule 412 was promulgated "to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value." *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982). The Rule 412 exceptions are definitions of "those times when the prior sexual behavior of a complainant *is* relevant to issues raised in a rape trial, and are not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes." *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980) (emphasis in original).

Rule 412(b)(1)

[1] Defendant first argues that because Mitchell and Wardrick were charged with the same crime, based on the same set of facts, as defendant, even though their cases were not joined for trial, Mitchell and Wardrick should have been allowed to testify regarding their sexual encounter with the complainant because the sexual encounter was between the "complainant and [a] defendant," within the meaning of N.C. Gen. Stat. § 8C-1, Rule 412(b)(1). According, however, to the plain language of that rule, *see State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) (words in unambiguous statutes are to be given their plain and ordinary meaning), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285 (1968), the prior sexual conduct which is deemed relevant is that between the complainant and the defendant, who is on trial. This is so, because although prior consent from a complainant to the defendant on trial is relevant to the complainant's subsequent

consent to that defendant, testimony that the complainant consented to sexual relations with two men not on trial during a separate encounter than that with defendant is not evidence that she consented to sexual relations with defendant. *See State v. Jenkins*, 115 N.C. App. 520, 526, 445 S.E.2d 622, 626, *disc. rev. denied*, 337 N.C. 804, 449 S.E.2d 752 (1994); *see also State v. Rhinehart*, 68 N.C. App. 615, 618, 316 S.E.2d 118, 121 (1984) (discussing irrelevancy of such evidence in context of Rule 412(b)(3)).

Defendant argues that to interpret Rule 412(b)(1) to apply only to the defendant on trial gives defendants whose trial has been joined an advantage, because evidence of one co-defendant's sexual encounter with a complainant would be admissible in the trial. Our interpretation of Rule 412(b)(1), however, is true even if multiple defendants are being tried for rape, as the trial court must "restrict the evidence [to consideration of only that defendant's case] and instruct the jury accordingly." *See* N.C.G.S. § 8C-1, Rule 105 (1992).

Rule 412(b)(3)

[2] Defendant also argues that the testimony by Mitchell and Wardrick was admissible because the testimony reveals a pattern of sexual behavior which tends to prove that the complainant consented. We disagree. Evidence of a distinctive pattern of sexual behavior is relevant to the issue of consent. *See Fortney*, 301 N.C. at 41, 269 S.E.2d at 116. The pattern may either establish that (1) the complainant consented to have sex with this defendant, because of the manner in which their sexual encounter took place or (2) because of the complainant's pattern, this defendant reasonably believed the complainant consented to have sex with him. *See* N.C.G.S. § 8C-1, Rule 412(b)(3); *see also State v. Bumgarner*, 115 N.C. App. 149, 151, 443 S.E.2d 744, 745 (1994) (statute using disjunctive word "or" applies to cases falling within either clause). In order for a defendant to have a reasonable belief that a complainant consented to sex, based upon a pattern of sexual behavior, the defendant must have knowledge of the pattern. *See Rhinehart*, 68 N.C. App. at 617, 316 S.E.2d at 120. The statute also allows a jury, however, to infer that a complainant consented to have sex with the defendant if the complainant's sexual encounter with defendant is similar to the complainant's pattern, even if the defendant did not know of the pattern at the time of the alleged rape.

A "pattern" is "[a] representative sample" or "[a] consistent characteristic form, style, or method." *The American Heritage College*

Dictionary 1003 (3d ed. 1993). This Court has cited, with approval, several Florida cases which require more than one incident or a "few isolated instances" of consensual sexual activities to establish a pattern of sexual conduct from which a defendant may infer consent. *Rhinehart*, 68 N.C. App. at 617-18, 316 S.E.2d at 120-21; *see also State v. Shoffner*, 62 N.C. App. 245, 248-49, 302 S.E.2d 830, 832-33 (1983) (a complainant who "many times" accosted men had a pattern of being the aggressor in sexual relations); *State v. Wilhite*, 58 N.C. App. 654, 660, 294 S.E.2d 396, 400 (1982) (evidence that a complainant left a bar with "perfect strangers" in the past did not closely resemble defendants' story that she left the bar with them, whom complainant knew, in light of uncontroverted evidence that one defendant threatened her with a gun), *rev'd in part on other grounds*, 308 N.C. 798, 303 S.E.2d 788 (1983).

In the present case, Wardrick and Mitchell testified that they exchanged sex for crack cocaine with the complainant, at the same time, but prior to the time that defendant and the complainant exchanged sex for crack cocaine. Thus, there is only evidence of one incident of the complainant exchanging sex for crack cocaine, prior to her alleged exchange with defendant. Although this is evidence of distinctive sexual behavior, i.e. exchanging sex for crack, there is not sufficient evidence that the complainant engaged in a pattern of exchanging sex for crack. Thus, the trial court correctly excluded the testimony pursuant to Rule 412.

II

[3] Defendant argues that he should have been allowed to question the complainant regarding her alleged attempt to have the charges against him dismissed, because that alleged attempt was a prior inconsistent statement which "pertained to [her] overall credibility."

In order to preserve an argument on appeal which relates to the exclusion of evidence, including evidence solicited on cross-examination, the defendant must make an offer of proof so that the substance and significance of the excluded evidence is in the record. N.C.G.S. § 8C-1, Rule 103 (1992); *see State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994); *State v. Locklear*, 322 N.C. 349, 361, 368 S.E.2d 377, 384 (1988). "In the absence of an adequate offer of proof, '[w]e can only speculate as to what the witness' answer would have been.' " *Barton*, 335 N.C. at 749, 441 S.E.2d at 310-11 (quoting *State v. King*, 326 N.C. 662, 674, 392 S.E.2d 609, 617 (1990)). In this

case, the complainant did not answer defendant's question and her answer is not obvious or apparent from the record.

Even assuming that the complainant's answer would have been "yes," the defendant has not established that her wish to drop the charges against defendant was a prior inconsistent statement. The complainant's mere wish to have the charges against defendant dropped is not in itself inconsistent with her testimony that the defendant raped her, because there are many reasons why a person may seek to drop charges previously filed. *Cf. State v. Wrenn*, 316 N.C. 141, 144-45, 340 S.E.2d 443, 446 (1986). The question of whether a prior statement is an inconsistent statement is a matter to be determined by the trial court after hearing evidence either party may offer, outside the presence of the jury. *See State v. Hunt*, 324 N.C. 343, 345, 348, 378 S.E.2d 754, 755, 757 (1989) (trial court conducted voir dire to determine if prior statements were inconsistent). In this case, the defendant offered no evidence in support of his claim and cannot now complain.

III

[4] Defendant argues that the trial court erred by not allowing defendant to question the complainant in the presence of the jury regarding the allegation of rape made five months earlier and subsequently withdrawn. We agree.

The trial court first excluded this evidence pursuant to Rule 412, which states that the past sexual behavior of rape complainants is irrelevant, unless it is deemed relevant under the specific provisions of the statute. N.C.G.S. § 8C-1, Rule 412. The complainant's statements concerning an alleged rape and the fact that she eventually dropped the allegations of rape were not evidence of her past sexual behavior and the evidence regarding that incident was not governed by Rule 412. *See State v. Younger*, 306 N.C. 692, 695-97, 295 S.E.2d 453, 456-57 (1982). The trial court, in the alternative to its Rule 412 ruling, excluded the evidence because "the probative value of any testimony as to false accusations by the complainant is greatly outweighed by the danger of unfair prejudice and confusion of the issues." The exclusion of evidence pursuant to Rule 403 is only reversible upon a determination that the trial court abused its discretion. *See State v. Cotton*, 318 N.C. 663, 668, 351 S.E.2d 277, 280 (1987). Where, however, a trial court has erroneously failed to exercise its discretion and "rules as a matter of law, the prejudiced party is entitled to have the matter reconsidered." *Id.*

In this case, the trial court erroneously ruled that the evidence of the complainant's prior allegations of rape was irrelevant under Rule 412. In its alternative ruling pursuant to Rule 403, it is "apparent that the trial court excluded this evidence as a matter of law based on the erroneous view that it was not relevant under [Rule 412] and therefore had no probative value at all under Rule 403." *See id.* Thus the trial court has erroneously failed to exercise its discretion and the defendant is entitled to a new trial because there is a reasonable probability that the outcome of the trial would have been different. *See* N.C.G.S. § 15A-1443(a) (1988).

New trial.

Judge McGEE concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring.

I agree with part III of the majority opinion, and concur in the result of the majority opinion reversing and remanding for a new trial. I disagree, however, with part I of the majority opinion, and I write separately to address this issue since it is likely to recur on retrial.

N.C. Gen. Stat. § 8C-1, Rule 412(b) states:

> Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> > (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented . . . .

Rule 412(b)(3) allows admission of evidence of a pattern of behavior by the complainant which closely resembles the defendant's version of the encounter, and tends to prove that the acts were consensual. Mr. Ginyard proffered the testimony of Oscar Mitchell and Melvin Wardrick that the complainant offered them sexual favors in exchange for crack cocaine. The majority upheld the trial court's

exclusion of this evidence on the ground that it was not evidence of a pattern of distinctive behavior. I disagree with this conclusion.

I believe that this case is controlled by *State v. Shoffner*, 62 N.C. App. 245, 302 S.E.2d 830 (1983). In *Shoffner*, this Court reversed the trial court's exclusion of evidence that "[t]he prosecuting witness *modus operandi* was to accost men at clubs, parties (public places) and make sexual advances by putting her hands 'all over their bodies.' " *Id.* at 248, 302 S.E.2d at 833.

Similarly, the evidence offered by Mr. Mitchell and Mr. Wardrick, if believed, shows that the complainant's *modus operandi* is to offer men sexual favors in exchange for crack cocaine. This evidence is admissible to show either that the complainant consented to the acts charged, or acted in such a manner that the defendant reasonably believed that the complainant consented.

The majority's reading of Rule 412(b)(3) and our case law interpreting it places a nearly impossible burden on defendants seeking to introduce evidence of a pattern of sexual behavior on the part of the complainant which is distinctive and closely resembles the defendant's version of the encounter. Under the majority's rationale, a defendant would be required to offer an unclear but significant number of prior acts in order to establish a pattern. The witnesses of such acts will often be difficult, if not impossible, to find. Under my understanding of Rule 412(b)(3), the more distinctive the alleged behavior of the complainant, the fewer the number of instances necessary to prove that a pattern exists. The majority relies upon *State v. Rhinehart*, 68 N.C. App. 615, 316 S.E.2d 118 (1984) for the proposition that the defendant must set forth more than a "few isolated instances" of sexual conduct to establish a pattern. Clearly, the complainant's alleged actions in the instant case were more distinctive than those of the complainant in *Rhinehart*. In *Rhinehart*, the evidence indicated that the complainant had consensual sex with a former boyfriend earlier that evening, and danced and talked with the defendant before the assault. This is hardly a distinctive pattern. In contrast, proffered witnesses in the instant case alleged that the complainant traded sex for crack cocaine. This behavior is far more distinctive, and far more suggestive of a pattern than the behavior in *Rhinehart*.

STATE OF NORTH CAROLINA v. JOHN ARDELL McKENZIE

No. COA95-370

(Filed 19 March 1996)

1. Searches and Seizures § 100 (NCI4th)— search warrant—suggestive identification—other information in affidavit—probable cause

Although a search warrant was based in part on a rape victim's identification of defendant which was found by the trial court to be impermissibly suggestive, other information in the affidavit provided probable cause for issuance of the search warrant, and clothing, hair and blood samples seized from defendant pursuant to the warrant were properly admitted into evidence, where the affidavit stated that the attacker entered the victim's apartment through an opening in the ceiling from the attic; only defendant's apartment had trap door access to the attic; items belonging to the owner of the apartment in which the rape occurred were found in defendant's pockets; the victim described her attacker as carrying an electrical cord; and a video cassette player belonging to the apartment owner and an electric razor with the cord cut off were found in defendant's apartment.

Am Jur 2d, Searches and Seizures §§ 110, 115, 117-119.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

Disputation of truth of matters stated in affidavit in support of search warrant—modern cases. 24 ALR4th 1266.

State constitutional requirements as to exclusion of evidence unlawfully seized—post-Leon cases. 19 ALR5th 470.

2. Evidence and Witnesses §§ 1432, 1958 (NCI4th)— rape kit—emergency room record—admissibility

The trial court did not err by allowing a rape kit and emergency room record to be published to the jury since they were relevant to corroborate the victim's testimony, and since such evidence showed trauma to the victim's vaginal area tending to establish penetration, an essential element of the offense of rape.

Am Jur 2d, Rape § 63; Sodomy § 76.

What constitutes penetration in prosecution for rape or statutory rape. 76 ALR3d 163.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense. 31 ALR4th 120.

3. Evidence and Witnesses § 2211 (NCI4th)— DNA evidence—admissibility

The trial court did not err in admitting DNA evidence which indicated that the samples of semen taken from the victim matched the samples of body fluid taken from defendant, since the expert witness's training and experience provided a proper basis on which to accept this scientific evidence; however, even if it were error to admit the DNA evidence, defendant could not show that the admission of such testimony constituted "plain error," as the testimony from the expert witness corroborated the overwhelming evidence of defendant's quilt.

Am Jur 2d, Rape § 61; Trial § 341.

Admissibility, in proseuciton for sex-related offense, of results of tests on semen or seminal fluids. 75 ALR4th 897.

Admissibility of DNA identification evidence. 84 ALR4th 313.

4. Kidnapping § 16 (NCI4th)— second-degree kidnapping asportation not part of rape—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of second-degree kidnapping where it tended to show that the victim was in the hallway of an apartment when she first discovered defendant who immediately grabbed her, carried her to the bedroom, bound her hands, and covered her head with a pillowcase; when asked if he was going to rape her, defendant replied "no"; thereafter the victim heard defendant shut the blinds, open the cabinets, and rummage through the apartment before he returned to the bedroom; and it was apparent then that the asportation of the victim from the hallway to the bedroom and her confinement prior to the rape was an effort on the part of defendant to conceal his identity and facilitate the commission of the independent acts of larceny and robbery.

Am Jur 2d, Robbery § 6; Trial § 115.

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

5. Criminal Law § 1079 (NCI4th)— aggravating factor outweighing mitigating factor—maximum sentence imposed—error

Where the trial court properly found as a statutory aggravating factor that the defendant had a prior criminal record and as a nonstatutory mitigating factor that the prior convictions did not consist of any crime of violence, it was within the discretion of the trial court to conclude that the aggravating factor outweighed the mitigating factor and to impose the maximum sentence allowed by statute for each offense.

Am Jur 2d, Trial §§ 841, 1760.

6. Criminal Law § 1054 (NCI4th)— continuance of sentencing hearing—no basis argued—denial proper

The trial court did not abuse its discretion in denying defendant's request for an overnight continuance of his sentencing hearing where defendant did not offer any basis for the continuance. N.C.G.S. § 15A-1334(a).

Am Jur 2d, New Trial § 337

Appeal by defendant from judgments entered 6 September 1994 by Judge William C. Gore, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 22 January 1996.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the State.

Lee & Lee, by Junius B. Lee, III, for defendant-appellant.

WALKER, Judge.

John McKenzie (defendant) was convicted of second degree kidnapping, felonious breaking or entering, felonious larceny, second degree rape, and common law robbery and was sentenced to a total of 100 years in prison. On appeal, defendant challenges the following: (1) the admission of physical evidence seized pursuant to a search warrant, (2) the publication of the rape kit and emergency room record, (3) the admission of evidence regarding the DNA profile analysis, (4) the denial of defendant's motion for directed verdict, (5)

the refusal to dismiss the charge of second degree kidnapping, (6) the sentence imposed and (7) the denial of defendant's motion for a delay in the sentencing hearing. We find that defendant received a fair trial free from prejudicial error.

At trial the State's evidence tended to show that: On 26 October 1993, Shirley Boring lived in apartment 1007-D, Kent Place Apartments in Whiteville. The defendant lived in apartment 1007-H. Her niece, the victim, was in Ms. Boring's apartment fixing lunch when she thought she heard a noise down the hall. As the victim turned to go into the living room, she saw a black man wearing a red jacket, later identified as the defendant, with a cord in his hands. Defendant immediately turned the victim around, picked her up, took her to the bedroom, placed her face down on the bed and told her to "shut the f—— up." Then he tied the victim's hands together and placed a pillowcase over her head. The victim asked defendant if he was going to rape or kill her, to which he responded, "no."

Defendant then left the bedroom, turned off the television, shut the blinds, and rummaged through the cabinets. Later he re-entered the bedroom and began unbuckling his pants. The victim testified that defendant pulled off her clothing and raped her. After the defendant left the apartment, the victim went to the emergency room where she was treated and released.

Approximately fifteen minutes after the reported rape, Detectives Cutchin and George of the Whiteville Police Department observed a black male wearing a red jacket in the complex outside the building where the crimes occurred. Detectives asked the defendant to accompany them to the police department for a photograph. Defendant had in his pockets several gold chains and two watches belonging to Ms. Boring that he allegedly found on his kitchen counter that morning. He also had in his possession a one and a five dollar bill. The victim had reported that a ten, a five, and a one dollar bill were missing from her purse. A ten dollar bill was later found near the foot of the victim's bed.

After searching defendant's apartment, the officers discovered insulation and sheetrock torn away from an opening in the ceiling which provided access to Ms. Boring's apartment through a big hole kicked in her ceiling. A VCR that the victim identified as being stolen on the day of the rape was found under defendant's sink. An electric razor with its cord cut off was found in defendant's apartment.

At trial, Agent Mike Budzynski of the State Bureau of Investigation (SBI) introduced DNA evidence which indicated that certain samples of bodily fluids taken from the victim's body matched the DNA of the defendant. Agent Budzynski opined that the probability that the samples could have come from someone other than defendant was approximately one in 5.5 billion.

The defendant then presented evidence. David Lee Rose testified that he saw the defendant downtown at the shopping center wearing a red jacket and gold pants. The defendant's father also testified that defendant owned the red jacket. Finally, defendant testified and denied all charges against him. He stated that he found the necklaces and watches on the counter of his apartment and that someone must have left them there when the locks on his apartment were being changed.

I.

[1] By way of his first assignment of error, defendant argues that the trial court improperly admitted into evidence clothing, hair, and blood samples seized from the defendant pursuant to an invalid search warrant issued on 26 October 1993. The warrant was based in part on a sworn statement by the investigating officer that the victim identified defendant as her attacker. Later, the identification was suppressed upon a finding by the trial judge that the identification procedure was impermissibly suggestive. Defendant contends that the physical evidence seized pursuant to the invalid warrant also should have been suppressed. Specifically, defendant argues that the State did not establish the admissibility of such evidence pursuant to the inevitable discovery exception to the exclusionary rule.

A court's findings concerning the admissibility of evidence in a motion to suppress are binding on appeal when supported by competent evidence. *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992), *cert. denied*, —— U.S. ——, 130 L.Ed.2d 549 (1995). Conclusions of law, however, may be reviewed on appeal. *State v. McKoy*, 323 N.C. 1, 18, 372 S.E.2d 12, 21 (1988), *vacated on other grounds*, 494 U.S. 433, 108 L.Ed.2d 369 (1990). Our Supreme Court has held that only conclusions of law which are "required by the findings" are binding on appeal. *Mahaley*, 332 N.C. at 593, 423 S.E.2d at 64.

Here, the probable cause affidavit included the following pertinent information: Victim described the attacker as a black male who

was carrying an electrical cord. The attacker entered victim's apartment through an opening in the ceiling which led to the building's attic. The defendant's apartment is the only apartment which had a trap door access to the attic. Found in the defendant's pockets were various items belonging to the owner of the apartment where the rape occurred including: several gold chains, two watches, a five dollar bill, and a one dollar bill. A video cassette player belonging to the apartment owner and an electric razor with its cord cut off were discovered in defendant's apartment. Based on this information, the judge concluded that "insufficient facts were alleged in the search warrant to constitute probable cause for the issuance of a search warrant." Upon review of the affidavit of the investigating officer, we find that there was ample evidence to constitute probable cause for the issuance of a search warrant and we reject the court's contrary conclusion. Accordingly, the trial court did not commit reversible error by admitting the physical evidence seized pursuant to this warrant.

II.

[2] Defendant also contends that the trial court erred by allowing the rape kit and emergency room record to be published to the jury in violation of Rule 403 of the North Carolina Rules of Evidence. Relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (1992). The decision to exclude evidence pursuant to Rule 403 is within the trial judge's discretion. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). On appeal, such decision will not be reversed absent a showing of abuse of discretion. *Id.*

In the present case, the rape kit and emergency room record were relevant to corroborate the victim's testimony. Furthermore, such evidence showed trauma to the victim's vaginal area tending to establish penetration, an essential element of the offense of rape. Accordingly, we find that the trial court did not abuse its discretion by admitting such evidence and allowing it to be published to the jury.

III.

[3] By his next assignment of error, defendant argues that the trial court improperly admitted DNA evidence which indicated that the samples of semen taken from the victim matched the samples of body fluid taken from the defendant. Defendant contends that the DNA tes-

timony from Agent Budzynski was unreliable and should not have been admitted.

At trial no objection was made to the admission of this testimony and the evidence relating to the DNA match. Ordinarily, a failure to object prior to the introduction of testimony or evidence waives the objection. No prejudice results from the admission of such evidence unless the error affects a substantial right and there is a timely motion to strike. *State v. Jones*, 280 N.C. 322, 340, 185 S.E.2d 858, 869 (1972). However, a party who has failed to object to the admission of evidence at trial may be entitled to a reversal upon a showing that the trial court committed "plain error" by allowing such testimony. Plain error has been defined as:

> (1) a fundamental error, meaning something so basic, so prejudicial, so lacking in its elements that justice cannot be done or (2) a grave error, which must amount to a denial of a fundamental right of the accused; or (3) the error which has resulted in a miscarriage of justice; (4) an error that denies appellant of a fair trial; or (5) an error that seriously affects the fairness, integrity or public reputation of judicial proceedings; or (6) where it can be fairly said that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Reilly, 71 N.C. App. 1, 9, 321 S.E.2d 564, 569 (1984), *aff'd*, 313 N.C. 499, 329 S.E.2d 381 (1985) (citations omitted).

This Court recently discussed the admissibility of DNA evidence in *State v. Futrell*, 112 N.C. App. 651, 436 S.E.2d 884 (1993). In *Futrell*, this Court allowed evidence of DNA profile testing and held that it was for the jury to determine the credibility of the experts and the weight of each expert's testimony. *Futrell*, 112 N.C. App. at 664, 436 S.E.2d at 891. The competency of a witness to testify as an expert is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984); *State v. Hill*, 116 N.C. App. 573, 582, 449 S.E.2d 573, 577, *disc. rev. denied*, 338 N.C. 670, 453 S.E.2d 183 (1994).

Our Supreme Court has held that DNA profile testing is "generally admissible." *State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990). In *Pennington*, the Court ruled that DNA molecules extracted from the defendant's blood and DNA molecules extracted from a stain on a bedspread taken from the crime scene were admissible in the

prosecution for first degree rape, first degree sexual offense, and other crimes. *Id.* The Court focused on "indices of reliability" which include: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Pennington*, 327 N.C. at 98, 393 S.E.2d at 853.

Here, the court conducted a voir dire outside the presence of the jury concerning the qualifications of Agent Budzynski and after examination by the prosecutor, defense counsel, and the court, he was allowed to testify as an expert in the field of forensic DNA analysis. Agent Budzynski stated that the forensic DNA analysis was conducted by him under the auspices of the SBI. He also testified regarding the statistical analysis concerning the predicted population frequency of the DNA profiles in this case. The court found that Agent Budzynski completed a particularized SBI training program and had done active DNA casework since 1990. In addition, he attended a number of seminars and working groups with particular reference to DNA analysis and comparisons and had been previously accepted as an expert witness in the courts of this State. Based on Agent Budzynski's training and experience, his testimony, which included visual aids for the jury, provided a proper basis on which to accept this scientific evidence.

Defendant also challenges the reliability of the SBI laboratory which conducted the DNA tests and analysis. The record, however, fails to include any evidence which would bring the reliability of the laboratory or testing procedures into question. Furthermore, defendant has failed to show a lack of opportunity to challenge the reliability of the laboratory and its testing procedures by way of cross-examination and other expert testimony. *See State v. Hill*, 116 N.C. App. 573, 582, 449 S.E.2d 573, 578 (1994). Thus, the evidence was properly admitted by the trial court and it was the jury's duty to determine if the evidence was credible.

Even if it were error to admit the DNA evidence, the defendant cannot show that the admission of such testimony constituted "plain error" since the testimony from Agent Budzynski corroborated the overwhelming evidence of defendant's guilt. This evidence included the testimony of the officers who investigated the reported rape and observed the defendant in the complex outside the building where the

crimes occurred. Furthermore, the attacker entered Ms. Boring's apartment through an opening in the ceiling which led to the building's attic. Defendant's apartment is the only apartment which had a trap door access to the attic. Several gold chains, two watches, a five dollar bill, and a one dollar bill were found in the defendant's pockets. A VCR stolen from Ms. Boring's apartment was also found in the defendant's apartment. Accordingly, this assignment of error is without merit.

IV.

Defendant also assigns as error the trial court's denial of defendant's motion for a directed verdict on all charges. In ruling on a motion for a directed verdict or a motion to dismiss, the trial court must determine whether the State has offered substantial evidence of the 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 requires that the evidence must be "existing and real, not just seeming and imaginary." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983). In considering the evidence, the State is entitled to every reasonable inference that may be drawn therefrom. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). Contradictions and discrepancies in the evidence are for the jury to decide. *Id.* The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct. *Earnhardt*, 307 N.C. at 68, 296 S.E.2d at 653. When a motion for a directed verdict involves circumstantial evidence in a case:

> [T]he court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown. If so the jury must then decide whether the facts establish beyond a reasonable doubt that the defendant is actually guilty.

State v. Triplett, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986) (citation omitted).

[4] We first address the sufficiency of the evidence to support the charge of second degree kidnapping. Defendant contends that the trial court erred by failing to grant his motion to dismiss on the grounds that the acts giving rise to this charge were inherent features of other felonies with which defendant was charged. N.C. Gen. Stat. § 14-39 (1995) provides in part that:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or

over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

. . .

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

Defendant argues that there was no confinement or restraint independent from that necessary for the crime of rape. In support of his argument, defendant relies on *State v. Irwin*, which held that a removal which is an integral and inevitable part of some crime other than the kidnapping will not support a separate conviction for kidnapping. *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

Although some restraint is inherent in the crime of rape, "the restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape." *State v. Silhan*, 297 N.C. 660, 673, 256 S.E.2d 702, 710 (1979). Here, the State's evidence tended to show that the victim was in the hallway when she first discovered the defendant, who immediately grabbed her, carried her to the bedroom, bound her hands, and covered her head with a pillowcase. When asked if he was going to rape her, defendant replied, "no." Thereafter, the victim heard defendant shut the blinds, open the cabinets and rummage through the apartment before he returned to the bedroom. It is apparent then that the asportation of the victim from the hallway to the bedroom and her confinement prior to the rape, was an effort on the part of defendant to conceal his identity and facilitate the commission of the independent acts of larceny and robbery. *See State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 353 (1978) (holding that the restraint of each of the women was separate and apart from the commission upon her of the crime against nature where each woman was restrained for the purpose of facilitating the commission of the felony of the crime against nature upon the other).

Defendant also contends that the trial court erred by denying his motion for a directed verdict on the charges of breaking and entering, larceny, and common law robbery. We have carefully reviewed the evidence in this case and find it sufficient for a jury to draw a reasonable inference of the defendant's guilt on each of these charges.

Defendant also challenges the sufficiency of the evidence to support the conviction of second degree rape. Specifically, defendant argues that the DNA evidence should have been excluded, and that absent this evidence and any identification of defendant by the victim, the rape charge must be dismissed. We disagree.

As previously discussed, DNA profile testing is "generally admissible" and since the evidence was properly admitted, it was the jury's duty to determine if the evidence was credible. In addition, notwithstanding any identification by the victim, there is sufficient evidence to enable a jury to conclude that defendant committed the rape.

V.

[5] By way of his next assignment of error, defendant argues that the trial court's sentence exceeds the lawful and appropriate sentences for these convictions under presumptive sentencing rules. Under the Fair Sentencing Act, the trial judge "must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence," when imposing a sentence that is greater or lesser than the presumptive term. N.C. Gen. Stat. § 15A-1340.4 (b) (1988). If a prison term in excess of the presumptive is imposed, the trial judge must conclude that the factors in aggravation outweigh the factors in mitigation. *Id.*

Our Supreme Court explained the purpose of the presumptive sentencing rules in *State v. Ahearn*:

> The Fair Sentencing Act was not intended, however, to remove all discretion from our able trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. While he is required to justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the Act, a trial judge need not justify the weight he attaches to any factor.

State v. Ahearn, 307 N.C. 584, 596-97, 300 S.E.2d 689, 697 (1983). Accordingly, the weighing of the factors in aggravation and mitigation is within the sound discretion of the trial judge. Once the trial judge determines that the aggravating factors outweigh the mitigating factors, the extent by which the sentence exceeds the presumptive sen-

tence is within his or her discretion so long as it does not exceed the maximum punishment set by the legislature. *Ahearn*, 307 N.C. at 598, 300 S.E.2d at 698. Furthermore, the trial judge has the discretion to impose either consecutive or concurrent sentences. *State v. Ysaguire*, 309 N.C. 780, 785, 309 S.E.2d 436, 440 (1983).

In this case, the trial court properly found as a statutory aggravating factor that the defendant had a prior criminal record. As a non-statutory mitigating factor the court found that the prior convictions did not consist of any crime of violence. The court then concluded that the aggravating factors outweighed the mitigating factors and we cannot say that the trial court abused its discretion by giving the defendant the maximum sentence allowed by statute for each offense.

VI.

[6] Finally, defendant argues that the trial court erred by refusing to grant defendant's request for an overnight delay in the sentencing hearing. N.C. Gen. Stat. § 15A-1334(a) (1988) provides that: "[e]ither the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing." Whether to allow a continuance of the sentencing hearing lies within the discretion of the trial judge. *In re Gallimore*, 59 N.C. App. 338, 340, 296 S.E.2d 509, 511 (1982). Where defendant offers no reason why the hearing should not proceed, this Court has held that the trial court did not abuse its discretion in denying the request for a continuance. *State v. Bush*, 78 N.C. App. 686, 692, 338 S.E.2d 590, 593-94 (1986).

Here, the defendant requested an overnight delay in the sentencing hearing but did not offer a basis for granting the continuance or why a continuance would be helpful. The defense then stated that they did not wish to present any other evidence for sentencing. At this time, defendant could have challenged his prior criminal record but did not do so. In the absence of any showing of "good cause," we cannot find that the trial court abused its discretion in denying defendant's request for a continuance.

After carefully reviewing defendant's assignments of error, we find that the defendant received a fair trial free from prejudicial error.

No error.

Chief Judge ARNOLD and Judge LEWIS concur.

H.B.S. CONTRACTORS, INC., PLAINTIFF-APPELLANT/APPELLEE v. CUMBERLAND COUNTY BOARD OF EDUCATION, DEFENDANT-APPELLEE/APPELLANT

No. COA95-898

(Filed 19 March 1996)

1. Schools § 16 (NCI4th)— closed session—termination of building contract—no attorney-client privilege—no "administrative procedure"—violation of Open Meetings Law

Defendant board of education's decision to terminate a construction contract in closed session violated the Open Meetings Law where the board contended the challenged closed session was to preserve attorney-client confidences, or, in the alternative, any instructions given to the attorney concerned the "handling or settlement of . . . [an] administrative procedure," but the board's order to terminate the contract did not fall under the protective umbrella of the attorney-client privilege as it would have to be divulged, at a minimum, to plaintiff contractor, and "administrative procedure," as used N.C.G.S. § 143-318.11(a)(3), refers only to administrative proceedings instituted under this State's Administrative Procedure Act and does not include mere clerical or managerial instructions to terminate a contract.

Am Jur 2d, Schools § 61.

2. Schools § 16 (NCI4th)— violation of Open Meetings Law—action allowed to stand—consideration of statutory factors—interpretation of "person" proper

The trial court did not abuse its discretion in declining to void defendant board of education's termination of a construction contract during a closed session held in violation of the Open Meetings Law, and there was no merit to plaintiff's contention that the trial court improperly considered the fifth factor of N.C.S.G. § 143-318.16A(c)—"[t]he extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void"—by failing to limit "persons" in this case to the surety, replacement contractors, or similarly situated entities, since the interpretation applied by the trial court that "persons" included any citizen of the State whose interests will be affected by voiding the Board's action best effectuated the legislative intent.

Am Jur 2d, Schools § 61.

3. Evidence and Witnesses § 2593 (NCI4th)— alleged error—no better result if "error" not committed

Even if the trial court erred in admitting the affidavit of plaintiff's counsel over defendant's objection without requiring the attorney to withdraw from representation, defendant was not prejudiced where the exclusion of the affidavit could not have resulted in a more favorable ruling for defendant.

Am Jur 2d, Witnesses §§ 225-241.

Disqualification of attorney because member of his firm is or ought to be a witness in case—modern cases. 5 ALR4th 574.

Attorney as witness for client in civil proceedings—modern state cases. 35 ALR4th 810.

Attorney as witness for client in federal case. 9 ALR Fed. 500.

4. Costs § 37 (NCI4th)— plaintiff prevailing on same claims—plaintiff as prevailing party—award of attorney fees proper

Plaintiff was a prevailing party and the trial court therefore did not err in awarding attorney's fees to plaintiff under N.C.G.S. § 143-318.16B where plaintiff sought a declaration that defendant board of education violated the Open Meetings Law and that defendant's termination of a construction contract was null and void; the trial court found that defendant violated the Open Meetings Law but allowed the termination to stand; plaintiff thus prevailed on the primary legal question in its cause of action; and plaintiff thus met with "significant success."

Am Jur 2d, Costs §§ 57-70.

Appeal by plaintiff and defendant from judgment entered 1 March 1995 by Judge Coy E. Brewer, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 30 January 1996.

Thorp and Clark, by Herbert H. Thorp and Matthew R. Plyler, and Lee and Lee, by W. Osborne Lee, Jr., for plaintiff-appellant/appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Elizabeth L. Riley, for defendant-appellee/appellant.

MARTIN, Mark D., Judge.

Defendant Cumberland County Board of Education (Board) appeals from the trial court's declaration that the Board violated the Open Meetings Law, N.C. Gen. Stat. § 143-318.9, *et seq.*; and plaintiff H.B.S. Contractors (HBS) appeals from the trial court's subsequent refusal to declare the Board's order terminating HBS' contract null and void.

At the outset we note N.C.R. App. P. 28(j) requires that briefs filed in this Court be "formatted according to Rule 26 and . . . limited to 35 pages of text . . . ." N.C.R. App. P. 28(j). Under Rule 26(g) "[a]ll printed matter must appear in at least 11 point type . . . ." N.C.R. App. P. 26(g). Accordingly, where printed matter within a brief is not at least 11 point type, the appeal is subject to dismissal. N.C.R. App. P. 25(b); *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-568 (1984).

In the present case, the brief filed on behalf of H.B.S. does not comply with Rule 26(g). Nevertheless, in the interests of justice, we waive the present violation pursuant to N.C.R. App. P. 2 and address the merits.

On 25 June 1993 HBS entered into a construction contract (Contract) with the Board in which HBS agreed to build Federal Site No. 1 Elementary School (Project). On 18 November 1994 Michael Boose, Chairman of the Board, calendared an emergency meeting for 23 November 1994. On 21 November 1994 Maynette Regan (Regan), legal counsel for the Board, sent a letter to Herbert H. Thorp (Thorp), counsel for HBS, stating that no HBS attorney "was to communicate or cause another to communicate with the Board" regarding the project.

At the 23 November emergency meeting, the Board unanimously passed a motion to enter closed session, pursuant to N.C. Gen. Stat. § 143-318.11(a)(3), "to discuss a legal matter." The minutes of the closed session indicate the only non-Board members present were attorney Regan, Tim H. Kinlaw (Kinlaw), Assistant Superintendent of Operations with responsibility for school construction projects, and Superintendent John Griffin.

Kinlaw advised the Board: the project was severely behind schedule; the project was undermanned; the Department of Environment, Health, and Natural Resources was citing the Board for inadequate sedimentation control measures at the project; the project had some

unresolved construction issues; and there was a possibility of damage claims from the other prime contractors. The Board was also provided a report prepared by Dan MacMillan, the project architect, certifying that grounds for termination existed. After considering this information, the Board voted in closed session to terminate the contract. Kinlaw, acting at the Board's direction, informed HBS in writing that the contract was terminated.

On 4 January 1995 HBS instituted a declaratory judgment action seeking a declaration that the Board's termination of the contract violated the Open Meetings Law and that the termination order was null and void. On 1 March 1995 the trial court entered a judgment concluding the Board violated the Open Meetings Law. Nonetheless, after a plenary hearing and considering all relevant factors, the trial court refused to void the termination order.

On appeal HBS and the Board raise a myriad of contentions which can be consolidated into four issues—(1) whether the trial court erred in concluding the Board violated the Open Meetings Law by terminating the contract in a closed session; (2) whether the trial court erred by failing to declare the termination order null and void because of overriding policy considerations; (3) whether the trial court erred by admitting attorney Thorp's affidavit despite his continued representation of HBS; and (4) whether HBS is entitled to an award of attorney's fees.

Initially we note, "[a]lthough [this Court] may not question [findings of] fact . . . which are supported by [competent] evidence, we are not bound by the conclusions or inferences drawn by the trial court." *Howell v. Landry*, 96 N.C. App. 516, 523, 386 S.E.2d 610, 614 (1989), *disc. review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990). Further, "[i]f [a] finding of fact is essentially a conclusion of law, [] it will be treated as a conclusion of law which is [fully] reviewable on appeal." *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984).

I.

[1] We first consider whether the Board's decision to terminate the contract in closed session violated the Open Meetings Law.

N.C. Gen. Stat. § 115C-4 provides that school boards must comply with the Open Meetings Law, *Jacksonville Daily News Co. v. Onslow County Bd. of Education*, 113 N.C. App. 127, 130, 439 S.E.2d 607, 609 (1993), which, as a general rule, requires public bodies to hold official

meetings in open session so the public can attend, N.C. Gen. Stat. § 143-318.10(a) (Cum. Supp. 1995). See also N.C. Gen. Stat. § 143-318.9 (1993) (public policy of this State requires that "hearings, deliberations, and actions of [public bodies] be conducted openly," because public bodies "exist solely to conduct the people's business"). In fact, public bodies are allowed to enter closed sessions "only when required to permit [them] to act in the public interest . . . ." N.C. Gen. Stat. § 143-318.11(a) (Cum. Supp. 1995) (emphasis added).

Section 143-318.11(a)(3) establishes it is "in the public interest" to close a meeting which is held:

> (3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body . . . . General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney . . . is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, or administrative procedure.

N.C. Gen. Stat. § 143-318.11(a)(3). In the present case the Board contends the challenged closed session was to preserve attorney-client confidences, or, in the alternative, any instructions given to attorney Regan concerned the "handling or settlement of . . . [an] administrative procedure."

Clearly, the Board's order to terminate the contract does not fall under the protective umbrella of the attorney-client privilege as it must be divulged to, at a minimum, HBS. *See Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 822 (1992) (" 'If it appears by extraneous evidence or from the nature of a transaction . . . [the communications] were made for the purpose of being conveyed by the attorney to others, they . . . are not privileged.' " (*quoting Dobias v. White*, 240 N.C. 680, 684-685, 83 S.E.2d 785, 788 (1954))), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994). See also 81 Am. Jur. 2d *Witnesses* § 378 (1992).

As the attorney-client exception is inapplicable to the present case, we now consider whether issuing a termination order is an "administrative procedure." To resolve this contention we must necessarily refer to well established canons of statutory construction.

"If statutory language is clear and unambiguous, judicial construction is unnecessary and the plain and definite meaning of the statute controls." *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 220, 447 S.E.2d 471, 475, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 807 (1994). In any event, "[a] word of a statute may not be interpreted out of context but must be [read] as . . . part of the composite whole . . . ." *Desk Co. v. Clayton, Comr. of Revenue*, 8 N.C. App. 452, 456, 174 S.E.2d 619, 622 (1970). See also *Morecock v. Hood*, 202 N.C. 321, 323, 162 S.E. 730, 731 (1932) ("meaning of [an ambiguous] word may be ascertained by reference to the meaning of words with which it is associated."); 73 Am. Jur. 2d *Statutes* § 213 (1974) (courts should consider "the meaning naturally attaching . . . from the context, and adopt that sense of the word[] which best harmonizes with the context).

In the present case, the Board argues "administrative procedure" should be interpreted to include even the most trivial clerical or managerial orders. Not only would this interpretation be wholly inconsistent with the legislative intent behind the Open Meetings Law—to promote openness in the daily workings of public bodies—it would also superimpose an overly broad definition of "administrative procedure" which is clearly inconsistent with the overall context of the statute. Therefore, we conclude, "administrative procedure," as used in section 318.11(a)(3), refers only to administrative proceedings instituted under this State's Administrative Procedure Act, N.C. Gen. Stat. § 150B-1, *et seq.*, and does not include mere clerical or managerial instructions to terminate a contract.

We also note Chairman Boose testified the Board has a policy of entering closed session: (1) to avoid embarrassment of the individual or entity under discussion; (2) to discuss quality of performance; (3) to talk about specifics; and (4) to enable Board members to better express themselves. Our reading of section 318.11(a) does not reveal an exception to the Open Meetings Law premised on any of these considerations. Indeed, we believe it apparent the General Assembly intended the Open Meetings Law to curtail exactly this type of unwarranted secrecy by public bodies.

Accordingly, we affirm the trial court's declaration that the Board violated the Open Meetings Law by terminating its contract with HBS in closed session.

II.

[2] Because the Board violated the Open Meetings Law by terminating the contract during closed session, we now determine if the trial court erred by failing to void the termination order pursuant to N.C. Gen. Stat. § 143-318.16A.

When a public body violates the Open Meetings Law, the trial court "may declare any such action null and void." N.C. Gen. Stat. § 143-318.16A(a) (1993). The decision to void a challenged action is committed to the sound discretion of the trial court and, therefore, "can be reversed on appeal only if the decision is 'manifestly unsupported by reason' and 'so arbitrary that it could not have been the result of a reasoned decision.' " *Dockside Discotheque v. Bd. of Adjustment of Southern Pines*, 115 N.C. App. 303, 307, 444 S.E.2d 451, 453, *disc. review denied*, 338 N.C 309, 451 S.E.2d 634 (1994) (*quoting White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)) (citations omitted). In making this discretionary ruling, the trial court must consider six statutory, and any other relevant, factors. N.C. Gen. Stat. § 143-318.16A(c).

HBS argues the trial court improperly considered the fifth statutory factor—"[t]he extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void," N.C. Gen. Stat. § 143-318.16A(c)(5)—by failing to limit "persons," in this case, to the surety, replacement contractors, or similarly situated entities.

As the paramount objective in statutory interpretation is to give effect to the legislative intent, *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994), we decline to adopt the narrow reading proposed by HBS because we believe it neglects the overriding intent behind the Open Meetings Law—public bodies should act in open session because they serve the public-at-large, N.C. Gen. Stat. § 143-318.9. Rather, we believe the interpretation applied by the trial court—"persons" includes any citizen of the State whose interests will be affected by voiding the Board's action—best effectuates the legislative intent.

Further, we believe, after careful review of the present record, that the trial court did not abuse its discretion by declining to void the Board's action. Accordingly, although we may have reached a different conclusion than the trial court, we must uphold the trial court's

ruling. *Cf. State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989).

III.

[3] We next consider the Board's allegation the trial court erred by admitting the affidavit of Herbert Thorp, counsel for HBS, over the Board's objection, without requiring attorney Thorp to withdraw from representation pursuant to Rule 5.2 of the North Carolina Rules of Professional Conduct.

Assuming, without deciding, the trial court erred, a remedy is nonetheless unavailable to the Board unless it can establish the error was prejudicial and, without the error, a different result would likely have ensued. *Boyd v. L. G. DeWitt Trucking Co.*, 103 N.C. App. 396, 405, 405 S.E.2d 914, 920, *disc. review denied*, 330 N.C. 193, 412 S.E.2d 53 (1991).

Here the trial court admitted the Thorp affidavit into evidence before ruling—in the Board's favor—that the termination order should remain in effect. Clearly, exclusion of the Thorp affidavit could not result in a more favorable ruling for the Board and, accordingly, we find no prejudicial error.

IV.

[4] Finally, we consider whether the trial court erred by awarding attorney's fees to HBS under N.C. Gen. Stat. § 143-318.16B.

Section 318.16B provides, in pertinent part:

> When an action is brought pursuant to . . . G.S. 143-318.16A, the court may make written findings specifying the prevailing party . . . and may award the prevailing party . . . reasonable attorney's fee.

N.C. Gen. Stat. § 143-318.16B (Cum. Supp. 1995) (emphasis added). Put simply, the issue for this Court is whether HBS prevailed where it established a violation of the Open Meetings Law and the trial court, nonetheless, subsequently refused to declare the Board's action void.

We note this Court recently addressed the award of attorney's fees under the superseded version of section 143-318.16B. *Jacksonville Daily News*, 113 N.C. App. at 131, 439 S.E.2d at 609 (plaintiff is prevailing party because it succeeded on only claim for

relief—a declaration defendant violated the Open Meetings Law). Nevertheless, *Jacksonville* is inapposite to the present case as HBS succeeded on some, but not all, of its claims.

When, as here, a plaintiff only succeeds on some of its claims, the Fourth Circuit applies the "merits test" to determine if plaintiff is a "prevailing party." *Smith v. University of North Carolina*, 632 F.2d 316, 350 (4th Cir. 1980) (applying "merits test" to 42 U.S.C. §§ 1988 and 2000(e)-5(k), statutory provisions which limit the award of attorney's fees to "prevailing" parties). Under the merits test, "to receive attorney's fees allowed by statute to the prevailing party, a party must prevail on the merits of at least some of his claims." *Id.* at 352 (emphasis added). This Court has also adopted the merits test as the proper standard for awarding attorney's fees to "prevailing" parties pursuant to N.C. Gen. Stat. § 6-19.1. *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 195-196, 412 S.E.2d 893, 896 ("persons may be considered prevailing parties for the purposes of attorney's fees if they succeeded on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit."), *disc. review denied*, 331 N.C. 284, 417 S.E.2d 251 (1992). See also *Miller v. Henderson*, 71 N.C. App. 366, 371, 322 S.E.2d 594, 598 (1984) (attorney's fees can be awarded under section 1988 to a party that has been successful on a significant issue in the case).

We note the operative language—"prevailing party"—in the federal statutes and N.C. Gen. Stat. § 6-19.1 is identical to that found in N.C. Gen. Stat. § 143-318.16B. Therefore, we believe the question of whether HBS is a "prevailing party" under section 143-318.16B should be resolved by application of the merits test. Consequently, we must examine the benefits sought by HBS in its complaint versus those actually obtained and, thereby, determine if HBS "succeed[ed] on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *Hillhaven*, 105 N.C. App. at 196, 412 S.E.2d at 896.

In *Hillhaven* plaintiffs forwarded a myriad of claims. For example, plaintiffs sought a declaratory judgment finding the State violated N.C. Gen. Stat. §§ 131E-129 and 131E-126; and issuing preliminary and permanent injunctions requiring proper monitoring of the conditions at the nursing home. Plaintiffs did not succeed on these issues. In fact, plaintiffs lost every substantive issue presented to the trial court. This Court concluded, after "weighing the benefits sought by plaintiffs against the recovery obtained . . . that plaintiffs have not

succeeded on any significant issue which brought about the results plaintiffs were seeking." *Id.* at 197, 412 S.E.2d at 897.

In the present case, HBS sought a declaration the Board violated the Open Meetings Law and the Board's termination order was null and void. The trial court: (1) granted HBS' motion for summary judgment and concluded the Board violated the Open Meetings Law; (2) imposed a permanent injunction on the Board which prohibits it from "considering the performance of independent contractors or taking votes on the issue of the termination of independent contractors" in closed sessions; and (3) determined, in an exercise of its discretion, that the Board's termination order should not be declared null and void.

After careful review of the present record, we conclude HBS succeeded, at least in part, by securing a declaration the Board violated the Open Meetings Law. By establishing that violation, HBS prevailed on the primary legal question in its cause of action which, in our estimation, is "a significant success." In fact, only the trial court's subsequent ancillary ruling to leave the termination order intact precluded HBS from obtaining everything in its prayer for relief. Therefore, we conclude HBS is a "prevailing party," and, accordingly, affirm the trial court's grant of reasonable attorney's fees to HBS.

We have carefully reviewed the remaining assignments of error and conclude they are without merit.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

KATHLEEN DORSEY, PETITIONER-APPELLANT v. UNC-WILMINGTON, RESPONDENT-APPELLEE

No. COA95-169

(Filed 19 March 1996)

1. Labor and Employment § 121 (NCI4th)— black job applicant—disparate treatment claim—absence of discrimination

Substantial evidence in the whole record supported the Personnel Commission's decision to reject petitioner's "disparate treatment" claim where it tended to show that the candidate who

was employed by respondent had more years of relevant work experience than petitioner, received better performance reviews and better recommendations, and two other candidates for the job would have been chosen over petitioner had respondent's first choice not taken the job.

Am Jur 2d, Job Discrimination §§ 1, 126, 304, 2409, 2707, 2733.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 ALR3d 351.

2. Labor and Employment § 121 (NCI4th)— black job applicant—disparate impact analysis—absence of discrimination

The trial court did not err in finding that the evidence supported the Personnel Commission's determination that petitioner had not been discriminated against because of her race under "disparate impact" analysis, since the evidence simply did not show that any of respondent's hiring practices caused minority applicants, and more specifically black applicants, to be excluded from jobs or promotions.

Am Jur 2d, Job Discrimination §§ 2707, 2733.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 ALR3d 351.

3. Attorney General § 6 (NCI4th)— dual role served by Attorney General's office—no prejudice to petitioner

There was no evidence to support petitioner's claim that because respondent was represented before the State Personnel Commission by a senior deputy attorney general, and an assistant attorney general served as legal advisor to the Commission, there was a potential for conflict of interest and bias sufficient to deprive her of an impartial decision-maker, delay the resolution of the claims, and deny her constitutional rights.

Am Jur 2d, Parties § 141.

What constitutes representation of conflicting interests subjecting attorney to disciplinary action. 17 ALR3d 835.

Representation of conflicting interests as disqualifying attorney from acting in a civil case. 31 ALR3d 715.

Appeal by petitioner from order entered 8 August 1994 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 13 November 1995.

McSurely and Dorosin, by Alan McSurely and Mark Dorosin, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Anne J. Brown, for respondent-appellee.

MARTIN, John C., Judge.

Petitioner, Kathleen Dorsey, appeals from an order of the superior court affirming the decision of the State Personnel Commission ("Commission") to reject Ms. Dorsey's claim that she had been discriminated against on the basis of her race in connection with an employment promotion decision by respondent, the University of North Carolina at Wilmington ("UNC-W").

The record shows that Ms. Dorsey, who is black, has been employed as a secretary in the Office of Legal Affairs and Compliance at UNC-W since 1983 and, in 1992, was secretary to the University's general counsel. In early 1992, the Administrative Assistant to Chancellor James Leutze gave notice of her intent to resign. The vacancy in the position was announced to all UNC-W employees, fourteen of whom, including Ms. Dorsey, applied for the position. The position was classified at salary grade 63; Ms. Dorsey's position was classified at salary grade 59.

The applications were reviewed by the Chancellor's staff and six candidates, including Ms. Dorsey, were selected for interviews after consultation with the director of UNC-W's Human Resources Department. Four of the candidates were white and two were black. After reviewing the applications, personally interviewing each candidate, and considering staff recommendations, Chancellor Leutze chose Lynne Goodspeed, who is white, for the position.

Ms. Dorsey alleged the decision had been racially discriminatory and followed UNC-W's grievance procedures. After her grievance was denied, she filed a contested case petition with the Office of Administrative Hearings. After a hearing, the Administrative Law Judge made extensive findings of fact and concluded that Ms. Dorsey had established a *prima facie* case of discrimination, that UNC-W had rebutted the *prima facie* case by articulating legitimate nondiscriminatory reasons for not selecting her, and that Ms. Dorsey had not

proven that the nondiscriminatory reason was merely a pretext for illegal discrimination. The Administrative Law Judge issued a recommended decision that the decision to promote Ms. Goodspeed be left undisturbed, but that UNC-W consider reclassifying Ms. Dorsey's current position to pay grade 63.

The State Personnel Commission adopted the Administrative Law Judge's recommended findings of fact, with three minor amendments, and his recommended conclusions of law, with the exception of the conclusion of law pertaining to the salary reclassification of Ms. Dorsey's current position, which it determined not to be supported by substantial evidence. The Commission affirmed UNC-W's decision not to select Ms. Dorsey for the administrative assistant position.

Ms. Dorsey petitioned for judicial review, pursuant to G.S. § 150B-45, of the order of the State Personnel Commission. Upon her motion and with consent of UNC-W, the superior court vacated the Commission's decision on the grounds that the Commission had made its ruling without having before it the entire official record of the case and remanded the case to the Commission with instructions to "consider all exceptions properly filed in this matter after a review of the complete official record, and make a final administrative decision in accordance with applicable law."

Upon remand, the Commission again issued a decision and order affirming UNC-W's decision not to select Ms. Dorsey. Ms. Dorsey petitioned for judicial review of the Commission's order, alleging that the order was affected by error of law, was unsupported by substantial evidence, and was arbitrary and capricious. Upon review, the superior court determined that the Commission's decision was not in violation of constitutional provisions; was not in excess of its statutory authority or jurisdiction; was not made upon unlawful procedure; was not affected by other error of law; was not arbitrary or capricious; and was supported by substantial evidence in view of the entire record. Ms. Dorsey now appeals to this Court.

I.

Chapter 150B of the North Carolina General Statutes, the North Carolina Administrative Procedure Act, governs trial and appellate court review of administrative agency decisions. Pursuant to G.S. § 150B-51(b), the superior court may reverse or modify an administrative agency decision if the substantial rights of the petitioners have

been prejudiced because the agency's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Although G.S. § 150B-51(b) lists the grounds upon which a court may reverse or modify an administrative agency decision, the proper standard of review to be employed by the court depends upon the nature of the alleged error. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). If a petitioner asserts that the administrative agency decision was based on an error of law, then "de novo" review is required. *Id.* " 'De novo' review requires a court to consider a question anew, as if not considered or decided by the agency." *Id.* (citing *Black's Law Dictionary* 435 (6th Ed. 1990)). "The court may 'freely substitute its own judgment for that of the agency.' " *Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 567, 452 S.E.2d. 337, 344 (1995) (quoting *Brooks, Commissioner of Labor v. Grading Co.*, 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981)).

On the other hand, if a petitioner asserts that the administrative agency decision was not supported by the evidence, or was arbitrary or capricious, then the court employs the "whole record" test. *Amanini*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118. The "whole record" test requires the court to examine all competent evidence comprising the "whole record" in order to ascertain if substantial evidence therein supports the administrative agency decision. *Id.* "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991) (citing *Joyce v. Winston-Salem State University*, 91 N.C. App. 153, 370 S.E.2d 866, *cert. denied*, 323 N.C. 476, 373 S.E.2d 862 (1988)). The standard of review for an appellate court upon an appeal from an

order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court. *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995).

II.

[1] By her first and third assignments of error, Ms. Dorsey disputes the superior court's finding that the decision of the Commission to reject her claim of "disparate treatment" against UNC-W was supported by the record. Ms. Dorsey contends that this finding was in error because UNC-W (1) failed to produce a legitimate nondiscriminatory reason for rejecting her and hiring Ms. Goodspeed, and (2) relied only on "subjective and pretextual" qualifications in its hiring process. Her argument challenges the sufficiency of the record evidence, thus the applicable standard of review is the "whole record" test.

When, as in the present case, an employee raises a claim of "disparate treatment" in an employment promotion decision, she is asserting that the employer specifically treated her less favorably than other employees. *N.C. Dept. of Correction v. Hodge*, 99 N.C. App. 602, 611, 394 S.E.2d 285, 290 (1990). According to "disparate treatment" analysis, once the complaining employee meets her initial burden of proving, by a preponderance of the evidence, a *prima facie* case of such "disparate treatment", the employer then has the burden of articulating some legitimate, nondiscriminatory reason for the employee's rejection. *Id.* The employer's burden is satisfied if it simply produces evidence that it hired a better-qualified candidate. *Id.* However, the employee can ultimately prevail in her claim of "disparate treatment" if she can prove that the employer's claim to have hired a better-qualified applicant is pretextual by showing that she was, in fact, better-qualified than the person chosen for the job. *Id.* at 613, 394 S.E.2d at 291.

In the present case, the record contains substantial evidence that Ms. Goodspeed was, in fact, better-qualified for the position than was Ms. Dorsey. The advertised qualifications for the position, as contained in the notice for applications, were:

> ADMINISTRATIVE ASSISTANT I Serves as office manager responsible for supervision of clerical staff, budgeting, accounting, and purchasing functions. Performs chief executive level secretarial duties with high degree of accuracy and efficiency. Plans and

> coordinates meetings including travel and room accommodations, agenda, and record keeping. Requires proficiency in shorthand, effective written and oral communication skills, experience in maintaining a travel and appointment calendar (preferably using calendar software), and the ability to deal effectively and tactfully under pressure with many constituencies. Requires high school and four years progressively responsible secretarial or administrative office management experience. Secretarial science degree or CPS preferred. Word-Perfect and VAX administrative systems experience necessary.

In making his final decision, Chancellor Leutze stated that the principal differentiating factors were to select that individual who would best:

> *match the position in terms of directly related job experience;
>
> *be able to handle a variety of situations and constituents with professionalism, calmness, and control;
>
> *exhibit appropriate interactional and communication skills necessary to represent me in contacts with senior administrative officers of the University as well as external constituents; and
>
> *be able to undertake management of the office and supervision of subordinate staff.

Ms. Goodspeed had more than fourteen years job experience in executive assistant or equivalent positions, which was directly related to the position for which she applied. At the time of her selection, she had worked for approximately three years at UNC-W, during which time her performance was evaluated as exceptional. Her experience at UNC-W included a temporary assignment for approximately one year as a full-time secretary in the Chancellor's office, where she worked primarily with the Chancellor's administrative assistant, Andrea Williams, who was leaving. Ms. Goodspeed actually performed Ms. Williams' duties during an extended period of time when Ms. Williams was absent from work. As a result, the Chancellor had a first-hand opportunity to observe Ms. Goodspeed's secretarial abilities, professionalism, calmness and interactional and communicative skills, all of which he considered, according to his testimony, to be very good. Ms. Goodspeed also received highly favorable recommendations from Ms. Williams and from the Special Assistant to the Chancellor, Mark Lanier.

In contrast, Ms. Dorsey had fewer years of work experience than Ms. Goodspeed and her experience was less relevant to the position for which she applied, i.e., she had not worked in equivalent employment to the position of administrative assistant. Her performance evaluations while at UNC-W, although good, were not as good as Ms. Goodspeed's. Several persons for whom she had previously worked while at UNC-W advised the Chancellor that Ms. Dorsey was somewhat difficult to get along with and was sometimes tense and irritable. Indeed, Chancellor Leutze testified that had Ms. Goodspeed not been available to fill the administrative assistant position, two other candidates, both of whom had served in higher level administrative positions, would have been preferable to Ms. Dorsey. Accordingly, we agree with the superior court's determination that substantial evidence in the whole record supports the Commission's decision to reject Ms. Dorsey's "disparate treatment" claim.

III.

[2] In support of her second assignment of error, Ms. Dorsey argues that the superior court erred in finding the evidence supported the Commission's determination that Ms. Dorsey had not been discriminated against because of her race under "disparate impact" analysis. The appropriate standard of review is again the "whole record" test.

The elements of a "disparate impact" claim are prescribed by 42 U.S.C. § 2000e-2(k)(1)(A), which states:

> An unlawful employment practice based on disparate impact is established under this title only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . . .

In *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994, 101 L.Ed.2d 827, 845 (1988), our U.S. Supreme Court held that:

> The plaintiff must begin by identifying the specific employment practice that is challenged . . . . Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.

In the present case, Ms. Dorsey's evidence simply did not show that any of UNC-W's hiring practices caused minority applicants, and

more specifically, black applicants, to be excluded from jobs or promotions. Indeed, there is substantial evidence in the record indicating a concerted effort by UNC-W to hire and promote minorities to secretarial and administrative positions, and that these efforts have, in fact, resulted in a substantial minority work force in these positions. Ms. Dorsey's argument is overruled.

IV.

By her fourth assignment of error, Ms. Dorsey argues that the superior court erred in affirming the Commission's decision when, according to her argument, the Commission failed to state specific reasons for not adopting the Administrative Law Judge's recommended decision with respect to reclassifying her position for pay purposes. Although we find no merit in her argument, it is unnecessary to address it. Ms. Dorsey did not petition the superior court for review of the Commission's decision on this ground. This Court will not decide issues which have not been presented in the trial court. *See* N.C.R. App. P. 10(b); *White v. Pate*, 308 N.C. 759, 304 S.E.2d 199 (1983).

V.

[3] By her fifth and final assignment of error, Ms. Dorsey contends that the superior court erred by its failure to find a violation of her rights to justice without favor or delay under Article I, Section 18 of the North Carolina Constitution. She argues that because UNC-W was represented before the State Personnel Commission by a senior deputy attorney general, and an assistant attorney general served as legal advisor to the Commission, there was a potential for conflict of interest and bias sufficient to deprive her of an impartial decision-maker, delay the resolution of her claims, and deny her constitutional rights.

Because this assignment of error raises a question of law, we review *de novo* the question of whether Ms. Dorsey's constitutional rights were violated due to the alleged dual legal representation by members of the Attorney General's office. *Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254; *Amanini*, 114 N.C. App. 668, 443 S.E.2d 114.

Under G.S. § 114-2(2), it is the duty of this State's Attorney General "[t]o represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State." Thus, both UNC-W, as a constituent member of the State's university system, and the

Commission, are entitled to legal representation and advice from the Attorney General's Office. In similar circumstances, we have held that no *per se* violation of due process arises from such a combination of advisory function and advocacy function in the absence of a showing of actual bias or unfair prejudice. *See Hope v. Charlotte-Mecklenburg Board of Education*, 110 N.C. App. 599, 430 S.E.2d 472 (1993) (absent a showing of actual bias or unfair prejudice, rejected argument by petitioner, a dismissed teacher, that her right to due process was violated because the attorney advising the board of education and the attorney presenting the case for the superintendent seeking the teacher's dismissal were members of the same law firm). Ms. Dorsey offered no evidence to show that the dual role served by the Attorney General's Office resulted in actual bias or unfair prejudice to her or occasioned any delay in the disposition of her claims; therefore, we reject her argument.

Affirmed.

Chief Judge ARNOLD and Judge SMITH concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PLAINTIFF v. ATLANTIC INDEMNITY COMPANY, DEFENDANT

No. COA94-621

(Filed 19 March 1996)

1. Insurance § 621 (NCI4th)— termination clause—no ambiguity—no notice requirements—no unconscionability—clause enforceable

A termination clause in an automobile liability policy which provided for automatic termination if the insured obtained any similar insurance on the covered auto was not ambiguous and violative of public policy as unconscionable and permitting the unjust enrichment of plaintiff insurer, since the language of the clause in question did not state that the insured should expect notice of termination; requiring notice from the original insurer would be impractical when only the insured and new insurer would possess knowledge of the new contract; statutorily imposed notice requirements of N.C.G.S. § 20-310(f) are inapplicable when termination results from an act of the insured rather than the insurer; interpretation of the termination clause to dic-

tate cancellation upon the insured's procurement of similar insurance ensures continuous liability coverage and in no way violates the purpose of N.C.G.S. § 20-310; defendant's failure to plead the affirmative defense of unconscionability below operated to bar its raising of that issue on appeal; there was no showing that insured was deprived of a "meaningful" alternative to obtaining plaintiff's policy containing the termination clause or that she found herself in an oppressive bargaining position vis-a-vis plaintiff; and the Court of Appeals has previously expressed its willingness to enforce similar termination provisions.

Am Jur 2d, Sales § 238.

Doctrine of unconscionability as applied to insurance contracts. 86 ALR3d 862.

2. Insurance § 621 (NCI4th); Estoppel § 13 (NCI4th)— automatic termination of insurance—equitable estoppel inapplicable—no duty of plaintiff to defend and insure

Where plaintiff issued a policy of insurance which contained an automatic termination clause upon insured's obtaining a similar policy on the covered auto, insured obtained similar coverage from defendant without plaintiff's knowledge, insured was involved in an accident, plaintiff defended insured and admitted coverage, plaintiff subsequently learned of defendant's policy, plaintiff notified defendant that, in consequence of the automatic termination of its policy, defendant was responsible for taking over insured's defense and providing any necessary coverage, defendant denied responsibility and plaintiff filed this action for declaratory judgment, plaintiff was not required by the doctrine of equitable estoppel to fulfill its contractual obligations to defendant and insure, since the record contained no indication that plaintiff conducted itself in a manner so as to misrepresent or conceal facts, and plaintiff did not have knowledge of its rights and of facts which would enable it to take action as to enforcement thereof.

Am Jur 2d, Sales § 184.

Actual receipt of cancellation notice mailed by insurer as prerequisite to cancellation of insurance. 40 ALR4th 867.

Validity and construction of automobile insurance provision or statute automatically terminating coverage when

insured obtains another policy providing similar coverage. 61 ALR4th 1130.

What constitutes waiver by insured or insured's agent of required notice of cancellation of insurance policy. 86 ALR4th 886.

Appeal by defendant from order entered 30 March 1994 by Judge James R. Strickland in Craven County Superior Court. Heard in the Court of Appeals 1 March 1995.

J. Darby Wood, P.A., for plaintiff-appellee.

Wallace, Morris, Barwick & Rochelle, P.A., by P.C. Barwick, Jr. and Elizabeth A. Heath, for defendant-appellant.

JOHN, Judge.

In this declaratory judgment action, defendant Atlantic Indemnity Company (Atlantic) appeals the trial court's ruling upholding the termination clause in a policy of insurance issued by plaintiff State Farm Mutual Automobile Insurance Company (State Farm). Atlantic argues in the alterative that the trial court erred by failing to determine State Farm was equitably estopped from refusing to provide coverage under the policy at issue. We find Atlantic's contentions unpersuasive.

Pertinent factual and procedural background information is as follows: Ethel B. Darrisaw (Darrisaw) was the named insured under a State Farm automobile insurance policy. Darrisaw paid the premium providing coverage for a term between 20 February 1992 and a date subsequent to 10 November 1992. The State Farm policy, which insured Darrisaw's 1988 Plymouth automobile, contained the following provision:

> Automatic Termination
>
> If you obtain other insurance on **your covered auto**, any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.

(Emphasis in original) (hereinafter "the termination clause").

Thereafter, Darrisaw obtained from Atlantic an automobile insurance policy providing liability coverage on the identical 1988 Plymouth vehicle, effective 4 November 1992. Six days later, on 10 November 1992, Darrisaw's Plymouth automobile collided with a

vehicle owned by Laurie M. Woolard and her father, Robert H. Woolard (the Woolards). State Farm, unaware of the Atlantic coverage, hired an attorney to represent Darrisaw in the subsequent negligence action initiated by the Woolards. State Farm undertook the defense without reservation of rights, and represented on two occasions in the course of the action that its policy was in effect at the time of the collision—once in responses to interrogatories and once under oath in the affidavit of its underwriting operations superintendent.

In October 1993, State Farm became aware of the Atlantic policy. In November 1993, State Farm notified Atlantic that, in consequence of automatic termination of the State Farm policy upon the effective date of the Atlantic policy, Atlantic was responsible for taking over Darrisaw's defense and providing any necessary coverage.

When Atlantic responded in December 1993 denying responsibility, State Farm filed the instant complaint for declaratory judgment, seeking a determination that the Atlantic policy was in full force and effect on 10 November 1992. In Atlantic's answer and amended answer, filed 4 and 14 March 1994 respectively, it maintained the State Farm policy had not terminated prior to the date of the collision, that Atlantic was liable only for its pro rata share of the damages in the underlying tort action, and finally that State Farm was equitably estopped from denying liability.

The trial court determined the State Farm policy had automatically terminated 4 November 1992, and ruled that the Atlantic policy was in full force and effect on that date. Atlantic appeals.

I.

[1] Atlantic argues the termination clause is ambiguous and also violative of public policy as unconscionable and permitting the unjust enrichment of State Farm. Under the facts of the case *sub judice*, these contentions cannot be sustained.

While our courts do not appear previously to have addressed the validity of comparable termination clauses within automobile insurance policies, the Supreme Court's holding in *Baysdon v. Insurance Co.*, 259 N.C. 181, 130 S.E.2d 311 (1963), is instructive. In *Baysdon*, the insured's original fire policy contained no termination provision and the Court held the insured's act of procuring additional fire insurance, without requesting the original insurer to cancel its policy, did

not have the effect of terminating the original policy. *Id.* at 188, 130 S.E.2d at 317. Significantly for our purposes, the court stated:

> [i]t comes to this—an insurance policy is a contract; . . . it may be terminated in accordance with the provisions thereof or by mutual consent, a meeting of the minds, but one of the parties may not terminate it without the assent of the other unless the contract so provides.

Id. (Emphasis added).

The case *sub judice* is similar to *Baysdon* in that the insured (Darrisaw) procured additional auto liability insurance from Atlantic on the identical vehicle insured by State Farm. However, unlike *Baysdon*, the State Farm policy at issue herein expressly terminated by its own terms on the effective date of new, similar coverage on a "covered auto." Darrisaw's policy with State Farm, as a contract, therefore "terminated in accordance with the provisions thereof," *id.*, immediately upon the effective date of the Atlantic policy.

We reject Atlantic's arguments that the termination clause is ambiguous and violates public policy. Atlantic initially insists that the policy requirement of prior notice by the insurer for effective cancellation or termination might lead the "average lay person" also to expect notice prior to termination resulting from the insured's procurement of additional, similar insurance on the same automobile. This assertion fails for several reasons.

First, "[p]ersons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents," *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 8, 312 S.E.2d 656, 661 (1984). The language of the specific termination clause at issue does not state, and cannot be reasonably inferred to mean, that the *insured* should expect notice before termination occurs as the result of new, similar insurance being obtained by the *insured*. Moreover, requiring notice from the original insurer would be at best impractical when only the insured and new insurer would possess knowledge of the new contract.

Next, our courts have held the statutorily imposed notice requirements of N.C. Gen. Stat. § 20-310(f), read into all policies as part of the Vehicle Responsibility Act of 1957, *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 253, 382 S.E.2d 745, 748 (1989), to be inapplicable when termination results from an act of the insured and

not an act of the insurer. *Ins. Co. v. Davis*, 7 N.C. App. 152, 157, 171 S.E.2d 601, 604 (1970). At the time the policy was issued, *see White v. Mote*, 270 N.C. 544, 555, 155 S.E.2d 75, 82 (1967) ("laws in effect at the time of issuance of a policy of insurance become a part of the contract . . . . "), the statute provided as follows:

> No cancellation or refusal to renew by an insurer of a policy of automobile insurance is effective unless the insurer has given the policyholder notice . . . .

G.S. § 20-310(f) (1993) (repealed 1 February 1995).

Faizan v. Insurance Co., 254 N.C. 47, 59, 118 S.E.2d 303, 312 (1961), as interpreted in *Smith v. Nationwide Mut. Ins. Co.*, 72 N.C. App. 400, 407, 324 S.E.2d 868, 873, *rev'd*, 315 N.C. 262, 337 S.E.2d 569 (1985), held Faizan's (the insured) acquisition of another policy of insurance from a different company, in combination with his failure to pay the premium when due, constituted an "unequivocal" rejection by him of the initial policy and that notice by the insurer to the insured therefore was not required under G.S. § 20-310(f). *But see Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 271, 337 S.E.2d 569, 574 ("the critical point decided in [*Faizan*] is that where the insurer gives timely notice to the insured of the expiration date of an automobile liability insurance policy along with an offer to renew the policy if the premium is paid by the due date, no further notice to the insured is required.")

Finally, the notice requirements of G.S. §20-310, which convey certainty as to the period of coverage, work to accomplish the purpose of the 1957 Vehicle Financial Responsibility Act, *i.e.*, to provide protection to victims of motorist liability by requiring continuous liability coverage. *Pearson*, 325 N.C. at 253-54, 382 S.E.2d at 747-48. Therefore, interpretation of the termination clause to dictate cancellation upon the insured's procurement of similar insurance—albeit without notice by the insurer—ensures continuous liability coverage and in no wise violates the purpose of the statute.

Our holding finds support in *Taxter v. Safeco Ins. Co.*, 721 P.2d 972, 974, 44 Wash. App. 121, 126 (1986), where the Washington court upheld a similar termination provision, ruling it was consented to by the insured and did not conflict with statutory notice requirements. Moreover, the court determined the statute to govern only cancellation by the insurer and not termination by unilateral acts of the insured, reasoning that the purpose of the notice statute was to pro-

vide opportunity for the *insured* to obtain other insurance prior to cancellation of coverage. *Id.*

Atlantic also asserts that the termination clause violates public policy. It first alleges unconscionability as a basis for this argument. We do not agree.

> [T]his Court has previously held that "[t]o find unconscionability there must be an absence of meaningful choice on part of one of the parties [procedural unconscionability] *together with* contract terms which are unreasonably favorable to the other [substantive unconscionability]."

Rite Color Chemical Co. v. Velvet Textile Co., 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992), *quoting Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991) (emphasis added). Unconscionability is an affirmative defense, and the party asserting it has the burden of proving both procedural and substantive unconscionability. *Rite Color*, 105 N.C. App. at 20, 411 S.E.2d at 649.

In the case *sub judice*, Atlantic set out no allegation of unconscionability either in its answer or amended answer to State Farm's complaint. Atlantic's failure to plead the affirmative defense of unconscionability below operates to bar its raising of this issue on appeal, *see Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 598, 394 S.E.2d 643, 649 (1990), *disc. rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991) (failure to plead plaintiff's contributory negligence was bar to issue being raised on appeal), and we have no obligation to discuss it further.

Moreover, assuming *arguendo* Atlantic's pleadings may be read to allege the affirmative defense of unconscionability, the record reveals no showing that Darrisaw was deprived of a "meaningful," *Rite Color*, 105 N.C. App. at 20, 411 S.E.2d at 649, alternative to obtaining State Farm's policy containing the termination clause. Atlantic thus failed to come forward with evidence of the requisite procedural unconscionability. *Id.*

Moreover, Atlantic's unsupported contention that the policy unfairly terminates an insured's liability coverage fails to rise to the level of substantive unconscionability required by our courts:

> A court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of com-

> mon sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

Brenner v. Little Red School House, Ltd., 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981).

There is no indication in the record that Darrisaw found herself in an oppressive bargaining position *vis-à-vis* State Farm. Moreover, while it is uncontroverted that Darrisaw received no refund of premium from State Farm, nothing in the record suggests a proportionate refund was either requested of or denied by State Farm. The instant circumstance thus does not constitute one where " '[a]n instinctively felt sense of justice cries out against such a sharp bargain.' " *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 186, 221 S.E.2d 499, 506 (1976) (citation omitted).

Finally, this Court has expressed its willingness to enforce similar termination provisions. *See, City of Greensboro v. Reserve Ins. Co.*, 70 N.C. App. 651, 660-61, 321 S.E.2d 232, 237-38 (1984) (public officials liability insurance policy); and *Burgess v. Insurance Co.*, 44 N.C. App. 441, 444, 261 S.E.2d 234, 236 (1980) (homeowner insurance policy).

Atlantic also contends the termination clause violates public policy because it permits State Farm to become unjustly enriched by retention of premiums paid on policies terminated under the clause. This argument is inapposite to the circumstances *sub judice.* Unjust enrichment is

> a claim in quasi contract or a contract implied in law . . . . If there is an [actual] contract between the parties the contract governs the claim and the law will not imply a contract.

Booe v. Shadrick, 322 N.C. 567, 570, 369 S.E.2d 554, 556, *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988).

Having rejected Atlantic's arguments, we conclude the trial court properly enforced the termination clause.

II.

[2] Atlantic maintains alternatively that State Farm, irrespective of the validity of the termination clause, was required by application of the doctrine of equitable estoppel to fulfill its contractual obligations to defend and insure. Atlantic argues that

> [State Farm's] actions, admissions, failure to act and inconsistent positions lead Ms. Darrisaw to believe that coverage existed and that she, defendant and the plaintiffs' *(sic)* in the underlying tort action have all been unjustly prejudiced by plaintiff's denial of coverage.

Atlantic focuses upon State Farm's actions of continuous representation, admissions of coverage, and failure to cancel coverage or refund any premium.

> The doctrine of equitable estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result.

Thompson v. Soles, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980).

To establish a claim of equitable estoppel, the following elements must be met:

> (1) The conduct to be estopped must amount to false representation or concealment of material fact or at least which is reasonably calculated to convey the impression that the facts are other than and inconsistent with those which the party afterwards attempted to assert;
>
> (2) Intention or expectation on the party being estopped that such conduct shall be acted upon by the other party or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon.
>
> (3) Knowledge, actual or constructive, of the real facts by the party being estopped;
>
> (4) Lack of knowledge of the truth as to the facts in question by the party claiming estoppel;
>
> (5) Reliance on the part of the party claiming estoppel upon the conduct of the party being sought to be estopped;
>
> (6) Action based thereon of such a character as to change his position prejudicially.

Investors Title Ins. Co. v. Herzig, 101 N.C. App. 127, 134-35, 398 S.E.2d 659, 664 (1990), *citing Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E.2d 155 (1974). The party invoking the equitable estoppel

doctrine has the burden of proving facts necessary to establish the essential elements. *In Re Will of Covington*, 252 N.C. 546, 114 S.E.2d 257, 260 (1960).

Examining the record in light of the foregoing principles, we determine the showing regarding certain of the essential elements of equitable estoppel to have been insufficient. First, the record contains no indication that State Farm conducted itself in a manner so as to misrepresent or conceal facts, or which in any way was calculated to convey an impression inconsistent with its later position. Although Atlantic properly emphasizes that either an intentional act *or* culpable negligence would establish this element, *Thompson*, 299 N.C. at 487, 263 S.E.2d at 602, nothing in the record evidence manifests negligence on the part of State Farm in failing to discover Darrisaw's actions which effectuated termination of the State Farm policy. To the contrary, State Farm promptly notified its insured and Atlantic upon discovery of the latter's policy, and, upon disagreement with Atlantic over the effect of the termination clause, timely brought this action to clarify coverage on the insured's automobile.

Moreover, in order for the doctrine of equitable estoppel to apply, the party against whom estoppel is asserted must have full knowledge of its rights and of facts which will enable it to take action as to enforcement thereof. *Stonewall Insurance Co. v. Fortress Reinsurers Managers*, 83 N.C. App. 263, 270, 350 S.E.2d 131, 135 (1986), *disc. review denied*, 319 N.C. 410, 354 S.E.2d 728 (1987). Atlantic conceded in its Answer that State Farm had no actual knowledge of Darrisaw's Atlantic policy until October, 1993. Further, in view of Darrisaw's silence on the matter, it cannot be said State Farm possessed constructive knowledge of the Atlantic policy.

Based on the foregoing, the order of the trial court is in all respects affirmed.

Affirmed.

Judges JOHNSON and MARTIN, Mark concur.

TARLTON v. STIDHAM

[122 N.C. App. 77 (1996)]

WARD G. TARLTON AND JOHN P. TARLTON, CO-EXECUTORS OF THE ESTATE OF EDNA T. GRIGGS, HARVEY HOLLIS TARLTON, WARD GERALD TARLTON, JOHN P. TARLTON, FRANCES T. WEBB, JAMES B. TARLTON, JR., RANDY H. TARLTON, SANDY B. TARLTON, RENA ANN TARLTON, PATTI J. TARLTON, ROBERT L. CAGLE, III, MARY EDNA WILLIAMS, NED FRYE TARLTON, AND JEAN T. PELLETIER, PLAINTIFFS v. SHIRLEY GRIGGS STIDHAM, ADMINISTRATRIX OF THE ESTATE OF JOHN C. GRIGGS, JR., AND SHIRLEY GRIGGS STIDHAM, INDIVIDUALLY, AND HUSBAND, KYLE STIDHAM; RUTH GRIGGS SHORT AND HUSBAND, WILLIAM M. SHORT; SARA GRIGGS JARMAN AND HUSBAND, EDWARD JARMAN; PEGGY GRIGGS HURST AND HUSBAND, MICKEY HURST; PATRICIA GRIGGS LOCKLEAR AND HUSBAND, CAMERON LOCKLEAR; PAULA STORK AND HUSBAND, R.J. STORK, JR.; AND RUTH COLEY GRIGGS, DEFENDANTS

No. COA95-177

(Filed 19 March 1996)

1. Wills § 100 (NCI4th)— life interest in land to wife— remainder interest to wife under intestate succession— doctrine of merger applicable

Where decedent's husband left her all his personal property and a life estate in his real property, he did not provide a testamentary disposition either specifically or through a residuary clause for the four parcels of land in dispute between the parties, and he died without lineal heirs or parents, then the remainder interests in the four parcels passed to decedent via intestacy, and, through the doctrine of merger, her remainder interest merged with her life interest, creating a fee simple estate in the four parcels, which passed, pursuant to her will, to plaintiffs.

Am Jur 2d, Trusts § 116.

Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries. 7 ALR4th 621.

2. Wills § 152 (NCI4th)— life interest in property to wife — remainder interest to wife under intestate succession— dissent from will not required

There was no merit to defendants' contention that decedent, who, pursuant to her husband's will, took a life interest in his land, was required to dissent from the will if she wanted to take a remainder interest in the land under intestate succession, since N.C.G.S. § 30-1 does not require such an election.

Am Jur 2d, Wills § 1646.

Construction, application, and effect of statutes which deny or qualify surviving spouse's right to elect against deceased spouse's will. 48 ALR4th 972.

3. Estoppel § 13 (NCI4th)— distribution under will—equitable estoppel—summary judgment for plaintiffs proper

In a declaratory judgment action to determine distribution of real property under a will, the trial court did not err in granting summary judgment for plaintiffs on the issue of estoppel, since defendant did not present any evidence indicating that decedent acted with knowledge of the real facts with regard to the four parcels; even it decedent did represent to defendants that they, as remaindermen, owed inheritance taxes on the parcels, defendants did not demonstrate a lack of knowledge and means of knowledge as to the real facts in question; and if the inheritance tax was improperly paid by defendants, the proper remedy would be for unjust enrichment, not equitable estoppel.

Am Jur 2d, Summary Judgment §§ 15, 26, 27.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder. 78 ALR4th 90.

Appeal by plaintiffs and cross appeal by defendants from summary judgment entered 12 December 1994 by Judge Marvin K. Gray in Anson County Superior Court. Heard in the Court of Appeals 14 November 1995.

Wilson & Waller, P.A., by Betty S. Waller, for plaintiff appellants.

E.A. Hightower and Robert G. Sanders for defendant appellees.

SMITH, Judge.

In this appeal from summary judgment against them, plaintiffs seek a declaratory judgment concerning distribution of property under a will. Plaintiffs represent the estate of Edna T. Griggs (decedent), who died testate in 1994. Defendants are the brothers and sisters (and others similarly situated) of the decedent's late husband, Walter Eugene Griggs (Griggs), who died partially testate in 1982. The central issue concerns whether four parcels of land from the Griggs estate passed as a life estate to decedent, with remainder to defendants, or in fee simple to decedent, with no remainder to defendants. As a subsidiary issue, defendants cross appeal, claiming the trial court should not have granted summary judgment for plaintiffs on the issue of estoppel.

We hold that the four parcels in question passed to plaintiffs in fee simple, via North Carolina's Intestate Succession Act. We also hold that plaintiffs are not equitably estopped from claiming a fee simple interest in the property involved in this dispute. Thus, we reverse the judgment of the trial court on the will construction issue and affirm the trial court's denial of defendants' estoppel claim against plaintiffs.

The facts in this case are undisputed. Thus, to sustain the trial court's grant of summary judgment on the partial intestacy issue, defendants (as the moving party) must show they are entitled to judgment as a matter of law. *Kessing v. National Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). Defendants have not met this burden, as is explained herein.

Walter Eugene Griggs executed a will in 1963. In that will, Walter Eugene Griggs bequeathed all of his personal property, and a life estate in all of his real property, to his wife Edna T. Griggs. At his death in 1982, Walter Griggs owned seven parcels of land. Walter Griggs' will specifically reserved a remainder interest in three of the seven tracts of land to his brothers and sisters. In the will, Walter Griggs did not specifically dispose of the remaining four parcels, which were acquired by him subsequent to the execution of his will in 1963. Walter Griggs' will contained no residuary clause; thus no provision exists under the will for the passing of the four parcels not specifically bequeathed.

In 1994, Edna T. Griggs died testate. Edna Griggs' will contained a residuary clause, which allocated all of her property not specifically bequeathed to the instant plaintiffs, her brothers and sisters and their lineal descendents. Defendants argue Edna Griggs was not an heir to the four parcels in question, as "she could not take under the intestacy laws," because "a reversion was created [under Walter Griggs' will] which vested in his heirs." Defendants contend this "reversion" reflects the "paramount intent of the testator." By "his heirs," defendants mean the brothers and sisters (and their lineal descendents) of Walter Griggs. Defendants also argue that Edna Griggs must have dissented from Walter Griggs' will in order to claim the remainder interest in the four parcels. Defendants are mistaken.

[1] Our case law and statutes address the issues in this case without ambiguity. In *Ferguson v. Croom*, 73 N.C. App. 316, 318, 326 S.E.2d 373, 375 (1985), a case analytically identical to the instant one, this Court held that a disinherited party may still take in the event of a

partial intestacy. The *Ferguson* Court arrived at this disposition by applying N.C. Gen. Stat. § 29-8 (1984), which states: "If part but not all of the estate of a decedent is validly disposed of by his will, the part not disposed of by such will *shall* descend and *be distributed as intestate property.*" *Ferguson*, 73 N.C. App. at 318, 326 S.E.2d at 375 (quoting § 29-8) (emphasis in original).

In this case, Walter Griggs did not provide a testamentary disposition, either specifically or through a residuary clause, for the four parcels of land in dispute between the instant parties. Therefore, this property did not pass under Walter Griggs' will. Instead, the four parcels constitute a partial intestacy, as defined by N.C. Gen. Stat. § 29-8. As such,

> G.S. 29-8 creates a *mandatory* plan for disposing of a decedent's property which does not pass by will. It directs that the property pass by intestate succession *without regard to the intent* expressed by a testator in a will. The statute, which was adopted in 1959, was a codification of our common law. *See Dunlap v. Ingram*, 57 N.C. 178 (4 Jones Eq.) (1858) (where our Supreme Court held that property not disposed of by will passes as directed by the law regardless of attempts by the testator to disinherit the lawful takers).

Ferguson, 73 N.C. App. at 318, 326 S.E.2d at 375 (emphasis ours).

Based on *Ferguson*, then, the question here becomes one of determining the proper heir to the four parcels under our Intestate Succession Act. *Id.* Under N.C. Gen. Stat. § 29-14 (1984) of the Intestate Succession Act, a surviving spouse receives "all the real property" if "the intestate is not survived by a child, children or any lineal descendent of a deceased child or children, or by a parent." Neither party disputes that Walter Griggs had no lineal heirs or parents living at the time of his death; no one questions Edna Griggs' status as the surviving spouse. Therefore, Edna Griggs was the proper recipient of the remainder interests in the four parcels of land contested here.

Once the remainder interests in the four parcels passed to Edna Griggs via intestacy, the doctrine of merger, as espoused in *Elmore v. Austin*, 232 N.C. 13, 23, 59 S.E.2d 205, 213 (1950) became operative.

> Merger is the absorption of a lesser estate by a greater estate, and takes place when two distinct estates of greater and lesser rank meet in the same person or class of persons at the same time without any intermediate estate.

Id. In this case, Edna Griggs' remainder interest in the four parcels merged with her life interest in same, creating a fee simple estate in the four parcels. *Id.*

[2] Defendants argue in their brief that: "Walter Eugene Griggs gave his wife, Edna Tarlton Griggs, all his personal property and a life estate in his land so since she did not dissent from his will she lost her right to intestate succession." Defendants cite no authority for this proposition. However, we interpret defendants' argument as meaning that Edna Griggs should have been forced to dissent, if she sought to exercise her rights to the four parcels under the Intestate Succession Act, while simultaneously taking under Walter Griggs' will.

We do not agree the statute governing the right to dissent, N.C. Gen. Stat. § 30-1 (1992), requires such an election. *See generally Phillips v. Phillips*, 296 N.C. 590, 252 S.E.2d 761 (1979). The right to dissent is not an obligation to dissent. "It is a common principle of law in North Carolina that a surviving spouse must elect between taking under a Will and dissenting from the Will. The spouse cannot do both; the election of one precludes the other." *Hill v. Smith*, 51 N.C. App. 670, 674, 277 S.E.2d 542, 545, *disc. review denied*, 303 N.C. 543, 281 S.E.2d 392 (1981). Here, the surviving spouse did not seek to do both. Edna Griggs simply took a life estate in the real property of her late husband under his will, and received a remainder interest in four parcels of Walter Griggs' land per the Intestate Succession Act. This result is consistent with *Ferguson*, where the Court directed "that the property pass by intestate succession without regard to the intent expressed by testator in a will." *Ferguson*, 73 N.C. App. at 318, 326 S.E.2d at 375. Defendants' argument that a dissent election is mandated is without merit.

Finally, defendants argue in their brief that plaintiffs should be estopped from claiming a fee simple interest in the four parcels, due to conduct of Edna Griggs after Walter Griggs' death. This Court has defined the "essential elements of estoppel" as:

> "(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts."

Hensell v. Winslow, 106 N.C. App. 285, 290, 416 S.E.2d 426, 430, (quoting *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370,

396 S.E.2d 626, 628-29 (1990)), *disc. review denied*, 332 N.C. 344, 421 S.E.2d 148 (1992). Estoppel principles do vary though, based on the facts of each case. *Miller v. Talton*, 112 N.C. App. 484, 488, 435 S.E.2d 793, 797 (1993). "In determining whether the doctrine [of estoppel] applies, the conduct of both parties must be weighed in the balances of equity." *Id.* Finally, when only one inference can reasonably be drawn from the undisputed facts, estoppel becomes a question of law, properly decided by this Court. *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 185, 77 S.E.2d 669, 677-78 (1953).

[3] Defendants assert the trial court erred in granting summary judgment to plaintiffs on the estoppel issue. To sustain summary judgment, plaintiffs, as the moving party, must show that no material facts are in dispute and that they are entitled to judgment as a matter of law. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995). In addition, the record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom. *Id.* Evidence properly considered on a motion for summary judgment "includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829.

Upon close scrutiny of the record, it is apparent plaintiffs are entitled to judgment on the estoppel issue as a matter of law. Defendants have presented no evidence, which, if taken as true, would fulfill the elements of estoppel. For instance, defendants have not presented any evidence indicating that Edna Griggs acted with " 'knowledge, actual or constructive, of the real facts' " with regard to the four parcels. *Hensell*, 106 N.C. App. at 290, 416 S.E.2d at 430. Defendants assert that Edna Griggs "represented to her husband testator's brothers and sisters that she had a life estate in the land and that they, as remaindermen, owed inheritance taxes and under that representation induced the brothers and sisters to pay inheritance taxes [on the four parcels]." Plaintiffs dispute this assertion.

However, even if we assume defendants' allegations concerning the inheritance tax are true, these facts are insufficient to work an estoppel against plaintiffs. The party requesting estoppel must have had " '(1) a lack of knowledge and the *means of knowledge* as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.' " *Hensell*, 106 N.C. App. at

290-91, 416 S.E.2d at 430 (emphasis added). Defendants had every opportunity to determine their inheritance tax liability prior to paying same. They did not. "[A]n estoppel ordinarily will be denied where the party claiming it was put on inquiry as to the truth and had available the means for ascertaining it." *Hawkins*, 238 N.C. at 179, 77 S.E.2d at 673.

Moreover, even if defendants paid a tax on the four parcels for which they were not liable, the prejudice suffered them has no nexus to Edna Griggs' ownership rights. If the inheritance tax was errantly paid by defendants, the proper remedy would be for unjust enrichment, not equitable estoppel. *See Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56, (" 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.' " (citation omitted)), *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). Based on the foregoing, we find that defendants have failed to present facts which, viewed in their most favorable light, establish material elements of their estoppel claim. Therefore, the trial court did not err in granting summary judgment to plaintiffs on the estoppel issue.

In conclusion, we reverse the trial court on the intestacy issue and affirm the trial court's disposition of defendants' estoppel claim.

Affirmed in part and reversed in part.

Judges JOHNSON and WALKER concur.

KENZIE SALAAM, PLAINTIFF-APPELLANT v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT-APPELLEE

No. COA95-425

(Filed 19 March 1996)

1. Workers' Compensation § 339 (NCI4th)— permanent partial disability—I.C. Form 26 not fundamentally unfair

There was no merit to plaintiff's contention that the Industrial Commission should not have approved I.C. Form 26 giving plaintiff 30 weeks of 10% permanent partial disability compensation pursuant to N.C.G.S. § 97-31 because it was fundamentally unfair, since the record established that plaintiff was assigned a ten percent permanent partial disability of his back, but there was no evidence in the medical records submitted to

the Commission with I.C. Form 26 which supported awarding permanent total disability benefits under N.C.G.S. 97-29.

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

Back injury or condition as constituting total or permanent disability within insurance coverage. 23 ALR3d 1108.

What constitutes permanent or total disability within coverage of insurance policy issued to physical laborer or workman. 32 ALR3d 922.

Excessiveness or adequacy of damages awarded for injuries to back, neck, or spine. 15 ALR4th 294.

2. Workers' Compensation § 372 (NCI4th)— nonconsensual ex parte contact with employee's treating physician—deposition inadmissible

The Industrial Commission erred by admitting the deposition of plaintiff's treating physician in light of the nonconsensual *ex parte* contact between defendant's counsel and the physician.

Am Jur 2d, Workers' Compensation § 602.

Discovery right to ex parte interview with injured party's treating physician. 50 ALR4th 714.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 3 November 1994. Heard in the Court of Appeals 25 January 1996.

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

Attorney General Michael F. Easley, by Special Deputy Attorney General Elisha H. Bunting, Jr., for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff Kenzie Salaam (Salaam) appeals from Opinion and Award entered by the North Carolina Industrial Commission (Commission) denying Salaam's claim for additional compensation based on an alleged change of condition.

On 30 June 1988 Salaam, while employed with defendant North Carolina Department of Transportation (NCDOT), suffered an injury

to his back arising out of, and in the course of, his employment. On 24 August 1988 the Commission approved I.C. Form 21, Agreement for Compensation for Disability, submitted by NCDOT and Salaam.

On 30 January 1989 Salaam underwent surgery on his back. After surgery Dr. William L. Pritchard, Salaam's surgeon, rated Salaam with a ten percent permanent partial disability of the back. On 25 July 1989 the Commission approved I.C. Form 26, Supplemental Memorandum of Agreement as to Payment of Compensation, submitted by the parties. Under the terms of I.C. Form 26, Salaam received thirty weeks of ten percent permanent partial disability compensation pursuant to N.C. Gen. Stat. § 97-31.

Salaam subsequently requested a hearing for additional benefits under N.C. Gen. Stat. § 97-47. In the course of the attendant discovery process, the parties deposed Dr. Pritchard. Prior to the deposition, NCDOT's counsel engaged in an *ex parte* conversation with Dr. Pritchard. At the deposition, Salaam's counsel objected to the entire proceeding based on, among other things, the alleged inappropriate nature of the *ex parte* conversation.

On 15 December 1993 Deputy Commissioner Scott M. Taylor, after considering all the evidence, including Dr. Pritchard's deposition testimony, concluded Salaam had not sustained a change of condition. Salaam appealed to the Full Commission which also admitted Dr. Pritchard's deposition testimony. On 3 November 1994 the Full Commission filed an Opinion and Award finding "[o]n September 19, 1991 plaintiff returned to Dr. Pritchard complaining of pain. Plaintiff's physical condition, however, has not significantly changed since plaintiff agreed to accept ten percent permanent partial disability compensation as a result of his compensable injury on June 30, 1988." The Commission therefore concluded Salaam, since receiving a permanent partial disability rating of ten percent, "has not undergone a change of condition, and is not, therefore, entitled to additional compensation under N.C.G.S. § 97-47."

On appeal Salaam contends the Commission erred by: (1) approving I.C. Form 26 in light of the standard enunciated by the Supreme Court in *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 444 S.E.2d 191 (1994); (2) overruling Salaam's objection to the *ex parte* communication between Dr. Pritchard and NCDOT; (3) concluding Salaam has not sustained a change of condition; (4) finding NCDOT established, assuming *arguendo* I.C. Form 26 is set aside, that Salaam is employable; (5) failing to set forth sufficient findings of fact to allow

this Court to determine the rights of the parties; and (6) finding there was "no good ground to reconsider" the previous Order and Award.

I.

[1] We first consider Salaam's allegation the Commission should not have approved I.C. Form 26 because it was fundamentally unfair.

Our Supreme Court recently held the Commission, prior to approving any I.C. Form 26, must exercise its judicial authority by determining "the fairness of the agreement." *Vernon*, 336 N.C. at 434, 444 S.E.2d at 196. In *Vernon*, the parties submitted, and the Commission subsequently approved, I.C. Form 26, under which plaintiff received compensation for his injury pursuant to section 97-31. The medical report attached to I.C. Form 26 assigned plaintiff a fifteen percent permanent partial disability of the back, but also stated plaintiff would probably not be able to return to work. *Id.* at 434, 444 S.E.2d at 195.

The Supreme Court, relying on the attending physician's assertion plaintiff would be unable to work in the future, noted "plaintiff may have been entitled to permanent total disability benefits under section 97-29, as well as permanent partial disability benefits based on the fifteen percent rating under section 97-31." *Id.* The Court also found the approving authority assumed, rather than determined, that plaintiff understood his right to elect the most beneficial method of compensation under the Workers' Compensation Act. *Id.* at 434, 444 S.E.2d at 195-196. The Court therefore concluded the Commission failed to "act in a judicial capacity [by determining] the fairness of the agreement." *Id.* at 434, 444 S.E.2d at 196.

In contrast, although the present record establishes Salaam was assigned a ten percent permanent partial disability of his back, we find no evidence in the medical records submitted to the Commission with I.C. Form 26 which supports awarding permanent total disability benefits under section 97-29. *See* N.C. Gen. Stat. § 97-29 (1991). In fact, Dr. Pritchard, in his letter assigning Salaam a ten percent permanent impairment, "encouraged [Salaam] . . . to seek some gainful employment within his capabilities." (emphasis added). Therefore, the present case is distinguishable from *Vernon* because Salaam, unlike the plaintiff in *Vernon*, was not entitled to benefits under section 97-29. Accordingly, we conclude the Commission appropriately exercised its judicial authority by approving I.C. Form 26 submitted by NCDOT and Salaam.

Finally, we note the Commission may set aside a previously approved I.C. Form 26 if plaintiff can establish "that there has been error due to fraud, misrepresentation, undue influence or mutual mistake . . . ." N.C. Gen. Stat. § 97-17 (1991). We believe, after careful review of the present record, that Salaam cannot establish the existence of any of these factors. *See Brookover v. Borden, Inc.*, 100 N.C. App. 754, 755-756, 398 S.E.2d 604, 605-606 (1990), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 450 (1991). Accordingly, this assignment of error must fail.

II.

[2] We next consider Salaam's contention the Commission erred by overruling his objection to the *ex parte* communication between Dr. Pritchard and NCDOT.

N.C. Gen. Stat. § 97-27(b) (1991) provides, in pertinent part: "No fact communicated to or otherwise learned by any physician . . . who may have . . . examined the employee, or . . . been present at any examination, shall be privileged, either in hearings provided for by this Article or any action at law." *Id.* This proviso is considered an exception to the statutory physician-patient privilege created by N.C. Gen. Stat. § 8-53. LEONARD T. JERNIGAN, JR., NORTH CAROLINA WORKERS' COMPENSATION § 17-6 (2d Ed. 1995).

Nevertheless, "[t]he statutory physician-patient privilege is distinct from the rule prohibiting unauthorized *ex parte* contacts" and, therefore, information actually discoverable because the statutory privilege is inapplicable may be improperly acquired if done so through *ex parte* communications. *Crist v. Moffat*, 326 N.C. 326, 332-333, 389 S.E.2d 41, 45 (1990). Clearly, "the gravamen of [allowing *ex parte* contacts] is not whether evidence of plaintiff's medical condition is subject to discovery, but by what methods the evidence may be discovered." *Id.* at 336, 389 S.E.2d at 47.

In *Crist*, a medical malpractice case, the Court held "defense counsel may not interview plaintiff's nonparty treating physician privately without plaintiff's express consent" because "considerations of patient privacy, the confidential relationship between doctor and patient, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contacts place the nonparty treating physician supersede defendant's interest in a less expensive and more convenient method of discovery." *Id.* In so holding, the Court assumed the statutory physician-patient privilege was waived by plaintiff.

Therefore, the *Crist* rule precludes non-consensual *ex parte* communications during adversarial proceedings.

Although we recognize "the Commission is not required to strictly apply the rules of evidence applicable to a court of law," *Tucker v. City of Clinton*, 120 N.C. App. 776, 780, 463 S.E.2d 806, 810 (1995), we likewise note the rationale of the *Crist* Court did not turn on the existence or nonexistence of an evidentiary privilege. Moreover, after careful review of the bases for the *Crist* holding—patient privacy, the confidential relationship between doctor and patient, and the adequacy of formal discovery devices—we cannot discern why these policy considerations would not be equally applicable to adversarial proceedings before the Commission. Therefore, notwithstanding the relaxed evidentiary rules applicable to the Commission, *Id.*, and the fact defendant's arguments would carry great force were we writing on a clean slate, we nonetheless are bound by *Crist.* Consequently, we must conclude the Commission erred by admitting Dr. Pritchard's deposition testimony in light of the non-consensual *ex parte* contact between NCDOT and Dr. Pritchard. *See Crist*, 326 N.C. at 336, 389 S.E.2d at 47.

Finally, we also note NCDOT, in its brief, argues Salaam suffered no prejudice by admitting Dr. Pritchard's deposition over his objection because "Salaam was allowed to question the physician about the [*ex parte*] communication and show any possible taint or bias." Although the opportunity to cure any prejudice resulting from *ex parte* communications prior to deposition is theoretically available in every adversarial proceeding, we note the *Crist* Court appears to have established a prophylactic protection against non-consensual *ex parte* communications. *See Id.* Therefore, we must reject this contention.

Accordingly, we reverse the Opinion and Award filed 3 November 1994 and remand this case to the Commission with directions to strike the deposition testimony of Dr. Pritchard and reconsider Salaam's request for additional benefits under N.C. Gen. Stat. § 97-47.

Reversed and remanded.

Judges EAGLES and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. NEHEMIAH POPE, JR.

No. COA95-265

(Filed 19 March 1996)

1. Criminal Law § 1143 (NCI4th)— offense against law officer performing duties—deputy sheriff keeping the peace—sufficiency of evidence of aggravating factor

The evidence was sufficient to support the trial court's finding as an aggravating factor for a second-degree murder that the "offense was committed against a law enforcement officer who was in uniform while in the performance of his employment" where the evidence tended to show that defendant called the sheriff's department on the day preceding the offense and threatened to kill his wife's daughter if someone did not come and get her; in accompanying the daughter the next day so that she could take her child from defendant's residence, the deputy was acting as a peace officer to protect her and her child; and he was certainly acting within his common law authority as a peace officer when, after defendant aimed his rifle toward him, the deputy pointed his gun at defendant and asked defendant to put the gun down, and defendant shot and killed the deputy. N.C.G.S. § 15A-1340.4(a)(1)(e).

Am Jur 2d, Sheriffs, Police and Constables § 16.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like—post-*Gregg* cases. 64 ALR4th 755.

2. Criminal Law § 382 (NCI4th)— court's questioning of witness—no expression of opinion

The trial court's questioning of a witness was not an attempt to "rehabilitate" the witness after a successful cross-examination by defendant's attorney and was thus not an improper expression of opinion, since the court's questioning simply clarified that it was the usual practice of the sheriff's department to mediate when trouble was brewing, and these questions did not suggest that the court had an opinion about the legitimacy of such practice and did not aid the prosecution.

Am Jur 2d, New Trial § 157; Trial §§ 98, 274; Witnesses §§ 53, 727, 729.

3. Appeal and Error § 147 (NCI4th)— failure to state grounds for objection—issue not preserved for appellate review

Defendant failed to preserve for appellate review his assertion that the trial court committed reversible error by permitting the State to impeach him with extrinsic evidence of a collateral matter, since defendant failed to specifically object on the ground he asserted on appeal, in spite of several opportunities to do so, and it was not apparent from the context that defendant was objecting on the ground he asserted on appeal. N.C.R. App. P. 10(b)(1).

Am Jur 2d, Trial §§ 428, 429, 705.

Appeal by defendant from judgment and commitment entered 11 August 1994 by Judge William C. Griffin in Hertford County Superior Court. Heard in the Court of Appeals 25 October 1995.

Attorney General Michael F. Easley, by Associate Attorney General C. Norman Young, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender, Charlesena Elliott Walker, for defendant-appellant.

LEWIS, Judge.

Defendant appeals his second degree murder conviction and fifty year sentence.

At 9:38 a.m. on 15 September 1992, a person identifying himself as "Boss Man Pope" called the Hertford County Sheriff's Department. When the dispatcher answered, the caller said "y'all better come and get this girl out of my house before I kill her." The caller gave his phone number and address. He then told the dispatcher that "Tonette" came to his house "to get the child" and that "he was not going to let her take him." The dispatcher told the caller that she would send a deputy to the house to take care of his complaint. The dispatcher later called the number he had given her and recognized the voice as the man who had called previously. At trial, defendant's wife confirmed that this number was that of the house where she and defendant lived.

"Tonette Watford" is the daughter of defendant's wife, Mrs. Pope, and the mother of a child who had been living with the Popes since he was two months old. Deputy Paul Futrell drove Ms. Watford to defendant's home about 1:00 p.m. on 16 September 1992. He had been dispatched by the sheriff's office at Ms. Watford's request with the concurrence of DSS to take the child away from the Pope residence.

Having entered the home without a breach of the peace and having returned to his patrol car with the child and Ms. Watford, Deputy Futrell was confronted by defendant who pointed a gun at him. Defendant then shot Deputy Futrell who died at the scene. Testimony conflicted but the jury found defendant guilty of second degree murder. Judge Griffin found as the one aggravating factor, that the offense was against a law enforcement officer, in uniform, while in the performance of his employment. This factor he found outweighed the six mitigating factors.

In his brief, defendant presents arguments only on assignments of error numbers 6, 28, 34, and 36. His other assignments of error are deemed abandoned. N.C.R. App. P. 28(a) (1996). In assignments of error numbers 34 and 36, defendant asserts, *inter alia*, that the trial court violated defendant's constitutional rights in sentencing defendant based on its finding of an aggravating factor. Since defendant presents no argument on this issue in his brief, we deem it abandoned. N.C.R. App. P. 28(a) (1996).

[1] In assignments of error numbers 34 and 36, defendant also asserts that the evidence does not support the trial court's finding, as an aggravating factor at sentencing, that the "offense was committed against a law enforcement officer who was in uniform while in the performance of his employment." Defendant contends that Deputy Futrell was not on an authorized mission and that he was acting beyond his statutory authority. We conclude that he was carrying out his duty as a peace officer and therefore well within his common law authority.

N.C. Gen. Stat. section 15A-1340.4(a)(1) (1988) sets out aggravating factors that must be considered, in certain circumstances, by the trial court at sentencing. Factor (1)(e) may be found based on a preponderance of the evidence when

> the offense was committed *against a present or former law enforcement officer*, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance atten-

> dant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, *while engaged in the performance of his official duties or because of the exercise of his official duties.*

N.C.G.S. § 15A-1340.4(a)(1)(e) (1988) (emphasis added). A nearly identical aggravating factor is available in N.C. Gen. Stat. section 15A-2000(e)(8) for determining whether a defendant may or may not be tried capitally. *See* N.C.G.S. § 15A-2000(e)(8) (1988).

Our Supreme Court's construction of the aggravating factor set out in N.C.G.S. section 15A-2000(e)(8) is instructive here. In *State v. Gaines*, the Court held that this aggravating factor may be applied to the murder of a law enforcement officer who was engaged in secondary employment at the time of the murder. *State v. Gaines*, 332 N.C. 461, 465, 421 S.E.2d 569, 570 (1992), *cert. denied*, 507 U.S. 1038, 123 L. Ed. 2d 486 (1993). Citing previous holdings, the *Gaines* court stated that the aggravating factor in N.C.G.S. section 15A-2000(e)(8) may be found when an "on-duty" or on-shift law enforcement officer in uniform is murdered during the performance of his employment. *Id.* at 470, 421 S.E.2d at 573.

Here, the trial court tracked this statement by the *Gaines* court in finding, under N.C.G.S. section 15A-1340.4, that "the offense was committed on a law enforcement officer, who was in uniform, while in the performance of his employment." In tracking the *Gaines* language, the court used the phrase "performance of his employment" rather than the statutory phrase "in the performance of his official duties." Neither the State nor defendant contends that the court's re-wording of this statutory aggravating factor changed the essence of its finding. Thus, for purposes of this appeal only, we analyze the finding made by the court as a finding, under N.C.G.S. section 15A-1340.4(a)(1)(e), that the "offense was committed against a . . . law enforcement officer . . . while engaged in the performance of his official duties or because of the exercise of his official duties."

Defendant asserts that Deputy Futrell was not engaged in the performance of his official duties when he was shot. We disagree.

A deputy sheriff acts in the performance of his official duties when he exercises his common law duty to be a peace officer. Contrary to defendant's assertions, the duties of sheriffs and their deputies are not limited to those duties expressly set out by statute. N.C. Gen. Stat. § 4-1 provides as follows:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and *which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete*, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986) (emphasis added). Under the common law, sheriffs are recognized as peace officers. *Wilson v. Mooresville*, 222 N.C. 283, 287, 22 S.E.2d 907, 911 (1942). As a peace officer, a sheriff or deputy sheriff has a duty to conserve the peace in his county and to use whatever force is necessary to preserve and prevent breaches of the peace. 80 C.J.S. *Sheriffs and Constables* § 42(a) (1953).

The record shows that defendant called the sheriff's department on the day preceding the offense and threatened to kill Ms. Watford if someone did not come and get her. In accompanying Ms. Watford the next day, Deputy Futrell was acting as a peace officer to protect her and the child. He was certainly acting as a peace officer when, after defendant aimed his rifle towards him, Deputy Futrell pointed his gun at defendant and asked defendant to put the gun down. By finding defendant guilty of second degree murder under the instructions given, the jury either rejected the theory that defendant acted in self-defense or concluded that defendant was the aggressor with intent to kill or to inflict serious bodily injury. The record evidence and the jury's verdict support the finding that Deputy Futrell was acting in the performance of his official duties at the time he was shot.

The trial judge's comments to the contrary at the charge conference are immaterial. At this conference, the trial judge stated that he would review *Gaines* on this issue. Obviously, by the time of sentencing, the trial judge concluded that the aggravating factor was appropriate under *Gaines*. The trial judge neither erred nor abused his discretion in finding this factor in aggravation.

[2] In assignment of error number 6, defendant asserts that the trial court violated his rights to a fair trial and to due process by questioning a witness in a manner that suggested an opinion on the evidence. After examining the record, we conclude that the court's questioning was proper under N.C.R. Evid. 614(b) and did not prejudice defendant.

The court questioned Chief Deputy Sharpe following direct and redirect examination by the State and cross and recross examination by defendant. The questioning went as follows:

> THE COURT: Mr. Sharpe, is the sheriff's practice to—you used the word mediator earlier—mediator when there appears to be trouble brewing. Is that—
>
> THE WITNESS: Yes, sir.
>
> THE COURT: When you say the usual practice, is that what you mean?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Okay, All right. You may step down.

Defendant argues that this questioning was an attempt to "rehabilitate" the witness after a successful cross-examination by his attorney and, as such, was an improper expression of opinion. We disagree. *See State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986) (stating that judge may ask clarifying questions if done in a manner that does not prejudice the defendant).

The court's questioning simply clarified that it was the usual practice of the sheriff's department to mediate when trouble was brewing. These questions did not suggest that the court had an opinion about the legitimacy of such a practice and did not aid the prosecution. If anything, they reinforced testimony previously elicited by defendant. The court's questions here were proper under N.C.R. Evid 614(b) and did not violate defendant's rights to a fair trial and to due process of law.

[3] In assignment of error number 28, defendant asserts that the court committed reversible error by permitting the State to impeach defendant with extrinsic evidence of a collateral matter.

In order to preserve a question for appellate review, an objecting party must state the specific grounds for the ruling he requests if these grounds are not apparent from the context. N.C.R. App. P. 10(b)(1) (1996); *see State v. Glenn*, 333 N.C. 296, 303-04, 425 S.E.2d 688, 693 (1993) (refusing to address objection on a ground not specifically asserted at trial).

The evidence that defendant claims was collateral is an operations log that documents defendant's phone call to the sheriff's office the day before Deputy Futrell was shot. At trial, defendant's attorney

objected on the ground that he did not know what the State was attempting to rebut by using the log, but he did not state why this rebuttal was objectionable. He also objected on the ground that he wanted to know the origin of the log. The court dismissed the jury, at defendant's attorney's request, to address these objections, specifically asked defendant's attorney to state the grounds for his objections, and admitted the log as a business record under N.C.R. Evid. 803(6). In spite of these opportunities, defendant failed to specifically object on the ground he now asserts on appeal. It also was not apparent from the context that defendant was objecting on the ground he now asserts. He has not preserved this issue for our review.

To the extent that assignment of error number 28 also raises constitutional issues, defendant has abandoned these issues by failing to argue them in his brief. N.C.R. App. P. 28(a) (1996).

No error.

Judges WYNN and JOHN concur.

JOHN M. JENCO AND LESLYE M. JENCO, PLAINTIFFS v. SIGNATURE HOMES, INC., A NORTH CAROLINA CORPORATION, AND CRAIG R. WIESER, INDIVIDUALLY, AND SIGNATURE HOME CORPORATION, DEFENDANTS v. SECOR BANK F.S.B., THIRD PARTY DEFENDANT

No. COA95-496

(Filed 19 March 1996)

1. Appeal and Error § 122 (NCI4th)— interlocutory appeal—possible inconsistent verdicts—order immediately appealable

The order allowing plaintiffs' motion for partial summary judgment against three of defendants' counterclaims was immediately appealable, though the appeal was interlocutory, where plaintiffs' claims and defendants' fourth counterclaim remain viable, since different juries could reach different results, thereby resulting in inconsistent verdicts on the same factual issues, and thus affecting a substantial right of defendants which would be prejudiced if the appeal were not allowed.

Am Jur 2d, Parties § 81; Process § 407.

Appealability of order dismissing counterclaim. 86 ALR3d 944.

Modern status of state court rules governing entry of judgment on multiple claims. 80 ALR4th 707.

2. Contractors § 12 (NCI4th)— corporation as unlicensed contractor—no recovery on illegal contract allowed—no quantum meruit recover

The trial court properly entered summary judgment for plaintiffs on defendant's counterclaims for breach of contract, *quantum meruit*, and foreclosure on a claim of lien for labor and materials, since, at the time the parties entered into the contract in which the corporate seller was to construct a home for plaintiffs, the seller was an unlicensed general construction contractor even though the individual defendant, who was a licensed contractor, was the president, and the individual defendant's subsequent appointment as the seller and the transfer of the contract during construction by the unlicensed contractor to a corporation which was a licensed contractor did not cure the illegal contract which existed at the time the contract was signed; furthermore, recovery under quantum meruit is not applicable where there is an express contract.

Am Jur 2d, Judgments 624; Restitution and Implied Contracts § 65.

Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done—modern cases. 44 ALR4th 271.

Appeal by defendants from order entered 20 January 1995 by Judge James Clifford Spencer, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 February 1996.

Greene and Dortch, by Robert J. Greene, Jr., for plaintiffs-appellees.

Knox, Knox, Freeman & Brotherton, by Lisa G. Caddell, for defendants-appellants.

JOHNSON, Judge.

In the fall of 1992, plaintiffs John and Leslye Jenco decided to purchase a lot and build a home in a residential subdivision of

Charlotte, North Carolina known as Radbourne. The developer of Radbourne was Crosland Land Company. This developer had initiated a policy that it would not sell lots to individuals. Instead, Crosland Land Company would only sell lots to a list of pre-approved general contractors. One of the pre-approved general contractors for the Radbourne subdivision was Signature Homes, Inc. (Signature, Inc.).

Plaintiffs and Craig Wieser signed a document entitled Purchase Agreement which was dated 20 November 1992. Plaintiffs contend that this was a contract for the sale of the lot and construction of a house by Signature, Inc. There are, in fact, two different versions of this document. One version is attached as Exhibit A to plaintiffs' complaint and the other is attached as Exhibit A to defendants' answer and counterclaim. Defendants' version of this document contains a separate page entitled "Agreement to Purchase—Addendum 1," which was drafted by plaintiff John Jenco and signed by all parties on or about 31 December 1992. This addendum to the purchase agreement designates the "Seller" as "Craig R. Wieser d/b/a Signature Homes, Inc., a North Carolina corporation."

In February of 1993, a closing took place in which Signature, Inc. sold to plaintiffs a lot in the Radbourne subdivision. This closing was coordinated with the acquisition of that same property by Signature, Inc. from the developer of the subdivision.

Construction on plaintiffs' residence started about 10 April 1993. Building permits were granted in the name of Craig R. Wieser as the general contractor. Since 1990, Mr. Wieser had been a licensed general contractor in the State of North Carolina. Signature, Inc. has never held a general contractor's license.

In May of 1993, Mr. Wieser formed a new corporation called Signature Homes Corporation (Signature Corporation). Mr. Wieser applied for an unlimited general contractor's license for that corporation. This license was granted 19 May 1993. Thereafter, all existing projects which had been commenced under Mr. Wieser's supervision were transferred to Signature Corporation. Construction on the Jencos' residence continued until 29 August 1993. At that time, due to various conflicts with Mr. Wieser, the Jencos requested that he leave the project. As of that date, the Jencos had paid construction progress payments of $113,111.71. This figure included $50,000.00 which was paid for the lot. At the time Mr. Wieser exited the job, the Jencos owed $76,905.21 for labor and materials provided in the construction of the project.

On 29 October 1993, a claim of lien was filed against the Jencos' property by Craig Wieser d/b/a Signature Homes, Inc. and Signature Home Corporation in the amount of $76,905.21.

This suit was filed 12 November 1993. In the complaint, plaintiffs alleged that their contract was with Signature, Inc., the corporation. They further alleged that this corporation was an unlicensed contractor. Thus, plaintiffs argue that defendants cannot recover on the lien. Plaintiffs further contend that Signature, Inc., as general contractor, caused damages by failing to continue the work in a workman-like manner.

Defendants' answer alleged that Craig R. Wieser was a party to the original contract by virtue of the addendum drafted by plaintiff John Jenco. In defendants' first cause of action it is alleged that Craig R. Wieser is entitled to a recovery against the plaintiffs for breach of contract. In the alternative, Craig R. Wieser and Signature Corporation contend that they are entitled to recover the amount of labor and materials expended in the construction of plaintiffs' residence under a theory of quantum meruit. Finally, defendants allege a third cause of action in which Craig R. Wieser and Signature Corporation contend that they should be permitted to foreclose on the claim of lien filed 29 October 1993.

Plaintiffs filed a motion for partial summary judgment on the grounds that the contract in this action was strictly with Signature, Inc. Moreover, they also argued that since Signature, Inc. was an unlicensed general contractor, there should be no recovery for labor and materials expended in the construction of plaintiffs' residence by either Signature, Inc., Craig R. Wieser, or Signature Corporation.

The trial court granted plaintiffs' motion for partial summary judgment and dismissed the first three causes of action in defendants' answer and counterclaim and cancelled the claim of lien filed in this action. From this order, defendants have appealed.

[1] Although the parties failed to address the issue, we must first ascertain whether the order allowing plaintiffs' motion for partial summary judgment is immediately appealable. Plaintiffs' claims and defendants' fourth counterclaim remain viable; therefore, this action in not a final determination of the rights of the parties. N.C.R. Civ. P. 54(a). Thus, whether defendants would be deprived of a substantial right if they were not allowed an immediate appeal is the issue we first address. *See Beam v. Morrow, Sec. of Human Resources*, 77 N.C.

App. 800, 336 S.E.2d 106 (1985), *disc. review denied*, 316 N.C. 192, 341 S.E.2d 575 (1986).

This Court has held that the right to avoid the possibility of two trials on the same issues involved a substantial right if the same issues are present in both trials. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982); s*ee Lamb v. Lamb*, 92 N.C. App. 680, 683, 375 S.E.2d 685, 686 (1989). The same factual issues are involved in plaintiffs' claims and in defendants' claims. If the present appeal is not immediately heard, it is probable that different juries could reach different results— thereby resulting in inconsistent verdicts on the same factual issues. *Id.* Accordingly, the grant of partial summary judgment against defendants' counterclaims affects a substantial right which would be prejudiced if this action was not immediately appealable.

[2] Defendants argue that the trial court erred in granting partial summary judgment in favor of plaintiffs on defendants' first three counterclaims. Defendants contend that a genuine issue of material fact exists which precludes summary judgment on its counterclaims. Defendants allege that the "Addendum to Purchase Contract" indicates that Craig Wieser d/b/a Signature Homes, Inc. is the "Seller" under the purchase agreement. Consequently, a genuine issue of material fact exists as to whether the parties intended for Craig Wieser, the individual, to be a party to the agreement and to assume the rights, duties and obligations of "Seller." We disagree.

The actual purchase agreement provides that "SIGNATURE HOMES INC., THIS DAY HAS SOLD AND JOHN AND LESLY [sic] JENCO THIS DAY HAS [sic] PURCHASED . . . ." Further the typed signature states "SIGNATURE HOMES INC. SELLER" with Craig Wieser's signature. However the Addendum provides "To facilitate the conclusion of the subject residential Agreement to Purchase, previously executed between Leslye M. and John M. Jenco (hereinafter jointly referred to as "Buyer"), and, Craig R. Wieser, dba Signature Homes Inc., a North Carolina corporation, (hereinafter jointly referred to as "Seller") . . . ." Further, the typed signature line states that Craig R. Wieser was the Seller.

Our Supreme Court has held that contracts entered into by unlicensed construction contractors are unenforceable by the contractor. *Brady v. Fulghum*, 309 N.C. 580, 308 S.E.2d 327 (1983). The Court further held that "the existence of a license at the time the contract is signed is determinative." *Id.* at 586, 308 S.E.2d at 331. Moreover, the contract cannot be validated by the contractor's subsequent procure-

ment of a license. *Id.* At the time that the parties entered into the contract in which the Seller, Signature Homes, Inc., was to construct a home for plaintiffs, Seller Signature Homes, Inc. was an unlicensed general construction contractor. Thus, defendant Wieser's subsequent appointment as the Seller and transfer of the contract during construction by Signature Homes, Inc., an unlicensed contractor, to Signature Home Corporation, a licensed contractor, did not cure the illegal contract which existed at the time that the contract was signed.

In *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985), a case substantially similar to the one at bar, the corporation, an unlicensed general contractor, initiated a lawsuit to recover $55,000.00 allegedly owed on a contract for construction of certain renovations at a Mecklenburg County office park. The plaintiff argued that because its president was individually licensed as a general contractor, that his license was for the corporation's benefit. This Court held that a corporation which was an unlicensed general contractor, could not recover even though the corporation's president and sole shareholder was properly licensed as a general contractor in his individual capacity. *Id.*

Defendants argue in the alternative that they are entitled to recover payment under the theory of quantum meruit. This argument is also without merit because recovery under quantum meruit is not applicable where there is an express contract. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E.2d 507 (1968); *see Brady*, 309 N.C. 580, 308 S.E.2d 327.

For the reasons stated above, the trial court did not err in granting summary judgment for plaintiffs on defendants' counterclaims. Therefore, the decision of the trial court is affirmed.

Affirmed.

Judges MARTIN, JOHN C. and McGEE concur.

SNYDER v. FIRST UNION NATIONAL BANK

[122 N.C. App. 101 (1996)]

WAYNE ROY SNYDER AND WIFE, DENISE JOANNE SNYDER, PLAINTIFFS v. FIRST UNION NATIONAL BANK OF FLORIDA AND WILLIAM F. POTTS, JR., AS TRUSTEE, ADDITIONAL DEFENDANTS AND ALFRED T. HUMBLES AND WIFE, BETTY R. HUMBLES, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. LUCILLE B. JEFFERSON, WIDOW, ERNEST T. JEFFERSON AND WIFE, LYNN F. JEFFERSON, THIRD PARTY DEFENDANTS

No. COA95-411

(Filed 19 March 1996)

Appeal and Error § 119 (NCI4th)— fewer than all issues resolved—appeal interlocutory

Defendants' appeal was dismissed as interlocutory where plaintiffs filed suit alleging that they were entitled to an easement and right of way over the roads and streets as shown on the various maps in their chain of title and that defendants wrongfully blocked their access and use of the roads; the trial court granted partial summary judgment on the issue of liability in favor of plaintiffs and set the damages action for hearing; and allowing plaintiffs to use an easement until a final judgment has been made would not permanently harm plaintiffs.

Am Jur 2d, Judgments §§ 55, 203; Summary Judgment § 42.

Appealability of order dismissing counterclaim. 86 ALR3d 944.

Appeal by defendants Humbles from Order entered 14 December 1994 by Judge Samuel G. Grimes in Beaufort County District Court. Heard in the Court of Appeals 25 January 1996.

Carter, Archie and Hassell, by Thomas E. Archie, for plaintiffs-appellees Synder.

Wayland J. Sermons, Jr., P.A., by Wayland J. Sermons, Jr., for defendants-appellants Humbles.

JOHNSON, Judge.

E.S. Jefferson and wife Lucille Jefferson acquired a tract of property prior to 1953 on the Pungo River in Eastern Beaufort County. They proceeded to have a survey map prepared by H.L. Rayburn, dated 21 September 1953, which set forth the first 42 lots, bounded by a 25 foot property road. This map was recorded in Map Book 8, Page

55. Thereafter, Mr. Jefferson proceeded to convey various lots according to this map. He also began to convey lots which were not located on the map, by Deeds which contained maps within the Deeds themselves. Some of these Deeds contained maps prepared by surveyors, but the large majority of the lots sold were done pursuant to crude handwritten drawings made by Mr. Jefferson himself.

The area of concern, the southern boundary of Lots 74 through 78, was not shown on the subdivision map of the Jefferson property recorded in Beaufort County, which was shown in Exhibit 1 and recorded in Map Book 8, Page 55 of the Beaufort County Registry. There are several maps of the Jefferson property designated as Pungo Shores that are attached to the various Deeds that are Exhibits 2 through 20, 22 and 24. Exhibit 2 is by a registered surveyor and is for Lots 74 and 75 of Pungo Shores. It shows a 60 foot "new or back road" that extends behind Lots 74 and 75. It is referred to as a "New Road," with the width not shown, as "60 Foot Road," with "28 Foot Present" and "32 Foot Projected" and also shown as ending at a point prior to plaintiffs' lots. The original option contract from Ernest Jefferson and wife to defendants Humbles refers to the beginning point as being Lot 74 on a Map in Book 714, at Page 142 of the Beaufort County Registry. This is a map of Pungo Shores Subdivision that is a part of Exhibit 24. Lot 74 is also the same lot that is shown on the survey attached to Exhibit 2.

On 5 October 1978, defendants Humbles purchased a 7.6246 acre tract from Ernest S. Jefferson and wife Lucille B. Jefferson, and Ernest T. Jefferson and wife Lynn F. Jefferson. Defendants were given a drawing showing the property intended to be conveyed. This drawing was marked "Jefferson Realty Company, Belhaven, N.C. 27810" and indicated no right of way or other roadway to the south of Lot 74 through 78. It did, however, show as "Open" where Lot 79 would be. Before their purchase, defendants caused the property to be surveyed by a registered surveyor. The survey was dated 17 August 1978, and recorded in Plat Cabinet B, Slide 3. This survey showed no road or right of way to the south of Lot 74 through 78. In 1980, defendants sold a 2.02 acre tract in the northeast corner of their 7.6246 acre tract to three individuals.

The deposition of Russell Jefferson and Linwood Respess, together with the affidavits of defendants Humbles and Third Party Defendant Ernest T. Jefferson, established that the area behind Lots 74 through 78 was never opened, had never been used as a roadway,

and that defendants Humbles cleared a portion of the area when they built their cottage on their acreage. This evidence was contradicted by the affidavits of plaintiffs and the depositions of plaintiffs' adjoining land owner, Charles Randall Tyson, and plaintiffs' predecessor in title, Willy T. Baker.

Further, the evidence tends to show that Lots 77 and 78 of the Pungo Shores Subdivision were conveyed by Ernest S. Jefferson and wife to Clifton G. Loy and wife, then to Willie Baker and wife and then to plaintiffs; and that a map of said lots was attached to said Deed. Defendants admit that the these lots were conveyed and that the map is attached to the Deed.

Defendants allege that from their purchase of the property in 1978 until 1992, they had never been approached by anyone, nor had there been any discussion of any 60 foot right of way. In 1992, plaintiffs began talking about an alleged right of way, and began clearing some of the property of defendants behind plaintiffs' and defendants' properties. Defendants asked plaintiffs to stop, and plaintiffs ceased their activities.

Defendants obtained an Owners Policy of Title Insurance from United Title Insurance Company, which contained certain exclusions. The exclusions included "Number 3. Easements or claims of easements," and also specified book and page numbers. Defendants alleged that neither the book nor page numbers are in plaintiffs' chain of title, and defendants were never shown nor aware of any such maps during their purchase; that plaintiffs did not have the title searched for their purchase of Lots 77 and 78 and received no title insurance; and that plaintiffs failed to have a survey done at the time of their purchase.

However, the Deed to Grace C. Whitehurst for Lots 74 and 75 (Appendix 35, Exhibit 2, 1964), the Deed for Lot 71 and 72 to Louise Whitehurst Snowden, and the Deed for Lot 76 to George C. Bailey, Jr. and wife all are in plaintiffs' chain of title and all show a 60 foot road extending behind Lots 74, 75, 76 and 77. The maps attached to Exhibits 2 and 3 are by a registered surveyor. The map attached to the Deed that is Exhibit 6 shows a new road extending behind Lots 59 through 70 and east of Popular Drive, designates the property as part of the second subdivision of E. S. Jefferson Pungo Shores; and refers to Map Book 8, Page 55 of the Beaufort County Registry.

Additionally, all of the Deeds referred to in defendants' title insurance policy are in defendants' chain of title, as are all of the Deeds that are Exhibits 2 through 20, 22 and 24. Further, defendants were informed by their attorney who closed the purchase of their property that "portions of the lands to be conveyed to you and your husband have already been subdivided into lots and would be subject to easements." Furthermore, defendants were again notified by their closing attorney of the exceptions in their title policies and these exceptions were discussed prior to closing. Defendants' title policy disclosed that the easement existed in Book 658, p. 367, App. 57; Book 687, p. 103, App. 72; Book 692, p. 241, App. 78; Book 702, p. 550, App. 88; Book 703, p. 288, App. 90; and Book 714, p. 142, App. 100.

Plaintiffs filed suit alleging that they were entitled to an easement and right of way over the roads and streets as shown on the various maps and that defendants have wrongfully blocked their access and use of these roads. The trial court granted partial summary judgment on the issue of liability in favor of plaintiffs and set the damages action for hearing.

Defendants appeal from the grant of partial summary judgment of the liability claim in favor of plaintiffs. We need not address this issue, however, as an appeal from a grant of partial summary judgment is interlocutory, and defendants have not shown this Court that a substantial right will be affected if they are not allowed to immediately appeal. *See Miller v. Swann Plantation Development Co.*, 101 N.C. App. 394, 399 S.E.2d 137 (1991).

"A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). The purpose of this rule is to prevent fragmentary, premature and unnecessary appeals by allowing the trial court to make a final determination on the merits prior to being presented to the appellate courts. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 444 S.E.2d 252 (1994).

This Court has held that allowing plaintiff to use an easement until a final judgment had been made would not permanently harm defendants, and that any damage to the easement or defendants' property which results from plaintiffs' use could be rectified by monetary damages if necessary. *Miller*, 101 N.C. 394, 399 S.E.2d 137. Thus, any possible alteration of the 60 foot area by plaintiffs Synder in this action would not affect a substantial right.

Therefore, we dismiss defendants' appeal as being interlocutory.

Dismissed.

Judges JOHN and SMITH concur.

CARSWELL DISTRIBUTING COMPANY, Plaintiff v. U.S.A.'s WILD THING, INC., and CALIFORNIA INFLATABLES COMPANY, INC., Defendants

No. COA 95-66

(Filed 19 March 1996)

Courts § 16 (NCI4th)— California manufacturer—injection of boats into stream of commerce—exercise of personal jurisdiction over manufacturer proper

The exercise of personal jurisdiction over a California manufacturer did not violate due process, though the manufacturer had no offices, facilities, sales agents, or employees in North Carolina and had never conducted business in this state, since the manufacturer entered into an agreement with a distributor to ship boats to plaintiff in North Carolina; pursuant to this agreement defendant manufacturer intentionally injected its boats into the stream of commerce and purposely availed itself of the benefit of North Carolina markets; given the wide distribution of boats contemplated by defendant, it could reasonably expect to be sued in this state in a defective product action; and the fact that this was a suit for economic injury rather than personal injury did not preclude application of the stream of commerce analysis.

Am Jur 2d, Courts §§ 80, 106, 107.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transaction within state. 20 ALR3d 1201.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

Execution, outside of forum, of guaranty of obligations under contract to be performed within forum state as con-

ferring jurisdiction over non-resident guarantors under "long-arm" statute or rule of forum. 28 ALR4th 664.

Appeal by plaintiff from order entered 1 November 1994 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 20 October 1995.

Womble Carlyle Sandridge & Rice, a Professional Limited Liability Company, by W. Andrew Copenhaver and Timothy A. Thelen, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by William K. Davis and Stephen M. Russell, for defendant-appellee California Inflatables Company, Inc.

LEWIS, Judge.

The sole issue in this appeal is whether the exercise of personal jurisdiction by a North Carolina court over defendant California Inflatables Company, Inc. ("CICO") violates due process. Defendant U.S.A.'s Wild Thing, Inc. is not a party to this appeal.

On 22 June 1994 plaintiff filed a complaint against defendants asserting various claims arising from the manufacture of "Wild Thing" inflatable boats by defendants and subsequent distribution to plaintiff. On 12 September 1994 CICO moved to dismiss the complaint on the ground that the court lacked personal jurisdiction over CICO. By order entered 1 November 1994, the court granted CICO's motion to dismiss on the ground that its exercise of personal jurisdiction over CICO would violate due process. Plaintiff appeals this order.

In its complaint, plaintiff alleges the following, in pertinent part:

Defendants, California corporations, formed a joint venture to manufacture, sell, and distribute Wild Thing boats throughout the United States. Plaintiff entered into a verbal agreement with defendants in which plaintiff agreed to distribute boats in North Carolina and parts of the Southeast United States. Forty-two (42) boats were ordered by and shipped to plaintiff in North Carolina. Plaintiff then discovered that the boats were defective.

Affidavits and exhibits offered by CICO show the following:

CICO is a California corporation with no offices, facilities, distributors, sales agents, or employees in North Carolina and has never conducted business in this state. CICO has no property, no bank

accounts, and no contracts in North Carolina, nor with any resident, including plaintiff.

North America's Wild Thing, Inc., ("NAWT") serves as the distributor of boats throughout the United States, Canada, and Mexico for Serious Boat Marketing PTY Limited ("Serious Boat"). On 25 February 1993 CICO and NAWT entered into a manufacturing agreement in which CICO agreed to manufacture inflatable boats for distribution by NAWT pursuant to NAWT's agreements with Serious Boat. In 1993 CICO began making boats under this agreement and directly shipped forty-two (42) boats, at NAWT's direction, to plaintiff in North Carolina. Under the terms of the manufacturing agreement, CICO billed NAWT, not plaintiff, for the boats sent to plaintiff.

A court's exercise of personal jurisdiction over an out-of-state defendant comports with due process under the Fourteenth Amendment of the United States Constitution if the defendant has "certain minimum contacts" with the forum state so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)).

For a showing of minimum contacts, a defendant's " 'conduct and connection with the forum State' " must be " 'such that he should reasonably anticipate being haled into court there.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 85 L. Ed. 2d 528, 542 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)). To establish such conduct and connection there must be " 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Id.* at 474-75, 85 L. Ed. 2d at 542 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958)).

Minimum contacts can be found when the out-of-state defendant injects products into the "stream of commerce" with the expectation that the products will reach the forum state. *World-Wide Volkswagen Corp.*, 444 U.S. at 298, 62 L. Ed. 2d at 502. North Carolina courts have applied stream of commerce analysis to support the exercise of personal jurisdiction in defective product cases. *E.g.*, *Warzynski v. Empire Comfort Systems*, 102 N.C. App. 222, 228-29, 401 S.E.2d 801, 805 (1991) (holding a corporation subject to the jurisdiction of our courts when it has "purposefully injected" a product into "the stream of commerce" without limiting the area of distribution "so as to

exclude North Carolina"). North Carolina cases that use stream of commerce analysis have not been overruled by the United States Supreme Court's decision in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 94 L. Ed. 2d 92 (1987). *Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 57, 411 S.E.2d 640, 644, *disc. review denied*, 331 N.C. 116, 414 S.E.2d 752, *cert. denied*, 506 U.S. 824, 121 L. Ed. 2d 42 (1992); *Warzynski*, 102 N.C. App. at 229, 401 S.E.2d at 805.

Here, CICO entered into a manufacturing agreement with NAWT, a company that served as the distributor for Serious Boat throughout the United States, Mexico, and Canada. In the manufacturing agreement, NAWT appointed CICO as its "exclusive manufacturer" with a commitment from CICO to "mass manufacture" a "substantial quantity" of boats for distribution by NAWT. The agreement also provided that CICO would ship the boats to various destinations designated by NAWT. By shipping the boats to plaintiff in North Carolina pursuant to this agreement CICO intentionally injected its boats into the stream of commerce and purposefully availed itself of the benefit of North Carolina markets. Given the wide distribution of boats contemplated by its agreement with NAWT and its direct shipment to North Carolina under this agreement, CICO could reasonably expect to be sued in North Carolina in a defective product action.

The fact that this is a suit for economic injury rather than personal injury does not preclude application of stream of commerce analysis here. When confronted with this issue, courts in other states have noted that states have an interest in protecting their residents from economic injury, as well as from personal injury. *E.g.*, *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 321 (D.Md. 1983); *Charles Gendler & Co., Inc. v. Telecom Equipment Corp.*, 508 A.2d 1127, 1139 (N.J. 1986). Due process does not require North Carolina courts to wait for personal injury to occur before exercising jurisdiction in defective product actions against out-of-state defendants. Must someone die before justice will lie?

Neither does it offend "traditional notions of fair play and substantial justice," for our courts to exercise jurisdiction here. A defendant who has "purposefully directed his activities" at residents of the forum state "must present a compelling case" to show that "other considerations" would make the exercise of jurisdiction by the forum state "unreasonable." *Burger King Corp.*, 471 U.S. at 477, 85 L. Ed. 2d at 544. CICO has not done so here.

CICO asserts that the costs and inconvenience of litigation in North Carolina would be an unfair and extreme burden. We note,

however, that a similar burden would be borne by plaintiff if required to litigate in California. The record does not show that CICO would be "severely disadvantaged" by litigation in North Carolina. *See Burger King Corp.*, 471 U.S. at 478, 85 L. Ed. 2d at 544 (listing such disadvantage as illustrative of an unfair exercise of jurisdiction). Further, it is not unfair play to require CICO to defend here given its intentional decision to avail itself of the benefits of markets in North Carolina. North Carolina's interest in protecting its residents from harm caused by defective products outweighs any inconvenience to CICO.

The exercise of personal jurisdiction over CICO by a North Carolina court in this action does not violate due process.

Reversed and remanded.

Judge WALKER concurs.

Judge MARTIN, MARK D., concurs in the result.

ANGELA KNIGHTEN, GERALD N. KNIGHTEN, SIRINUCH T. CARRUTH, WILLIAM CARRUTH, STEVEN CARRUTH AND SIRINUCH RUTH CARRUTH BATISTA, PLAINTIFF-APPELLEES v. BARNHILL CONTRACTING COMPANY, DEFENDANT-APPELLANT

No. COA95-113

(Filed 19 March 1996)

1. Appeal and Error § 118 (NCI4th)— defense based on sovereign immunity—interlocutory order appealable

An order which does not completely dispose of the case is interlocutory and generally not appealable; however, when a defense based upon sovereign immunity is asserted, the denial of a motion for summary judgment based upon the ground of sovereign immunity is immediately appealable.

Am Jur 2d, Judgments § 203.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. Appeal and Error § 118 (NCI4th)— contractor working for state—no right to share in state's immunity in negligence claim—premature appeal dismissed

Defendant highway contractor was not entitled to share in the state's immunity in a negligence claim arising out of the performance of its contract with the state; therefore, the trial court's denial of defendant's motion for summary judgment on the basis of sovereign immunity did not deprive defendant of a substantial right absent an immediate appeal, and defendant's premature appeal is dismissed.

Am Jur 2d, Public Works and Contracts § 136.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 ALR3d 382.

Appeal by defendant from orders entered 15 August 1994 and 15 September 1994 by Judge Coy E. Brewer in Cumberland County Superior Court. Heard in the Court of Appeals 26 October 1995.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Mark A. Sternlicht, William O. Richardson and Rebecca J. Britton, for plaintiff-appellees Angela and Gerald Knighten.

Smith, Dickey & Smith, by Allen D. Smith, for plaintiff-appellees Sirinuch T. Carruth, William Carruth and Steven Carruth.

Lytch, Tart, Willis & Fusco, by Phillip A. Fusco, for plaintiff-appellee Sirinuch Ruth Carruth Batista.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten and William W. Pollock, for defendant-appellant.

WALKER, Judge.

Cumberland Paving Company, a predecessor in interest to defendant Barnhill Contracting Company (Barnhill), contracted with the North Carolina Department of Transportation (DOT) to resurface a section of Highway 87 in Harnett County. The contract required Barnhill to remove two inches of existing pavement and replace the roadway with two inches of new asphalt. The resurfacing work was completed on 2 May 1987.

On 4 July 1991, plaintiffs Sirinuch Ruth Carruth Batista, Angela Knighten, Sirinuch T. Carruth and Steven Carruth were traveling

home from work together on Highway 87. Just south of the Highway 27 overpass, the vehicle hit a pool of water in the roadway and went out of control, causing a collision which injured these plaintiffs. Plaintiffs alleged that Barnhill negligently "milled" Highway 87 by failing "to maintain a sufficient cross-slope and/or panel to allow adequate drainage," that it negligently compacted the paving material on Highway 87, and that it negligently resurfaced Highway 87 "in such a manner as to have large amounts of water to collect on the highway's surface."

Barnhill made a motion for summary judgment. At the summary judgment hearing on 15 August 1994 Barnhill raised, for the first time, a claim that it was entitled to governmental immunity. The motion for summary judgment was taken under advisement. On 22 August 1994, plaintiffs signed a consent order to allow Barnhill to file an amended answer and a third-party complaint adding DOT as a third-party defendant. The proposed amended answer did not contain an immunity defense. On 25 August 1994, Barnhill filed an amended answer asserting the defense of government immunity. Plaintiffs responded by filing a motion to strike Barnhill's amended answer on the grounds that the defense was waived because it had not been properly raised, or added by leave of the court, or included in an amendment by consent of the parties. Barnhill filed a motion to amend its answer on 1 September 1994 to assert the defense of governmental immunity. On 15 September 1994 the court allowed plaintiff's motion to strike the governmental immunity defense, denied Barnhill's motion to amend its answer, and denied Barnhill's summary judgment motion.

[1] An order which does not completely dispose of the case is interlocutory and generally not appealable. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). The purpose of this rule is to "prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). The denial of a motion for summary judgment is not a final judgment and is generally not immediately appealable even if the trial court has attempted to certify it for appeal under Rule 54(b). *Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147, *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991).

However, when a defense based upon sovereign immunity is asserted, a denial of a motion for summary judgment based upon the

grounds of sovereign immunity is immediately appealable. *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); *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991); *Corum v. University of North Carolina*, 97 N.C. App. 527, 531, 389 S.E.2d 596, 598 (1990), *rev'd on other grounds*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L.Ed.2d 431 (1992). The Supreme Court in *Mitchell v. Forsyth*, explained that "denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L.Ed.2d 411, 424 (1985).

[2] Barnhill contends that it has a right to an immediate appeal because it is entitled to share in the state's immunity pursuant to the "government contractor defense" doctrine. Under this doctrine, a government contractor may share in the state's immunity when it complies with the plans and specifications prepared by the governmental agency.

Plaintiffs argue that Barnhill waived the defense of governmental immunity by failing to raise the defense prior to filing its amended answer. Barnhill, however, contends that it preserved the defense of governmental immunity by raising such defense at the summary judgment hearing. In support of this argument, Barnhill relies on *Walker Grading & Hauling v. S.R.F. Management Corp.*, 66 N.C. App. 170, 310 S.E.2d 615, *rev'd on other grounds*, 311 N.C. 170, 316 S.E.2d 298 (1984).

Assuming *arguendo* that Barnhill properly preserved the defense of governmental immunity, we find no support for defendant's argument that a contractor is entitled to share in the State's immunity from suit. As authority for its position, Barnhill cites cases from other jurisdictions and also argues that the doctrine of "government contractor immunity" was accepted by our Supreme Court in the case of *Gilliam v. Construction Co.*, 256 N.C. 197, 123 S.E.2d 504 (1962). *Gilliam*, quoting from an earlier case, provides that "[o]ne who contracts with a public body for the performance of public work is entitled to share the immunity of the public body from liability for incidental injuries necessarily involved in the performance of the contract, where he is not guilty of negligence." *Gilliam*, 256 N.C. at

201, 123 S.E.2d at 507 (*quoting Moore v. Clark*, 235 N.C. 364, 367-68, 70 S.E.2d 182, 185 (1952).

However, Barnhill's reliance on *Gilliam* is misplaced. The above language is merely dicta since the issue in *Gilliam* did not involve a contractor's right to assert immunity from suit but rather a defense to liability. Furthermore, we can find no authority in this State which recognizes a contractor's right to assert governmental immunity in a negligence claim which arises out of the performance of a contract with the State. Accordingly, the trial court's denial of Barnhill's motion for summary judgment did not deprive defendant of a substantial right absent an immediate appeal, and Barnhill's premature appeal must be dismissed.

Dismissed.

Judges JOHNSON and SMITH concur.

SOUTHERN FURNITURE COMPANY OF CONOVER, INC. v. DEPARTMENT OF TRANSPORTATION

No. COA95-563

(Filed 19 March 1996)

1. Appeal and Error § 111 (NCI4th)— denial of motion to dismiss—sovereign immunity—denial immediately appealable

The denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable

Am Jur 2d, Appellate Review § 164.

2. State § 27 (NCI4th)— contract with state—claim of breach—sovereign immunity no bar

Where the parties' predecessors in interest entered a right-of-way agreement which granted defendant DOT a right-of-way over plaintiff's property, compensated plaintiff for the right-of-way, required defendant to maintain a secondary road on which plaintiff's property had frontage, and required defendant to maintain a median crossover, plaintiff's suit for breach of contract was not barred by sovereign immunity since the DOT implicitly consented to be sued for breach of its contract, and the statute providing a

special proceeding for inverse condemnation, N.C.G.S. § 136-111, did not provide for plaintiff's breach of contract claim.

Am Jur 2d, States, Territories, and Dependencies § 119.

Appeal by defendant from order entered 2 March 1995 in Guilford County Superior Court by Judge William Z. Wood, Jr. Heard in the Court of Appeals 23 February 1996.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for plaintiff-appellee.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Eugene A. Smith and Assistant Attorney General David R. Minges, for defendant-appellant Department of Transportation.

GREENE, Judge.

The North Carolina Department of Transportation (defendant) appeals from the trial court's 2 March 1995 order denying defendant's motion to dismiss pursuant to Rule 12(b)(1),(2), (6).

The predecessor in interest of Southern Furniture Company of Conover, Inc. (plaintiff) and defendant's predecessor in interest, the State Highway and Public Works Commission, entered a right-of-way agreement in 1953, with respect to access to U.S. 29/70 (highway) from plaintiff's property. The agreement granted defendant a right-of-way over plaintiff's property, and it is not disputed that plaintiff was compensated for the right-of-way. Plaintiff contends that the 1953 agreement requires the defendant to maintain a secondary road, on which plaintiff's property has frontage, and a median crossover on the highway. On 25 July 1990, defendant closed the median crossover by which plaintiff gained access to the secondary road from the highway.

After the closing of the crossover, plaintiff sued defendant for breach of the 1953 contract, requesting a determination of the parties' rights under the contract, pursuant to N.C. Gen. Stat. § 1-253, and specific enforcement of the 1953 contract or damages in the alternative. As defenses, defendant asserted sovereign immunity and that plaintiff's action is barred by the statute of limitations provided in N.C. Gen. Stat. § 136-111. Defendant made a motion that the plaintiff's

complaint be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), (6), which the trial court denied on 2 March 1995.

The issues are whether (I) defendant's appeal is interlocutory; and if not, (II) the plaintiff's suit for breach of contract is barred by sovereign immunity.

I

[1] Although generally the denial of a motion to dismiss is interlocutory and not immediately appealable, where the denial affects a substantial right it may be appealed. *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423, *disc. rev. denied*, 334 N.C. 162, 432 S.E.2d 358 (1993). The denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable. *See id.*; *see also Middlesex Constr. Corp. v. State ex rel. Art Museum Bldg. Comm'n*, 307 N.C. 569, 299 S.E.2d 640 (1983) (appeal from denial of motion to dismiss based upon sovereign immunity addressed, although interlocutory nature of appeal not addressed), *reh'g denied*, 310 N.C. 150, 312 S.E.2d 648 (1984). Thus, defendant's appeal is properly before this Court.

II

[2] It is not disputed that defendant is an agency of the State and is generally protected from suit by sovereign immunity. This immunity is waived whenever the State enters into a valid contract because it "implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Where, however, "administrative or judicial relief in a contract action against the State" has "been afforded through statutory provisions" sovereign immunity bars a common law action for breach of that contract. *Middlesex Constr. Corp.*, 307 N.C. at 574, 299 S.E.2d at 643. Defendant argues that N.C. Gen. Stat. § 136-111, which provides a cause of action for inverse condemnation, and the rule in *Middlesex* bar plaintiff's contract action. We disagree.

Section 136-111 provides a special proceeding for inverse condemnation when the Department of Transportation has taken land without just compensation to the landowner. N.C.G.S. § 136-111 (1993). The section does not provide a procedure for plaintiff's breach of contract claim and defendant has cited no other statutory

procedure which would control plaintiff's breach of contract action. Thus, plaintiff is a "contractor[] who [is] completely foreclosed, under the doctrine of sovereign immunity, from obtaining administrative or judicial relief in a contract action against the State." *See Middlesex Constr. Corp.*, 307 N.C. at 574, 299 S.E.2d at 643. Accordingly, the rule set forth in *Smith* applies in this case to abolish the bar of sovereign immunity in plaintiff's contract action, and the trial court correctly denied defendant's motion to dismiss on that basis.

Affirmed.

Judges LEWIS and SMITH concur.

KATHLEEN CONRAN, PETITIONER v. NEW BERN POLICE DEPARTMENT; CITY OF NEW BERN; AND CITY OF POLICE CIVIL SERVICE BOARD, RESPONDENTS

No. COA95-527

(Filed 19 March 1996)

Public Officers and Employees § 42 (NCI4th)— city employee—dismissed—no right to OAH review

A former city police officer was not a state or local employee within the meaning of N.C.G.S. Chapter 126 and thus was not entitled to petition OAH in order to challenge her dismissal based on alleged sex and creed discrimination. N.C.G.S. §§ 126-5, 126-16, 126-37.

Am Jur 2d, Municipal, County, School and State Tort Liability § 662; Public Officers and Employees § 259.

Application of state law to sex discrimination in employment. 87 ALR3d 93.

Appeal by petitioner from judgment entered 9 January 1995 by Judge James D. Llewellyn in Craven County Superior Court. Heard in the Court of Appeals 21 February 1996.

Voerman & Carroll, P.A., by David P. Voerman, for petitioner-appellant.

Ward, Ward, Willey & Ward, L.L.P., by A.D. Ward, for respondent-appellees.

WYNN, Judge.

On 29 July 1993, Kathleen Conran petitioned the Office of Administrative Hearings ("OAH"), challenging her employment dismissal from the City of New Bern Police Department ("the city") in May of 1993. She alleged sex and creed discrimination.

In response, respondents moved to dismiss for lack of subject matter jurisdiction arguing that Ms. Conran, a former employee of the city, was not a state or local employee as defined by N.C. Gen. Stat. § 126-5 (1995), and thus was not entitled to petition OAH.

Senior Administrative Law Judge Fred G. Morrison, Jr., agreed that the OAH lacked subject matter jurisdiction and, in an order dated 21 September 1993, dismissed Ms. Conran's petition.

Ms. Conran's appeal to the Superior Court of Craven County resulted in a judgment, dated 9 January 1995, affirming Judge Morrison's decision. She now seeks relief in this Court.

The issue is whether the trial court erred in affirming the decision of Judge Morrison that the OAH lacks subject matter jurisdiction over Ms. Conran's claim. Ms. Conran contends that N.C. Gen. Stat. § 126-16 (1995) and N.C. Gen. Stat. § 126-37 (1995), read together, confer subject matter jurisdiction to the OAH to hear her claim. We disagree.

N.C.G.S. § 126-5, entitled "Employees subject to Chapter; exemptions" designates which employees are covered under Chapter 126:

> (a) The provisions of this Chapter shall apply to:
>
> (1) All State employees not herein exempt, and
>
> (2) To all employees of area mental health, mental retardation, substance abuse authorities, and to employees of local social services departments, public health departments, and local emergency management agencies that receive federal grant-in-aid funds; and the provision of this Chapter may apply to such other county employees as the several boards of county commissioners may from time to time determine.

The record concedes that Ms. Conran was not a state employee; therefore, Ms. Conran must rely upon N.C.G.S. § 126-5(a)(2) to establish that a police officer working for a city in North Carolina is an employee subject to Chapter 126. This she fails to do.

A police officer is not an employee of a mental health, mental retardation, or a substance abuse authority. Likewise, a police officer is not covered under the part of subsection (2) that provides for employees of "local social services departments, public health departments, and local emergency management agencies that receive federal grant-in-aid funds . . . ." In addition, there is no evidence in the record that New Bern police officers are county employees determined by county commissioners. Thus, Ms. Conran fails to demonstrate that her position is covered by N.C.G.S. § 126-5.

Nevertheless, Ms. Conran argues that by reading N.C.G.S. § 126-16 together with N.C.G.S. § 126-37, her claim should be placed among those covered by Chapter 126. N.C.G.S. § 126-16 states:

> All State departments and agencies and *all local political subdivisions of North Carolina* shall give equal opportunity for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition as defined in G.S. 168A-3 to all persons otherwise qualified, except where specific age, sex or physical requirements constitute bona fide occupational qualifications necessary to proper and efficient administration.

(emphasis supplied).

N.C.G.S. § 126-37, as it existed on the date of Ms. Conran's petition, stated, in pertinent part:

> (a) The decisions of the State Personnel Commission shall be binding *in appeals of local employees subject to this Chapter* if the Commission finds that the employee has been subjected to discrimination prohibited by Article 6 of this Chapter or in any case where a binding decision is required by applicable federal standards. However, in all other local employee appeals, the decisions of the State Personnel Commission shall be advisory to the local appointing authority.

(emphasis supplied).

Ms. Conran argues that the italicized portions of N.C.G.S. §§ 126-16 and 126-37 grant local employees such as herself the right to OAH review, at least when discrimination as forbidden in N.C.G.S. § 126-16 is alleged. We disagree.

Where one statute deals with certain subject matter in particular terms and another deals with the same subject matter in more general

terms, the particular statute will be viewed as controlling in the particular circumstances absent clear legislative intent to the contrary." *Bryant v. Adams*, 116 N.C. App. 448, 457, 448 S.E.2d 832, 836-37 (1994).

N.C.G.S. § 126-5 states in particular terms which employees are covered by Chapter 126. On the other hand, N.C.G.S. § 126-16 and N.C.G.S. § 126-37 address the same subject matter in general terms. Moreover, neither N.C.G.S. § 126-16 nor N.C.G.S. § 126-37 affirmatively grants a remedy to a local employee such as Ms. Conran, who is not otherwise covered by Chapter 126.

In short, N.C.G.S. § 126-5 controls which employees are subject to Chapter 126. The petitioner is not within that class of employees. "If the Legislature desired to establish a public policy entitling county [or city] employees to the protection of G.S., Chap. 126, it could have done so." *Walter v. Vance County*, 90 N.C. App. 636, 641, 369 S.E.2d 631, 634 (1988).

The decision of the trial court is affirmed.

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

LEASECOMM CORPORATION, PLAINTIFF-APPELLEE v. RENAISSANCE AUTO CARE, INC., AND DAVID LEE DAVIS, DEFENDANT-APPELLANT

No. COA95-115

(Failed 19 March 1996)

Corporations § 80 (NCI4th)— foreign corporation not authorized to do business in N.C.—no right to bring action in North Carolina

Since a foreign corporation or its successor or assignee may not maintain any action in North Carolina (including an action to enforce a foreign judgment) until the foreign corporation obtains a certificate of authority to do business here, and plaintiff's assignor was never authorized to do business in North Carolina, plaintiff assignee had no authority to maintain an action to enforce its foreign judgment in North Carolina even if it is authorized to do business in this state. N.C.G.S. § 55-15-02(a).

Am Jur 2d, Mortgages § 1311.

What constitutes taking instrument in good faith, and without notice of infirmities or defenses, to support holder-in-due-course status, under UCC § 3-302. 36 ALR4th 212.

Appeal by defendants from summary judgment order entered 25 October 1994 by Judge Donald W. Overby in Wake County District Court. Heard in the Court of Appeals 9 January 1996.

In October 1990, American Bankcard Center (hereinafter ABC) and defendants entered into an equipment lease agreement. In the fall of 1991, defendants became dissatisfied with the equipment and attempted to cancel the agreement. ABC informed defendants that their lease agreement was now actually with Leasecomm Corporation (hereinafter plaintiff). ABC sent defendants a copy of the lease agreement showing that ABC had assigned the lease to plaintiff in November 1990. When plaintiff and defendants could not settle their dispute, plaintiff sued defendants in Massachusetts for defendants' failure to continue to make payments called for by the equipment lease and defendants' failure "to honor [the] remaining lease obligations." Plaintiff obtained a default judgment against defendants from the Massachusetts court on 29 May 1992.

The Uniform Enforcement of Foreign Judgments Act (G.S. 1C-1701 *et seq.*) provides an avenue for a party to enforce a foreign judgment in North Carolina. Pursuant to the Act, plaintiff filed a copy of its foreign judgment with the Wake County Superior Court Clerk accompanied by an affidavit stating that the judgment was a final judgment and was unsatisfied. Defendants then filed a "Notice Of Defenses; Motion For Relief From Foreign Judgment Of Default" stating, *inter alia*, that plaintiff was not authorized to enforce its judgment in North Carolina. A district court hearing to rule on defendants' motion was calendared for 8 October 1993, but plaintiff voluntarily dismissed its proceeding to enforce the foreign judgment on 6 October 1993. On 11 October 1993, plaintiff filed a complaint in district court commencing a civil action to enforce its foreign judgment. Plaintiff and defendants each moved for summary judgment. The trial court granted plaintiff's motion for summary judgment on 25 October 1994.

Defendants appeal.

No brief for plaintiff-appellee.

Winborne Law Office, P.A., by Paul Faison S. Winborne and Hall, O'Donnell & Boyles, by Jean Winborne Boyles, for defendant-appellants.

EAGLES, Judge.

Defendants argue that the trial court erred in granting plaintiff's summary judgment motion because plaintiff lacked authority to maintain an action in North Carolina to enforce the foreign judgment. We agree.

G.S. 55-15-02(a) provides:

> No foreign corporation transacting business in [North Carolina] without permission obtained through a certificate of authority . . . shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to trial; nor shall any action or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any cause of action arising out of the transaction of business by such corporation in this State until:
>
> > (1) A certificate of authority shall have been obtained by such corporation or by a foreign corporation which has acquired substantially all of its assets, or
> >
> > (2) Substantially all of its assets have been acquired by a domestic corporation or one or more individuals.
>
> An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

According to the plain language of G.S. 55-15-02(a)(1), a foreign corporation or its successor or assignee may not maintain any action in North Carolina (including an action to enforce a foreign judgment) until the foreign corporation obtains a certificate of authority to do business here. The record shows that ABC has never been authorized to do business in North Carolina. Although plaintiff Leasecomm (ABC's assignee) became authorized to do business in North Carolina in August 1993, G.S. 55-15-02(a)(1) provides that plaintiff had no authority to maintain an action to enforce its foreign judgment in North Carolina because ABC has never been granted authority to do business here. We also note that plaintiff fails to meet the require-

ments of G.S. 55-15-02(a)(2). Accordingly, we hold that the trial court erred in granting summary judgment for plaintiff and denying defendant's summary judgment motion.

Defendants also argue that because plaintiff chose to proceed under the Uniform Enforcement of Foreign Judgments Act first, plaintiff could not then voluntarily dismiss that action and subsequently file a civil action to enforce the judgment. We need not reach this issue because we already have determined that, under G.S. 55-15-02(a), plaintiff lacked the authority to pursue either avenue.

Reversed.

Judges MARTIN, John C., and MARTIN, Mark D., concur.

NORTH CAROLINA CHIROPRACTIC ASSOCIATION, PETITIONER v. NORTH CAROLINA STATE BOARD OF EDUCATION, RESPONDENT

No. COA95-422

(Filed 19 March 1996)

Administrative Law and Procedure § 54 (NCI4th)— respondent's rulemaking decision—no judicial review

The State Board of Education's decision not to amend a rule to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes was a rulemaking decision not subject to judicial review under N.C.G.S. §§ 150B-20(d) or 150B-43. N.C.G.S. § 150B-2(2).

Am Jur 2d, Licenses and Permits § 83; Parties § 33; Prohibition § 19.

Appeal by petitioner from order and judgment entered 16 February 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 25 January 1996.

Allen & Pinnix, P.A., by M. Jackson Nichols and Vance C. Kinlaw, for petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko, for respondent-appellee.

MARTIN, John C., Judge.

The North Carolina Chiropractic Association ("NCCA") appeals from the dismissal of its petition seeking judicial review of a decision of the North Carolina State Board of Education. The matter comes before us upon the following factual and procedural history: On 28 October 1992, the NCCA petitioned the State Board of Education, pursuant to G.S. § 150B-20(a), to amend Rule 16 N.C.A.C. 6E .0202(a)(4) to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes. At its meeting on 7 January 1993, the Board granted the petition pursuant to G.S. § 150B-20(b) and initiated public rule-making procedures.

On 18 March 1993, the Board held a public hearing and received comments on the proposed amendment. At its regular monthly Issues Session on 6 May 1993, the Board accepted the recommendation of the Department and Program Committee not to adopt the amendment, but "to leave the subject policy as it currently exists." The Board subsequently sent the NCCA notice of its decision on 15 November 1993. In December 1993, the NCCA petitioned for judicial review of the Board's decision, excepting to the decision on the following grounds:

> a. The Board's denial was made upon unlawful procedure in that the Board failed to provide the NCCA with a written statement of the reasons for denying the NCCA's rule-making petition, as required by G.S. 150B-20(c);
>
> b. The Board's denial was unsupported by substantial evidence in view of the entire record; and
>
> c. The Board's denial was arbitrary and capricious.

The trial court denied and dismissed the petition, finding that the case was not subject to review under G.S. §§ 150B-20(d) or 150B-43, and that the court did not have subject matter jurisdiction over the petition.

The dispositive issue is whether the trial court erred in dismissing the petition for lack of jurisdiction. We conclude the trial court had no jurisdiction and affirm its order dismissing the petition.

G.S. § 150B-20(c) provides in relevant part:

> If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the rea-

> sons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings.

Thus, if a rule-making petition is denied, the agency must provide the petitioner with a written statement of the reasons for the denial. G.S. § 150B-20(d) then provides for judicial review of the denial.

If, however, as in this case, the agency grants a rule-making petition, subsequent procedures for considering and adopting the rule are governed by either G.S. § 150B-21.1 for temporary rules, or § 150B-21.2 for permanent rules. Notably, neither of these sections provides for judicial review if the agency does not adopt or amend the rule after following the required procedures. Nor is judicial review available in such a case under G.S. § 150B-43, which provides a right to judicial review for "[a]ny person who is aggrieved by the final decision in a contested case . . . ." However, G.S. § 150B-2(2) expressly excludes "rulemaking" from its definition of a "contested case." Thus, inasmuch as the Board of Education's decision not to amend the rule was a "rulemaking" decision, it is not subject to judicial review and the trial court properly dismissed the NCCA's petition for judicial review for lack of jurisdiction. Accordingly, the decision of the trial court is

Affirmed.

Judges JOHNSON and MARTIN, Mark D., concur.

WILLIAM PITTMAN, Plaintiff-Employee v. THOMAS & HOWARD, Defendant-Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Defendant-Carrier

No. 9410IC663

(Filed 2 April 1996)

1. Workers' Compensation § 452 (NCI4th)— judicial review of Commission's award—standard

In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law: whether there was any competent evidence

before the Commission to support its findings of fact, and whether the findings of fact supported its conclusions of law.

Am Jur 2d, Workers' Compensation §§ 708-712.

Matters concluded, in action at law to recover for the same injury, by decision or finding made in workmen's compensation proceeding. 84 ALR2d 1036.

2. Workers' Compensation § 162 (NCI4th)— current back condition unrelated to prior injury—finding supported by competent evidence

The Industrial Commission did not err by failing to find that plaintiff's current condition involving the lumbar spine was directly related to his original injury, since there was competent evidence in the record to support the Commission's findings that the treating physician "could not relate plaintiff's lumbar spinal stenosis to any specific hour or event in plaintiff's work life or daily life" and that "lumbar spinal stenosis can be a dormant condition that becomes symptomatic just by performing daily duties and other activities."

Am Jur 2d, Workers' Compensation §§ 263-271, 317-319.

Workers' compensation: coverage of employee's injury or death from exposure to the elements—modern cases. 20 ALR5th 346.

3. Workers' Compensation § 426 (NCI4th)— finding of fact as conclusion of law—conclusions of law supported by findings

The Commission's finding that "[p]laintiff's worsening condition is due to severe lumbar spinal stenosis, which was not caused by the incident of 25 August 1987" was both a finding of fact and conclusion of law which sustained its decision to reject plaintiff's claims for further compensation for change of condition and additional medical treatment, and because competent evidence supported the Commission's findings and those findings in turn supported its conclusions of law, the Commission did not err in denying plaintiff's claims; furthermore, the Commission's decision was unaffected by any prejudicial error in its use of different reasoning or in its denominating solely as a finding of fact

the conclusion that plaintiff's lumbar spinal stenosis was not caused by his original injury. N.C.G.S. §§ 97-25 and 97-47.

Am Jur 2d, Workers' Compensation § 652.

Appeal by plaintiff from Opinion and Award entered 22 March 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 February 1995.

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

Cranfill, Sumner & Hartzog, L.L.P., by P. Collins Barwick, III, for defendant-appellees.

JOHN, Judge.

Plaintiff William Pittman appeals an Opinion and Award of the North Carolina Industrial Commission (the Commission) denying his claims for additional compensation and further medical treatment. He contends the Commission erred by: (1) concluding that one deputy commissioner possesses no authority to modify the previous order of another commissioner; and (2) failing to find that his current condition was attributable to a previous compensable injury. For the reasons set forth herein, we affirm the decision of the Commission.

Pertinent facts and procedural information are as follows: Plaintiff was employed by defendant Thomas & Howard, now operating under the name Nash-Finch, as a truck driver. While so employed on 25 August 1987, plaintiff sustained an injury to his back. Dr. Nelson T. Macedo, a neurosurgeon, indicated plaintiff suffered from congenital cervical spinal stenosis, a condition related to development of the spine, and that his difficulties following the injury resulted from "a combination of the accident plus the fact that he had that condition before."

On 1 March 1990, the parties entered into an Agreement of Settlement (the Agreement), which provided for a lump sum payment of $5,500.00 to plaintiff. The Agreement stated it was subject to approval of the Commission "by its award" and that it became binding on the parties upon such approval. The Agreement also provided:

> [T]he parties herein agree that Employee shall retain his right to claim additional compensation benefits, subsequent to the date on which this agreement is approved by the North Carolina

> Industrial Commission, to the extent that he is allowed to do so pursuant to North Carolina [G]eneral Statute §97-47, and, additionally, the parties herein agree that Employee shall retain his right to claim additional medical expenses, subsequent to the date on which this agreement is approved by the North Carolina Industrial Commission, to the extent that he is allowed to do so pursuant to North Carolina General Statute §97-25.

On 26 March 1990, Commissioner J. Harold Davis (Davis) issued an order (the Davis order) approving the agreement. However, this order provided for payment of medical bills only through 1 March 1990 "and no further," and also stated:

> Compliance with the agreement and the foregoing award shall fully acquit and discharge defendants from further liability under the Compensation Act by reason of the injury giving rise to this case.

None of the parties appealed the Davis order nor requested a hearing for purposes of resolving seeming inconsistencies between that order and the Agreement.

Plaintiff subsequently filed a "Request that Claim be Assigned for Hearing," alleging nonpayment of medical bills "on or about 19 March 1990." Defendants contended in response that plaintiff had not properly submitted the bills and agreed to payment of the bills upon submission to and approval by the Commission. Plaintiff thereupon withdrew his request for hearing.

In an 11 February 1991 order reciting plaintiff's withdrawal of the hearing request, Deputy Commissioner Lawrence B. Shuping, Jr. (Shuping), apparently *sua sponte,* also stated that Davis had "mistakenly treated" the Agreement as one releasing all rights of plaintiff to claim further compensation and/or medical benefits. Shuping thereupon ordered (the Shuping order) the last paragraph (quoted above) of the Davis order stricken so as to correct Davis' "clerical error." No appeal was taken from the Shuping order.

As a result of deterioration in his condition and a medical recommendation for surgery, plaintiff subsequently filed both a "Request that Claim be Assigned for Hearing," seeking payment for the recommended surgery and other medical expenses *per* N.C.G.S. § 97-25 (1991), as well as an "Application for Review of Award" pursuant to N.C.G.S. § 97-47 (1991). Following hearing on 10 June 1992, Deputy Commissioner John Charles Rush ruled "plaintiff did not experience

a substantial change in condition in his back caused by the August 25, 1987 injury" and denied plaintiff's claims.

Plaintiff thereupon appealed to the Full Commission which on 22 March 1994 filed an Opinion and Award setting forth the following "Conclusions of Law":

> 1. A Deputy Commissioner is without authority to overrule or act in a contrary manner to any action taken by a Commissioner. *See generally, Ivey v. Fasco Industries*, 101 N.C. App. 371, 399 S.E.2d 153 (1991).
>
> 2. Deputy Commissioner Shuping's Order of 11 February 1991 was issued without the authority to amend the previous order of Commissioner Davis of 26 March 1990. Therefore, Commissioner Davis' Order of 26 March 1990 remains in full force and affect [sic]. *Id.*
>
> 3. As a result, plaintiff is not entitled to further compensation under the Act. *Id.*

The Commission also found as a fact that

> [p]laintiff's worsening condition is due to severe lumbar spinal stenosis, which was not caused by the incident of 25 August 1987.

Plaintiff gave notice of appeal to this Court 11 April 1994.

We first consider plaintiff's assertion that the Commission "erred in its finding that the plaintiff's condition was not attributable to his injury of 25 August 1987." This contention is unfounded.

[1] While *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"), may appear to state a new and different standard of review of Commission decisions at the appellate level, *see Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 116, 465 S.E.2d 2, 9 (1995) (Judge Martin, Mark D., concurring) (emphasizing "need for the appellate division to articulate a consistent standard of review when considering the Commission's factual findings"), we believe the standard continues to be that adopted by our Supreme Court and repeatedly followed in appellate decisions thereafter. Over forty-five years ago, Justice Ervin wrote:

> In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two

questions of law, namely: (1) Whether or not there was *any competent evidence* before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.

Henry v. Leather Co., 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950) (citation omitted) (emphasis added). *See also Carroll v. Daniels and Daniels Construction Co.*, 327 N.C. 616, 620, 398 S.E.2d 325, 328 (1990) (Appellate court review is limited to "two questions of law: (1) whether any competent evidence exists before the Industrial Commission to support its findings of fact, and (2) whether the Commission's findings of fact justify its legal conclusions and decision."); *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432-33, 342 S.E.2d 798, 803 (1986) (Commission's findings "will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding."); *Morrison v. Burlington Industries*, 301 N.C. 226, 232, 271 S.E.2d 364, 367 (1980) (Court declines to abandon rule that exclusive authority to find facts rests with Commission, and that "such findings are conclusive on appeal when supported by any competent evidence."); *Anderson v. Construction Co.*, 265 N.C. 431, 434; 144 S.E.2d 272, 274 (1965) (Appellate court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding."); *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987) (This Court's review "limited to determining whether any competent evidence supported the Commission's findings and whether such findings are legally sufficient to support the Commission's conclusions of law."); *Carrington v. Housing Authority*, 54 N.C. App. 158, 159; 282 S.E.2d 541, 541-42 (1981) (Commission's findings "may be set aside on appeal only when there is a complete lack of competent evidence to support them.").

Our task in reviewing the Opinion and Award at issue herein, therefore, is to determine if there is *any competent evidence* in the record to support the Commission's findings of fact; in turn, those findings must support its conclusions of law. Moreover, the Commission, and not this Court, is "the sole judge of the credibility of witnesses" and the weight given to their testimony. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

[2] Bearing these principles in mind, we examine plaintiff's second assignment of error, *i.e.*, that the Commission erred by failing to find

that his current condition was attributable to the earlier injury for which he received compensation. Plaintiff advanced claims before the Commission for additional compensation under G.S. § 97-47 and for further medical treatment under G.S. § 97-25.

The former statute provides that, "on the grounds of a change in condition," the Commission may review any previously entered award and terminate, decrease, or increase compensation. *Haponski*, 87 N.C. App. at 104, 360 S.E.2d at 114. We assume *arguendo* that the original Agreement approved by the Commission constituted an award for purposes of G.S. § 97-47. *See Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987) (statute "inapplicable unless there has been a previous final award"); *see also Wall v. N.C. Dept. of Human Resources*, 99 N.C. App. 330, 331, 393 S.E.2d 109, 110 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991) (parties' agreement approved by the Commission in settlement of claim "was a final award or judgment of the Commission").

G.S. § 97-25 provides as follows:

> Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical . . . or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

Logically implicit in the authority accorded the Commission to order *additional* compensation under G.S. § 97-47 and *further* medical treatment under G.S. § 97-25 is the requirement that the supplemental compensation and future treatment be directly related to the original compensable injury. *See Gaddy v. Kern*, 32 N.C. App. 671, 673, 233 S.E.2d 609, 611 (1977) (G.S. § 97-47 claimant failed to show that current "headaches were caused by the [original] injury to his left hand"); *Little v. Penn Ventilator Co.*, 317 N.C. 206, 213, 345 S.E.2d 204, 209 (1986) (medical treatment under G.S. § 97-25 includes mitigation of "decline in [an injured employee's] health *due to the compensable injury*" (emphasis added)). Unlike a claim for further compensation under G.S. § 97-47, however, G.S. § 97-25 imposes no "change in condition" requirement. *Hyler v. GTE Products Co.*, 333 N.C. 258, 267, 425 S.E.2d 698, 704 (1993).

In the case *sub judice*, the Commission found as a fact that:

8. Plaintiff returned to Dr. N.T. Macedo on 28 October 1991, reporting continuing numbness in his hands and the deteriorating ability to walk in a normal fashion. These were residual effects of the surgery for congenital cervical spinal stenosis. After conducting tests, Dr. Macedo concluded that plaintiff's worsening physical condition was due to tightness in the lumbar region of plaintiff's spine and recommended surgery. Dr. Macedo noted that if the lumbar decompression laminectomy procedure was not performed, plaintiff's condition would continue to worsen. In Dr. Macedo's opinion, at the time plaintiff suffered from cervical spinal stenosis he also had asymptomatic lumbar spinal stenosis which did not become symptomatic until 1991.

9. In a letter dated 27 January 1992, Dr. Macedo noted that plaintiff suffered an aggravation of his 25 August 1987 accident, and that his current problems are directly related to the events of that date. (Plaintiff's Deposition Exhibit 2) In his deposition, Dr. Macedo explained this statement by noting that the residual problems with plaintiff's walking and his hesitant gait and of spasticity from the cervical spinal stenosis surgery have not entirely gone away. Further, Dr. Macedo noted that he could not relate plaintiff's lumbar spinal stenosis to any specific hour or event in plaintiff's work life or daily life. According to Dr. Macedo, lumbar spinal stenosis can be a dormant condition that becomes symptomatic just by performing daily duties and other activities. Dr. Macedo opined that the recommended surgery for lumbar spinal stenosis would not remedy plaintiff's gait problems.

10. Plaintiff's worsening condition is due to severe lumbar spinal stenosis, which was not caused by the incident of 25 August 1987.

Our review of the evidence reveals that Dr. Macedo examined plaintiff following complaints of tightness in his legs and difficulty in walking. Dr. Macedo testified at deposition as follows:

Q: Okay. And what—what diagnosis have you made of Mr. Pittman's present condition?

A: . . . He has a congenital spinal stenosis, cervical and lumbar spine. The cervical has been corrected. He has residual problems from cord compression from the cervical spinal stenosis, and he has an unresolved problem in the lumbar spine.

Q: Okay. And is it your opinion that the lumbar stenosis has been aggravated by his work?

A: I think it has, although I don't—I do not have a specific event along in his work life or along his daily work that can pinpoint to that.

. . . .

Q: Now, you—let me just—you stated that he had residual problems—that presently, he has residual problems from that accident of August '87, and than he has lumbar spinal stenosis. Are you stating that he has residual problems as a result of the August 1987 accident today in addition to the problems that he has as a result of the lumbar spinal stenosis?

A: No. What I'm saying is this: He had—the residual problems that I'm talking about are the symptoms that he still has despite the fact that we did surgery. In other words, his difficulty walking, his hesitant gait, his spasticity, that has never gone away. It's there, and that's a residual problem from the cervical spinal stenosis. But he still has lumbar spinal stenosis on the top of this problem, you know. Now—

Q: Now, is the—

A: —is this lumbar spinal stenosis related to the accident that was—happened August 25th, 1987? I do not have—as I have stated before, I do not have, either in his work life or daily life, any specific event that I can say, "Well, his symptoms in his lumbar spine right now can be related to this thing that happened such a date, such an hour." But I think his symptoms now can be related to the fact that his work—he works on a heavy job that demands a lot from his back.

. . . .

Q: So, Doctor, would it be fair to say that lumbar spinal stenosis—that you can become symptomatic—it can be a dormant condition that can become symptomatic just by your daily work and other activities.

A: Yes, it can.

As competent evidence thus existed to support the Commission's findings that Dr. Macedo "could not relate plaintiff's lumbar spinal stenosis to any specific hour or event in plaintiff's work life or daily life" and that "lumbar spinal stenosis can be a dormant condition that becomes symptomatic just by performing daily duties and other activ-

ities," those findings are binding on appeal, even though record evidence might support a contrary finding. *Peoples*, 316 N.C. at 432, 342 S.E.2d at 803. The Commission therefore did not err by failing to find that plaintiff's current condition involving the lumbar spine was directly related to his original injury.

[3] Having determined the Commission's findings to be supported by competent evidence, we next consider whether the findings in turn support the Commission's conclusions of law. Indisputably, the Commission failed to present in its conclusions of law a statement specifically addressing plaintiff's claims under G.S. §§ 97-25 and 97-47. The Commission rather appears to have denied plaintiff's claims on the basis that the Davis order "remain[ed] in full force and [e]ffect," thereby limiting defendants' liability to that which plaintiff had previously received.

However, the Commission's finding that "[p]laintiff's worsening condition is due to severe lumbar spinal stenosis, which was not caused by the incident of 25 August 1987," is both a finding of fact and a conclusion of law. *See Haponski*, 87 N.C. App. at 98, 360 S.E.2d at 111 (1987) (determining cause of plaintiff's psychiatric problems is mixed question of law and fact). We therefore may consider the Commission's finding to be a conclusion of law, *see id.* (Commission's designations of "findings" and "conclusions" not binding on this Court), resolving the question of whether the additional compensation and medical treatment presently requested were related to the original compensable injury.

The Commission's findings heretofore examined uphold the legal conclusion that plaintiff's current condition was not related to the original compensable injury and sustain its decision to reject plaintiff's claims for further compensation under G.S. § 97-47 and for additional medical treatment pursuant to G.S. § 97-25. Accordingly, because competent evidence supports the Commission's findings and those findings in turn support its conclusions of law, the Commission did not err in denying plaintiff's claims.

We further determine the Commission's decision was unaffected by any prejudicial error in its use of different reasoning or in its denominating solely as a finding of fact the conclusion that plaintiff's lumbar spinal stenosis was not caused by his original injury. *See MAO/Pines Assoc. v. New Hanover County Bd. of Equalization*, 116 N.C. App. 551, 560-61, 449 S.E.2d 196, 202 (1994) (quoting *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990))

(Property Tax Commission decision proper, albeit reached upon different reasoning from this Court, and unaffected by any prejudicial error because "[w]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision.").

In view of our decision rejecting plaintiff's second assignment of error, it is unnecessary to address his first argument relating to the authority of one deputy commissioner to modify the order of another deputy commissioner.

The final decision of the Commission is therefore affirmed.

Affirmed.

Judges JOHNSON and MARTIN, Mark D. concur.

MARY LOIS TART RYALS, PLAINTIFF v. HALL-LANE MOVING AND STORAGE COMPANY, INC., RAYMOND JENSEN, HOLLY LEE WILLIAMS AND FRANK MAHONEY, DEFENDANTS

No. COA94-748

(Filed 2 April 1996)

1. Evidence and Witnesses § 160 (NCI4th)— secret settlement with two of four defendants—defendants not prejudiced by lack of knowledge of settlement—evidence of settlement properly excluded

Defendants Williams and Mahoney were not unduly prejudiced by the trial court's refusal to suspend the normal rule prohibiting evidence of settlements and to allow evidence of plaintiff's pretrial settlement with defendants Jensen and Hall-Lane to come before the jury, although Jensen and Hall-Lane remained in the case, where plaintiff's pretrial comments unequivocally put all who would hear on notice that she was proceeding against Williams and Mahoney and not Jensen and Hall-Lane. N.C.G.S. § 8C-1, Rule 408.

Am Jur 2d, Compromise and Settlement § 48.

2. Damages § 53 (NCI4th)— reduction in award by settlement amount—no error

Even if plaintiff correctly characterized her complaint as setting out mutually exclusive claims against the driver and owner of an automobile involved in a collision and the driver and owner of a truck which allegedly caused the accident, there was no merit to plaintiff's contention that her pretrial settlement with the truck driver and owner should have no effect on the amount recoverable from the automobile driver and owner, since plaintiff sued both sets of defendants to recover for but one indivisible injury. Therefore, the trial court did not err by reducing under N.C.G.S. § 1B-4 plaintiff's $25,000 recovery against the automobile driver and owner by the $10,000 settlement she had received from the truck driver and owner.

Am Jur 2d, Damages §§ 566-590.

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.

Receipt of public relief or gratuity as affecting recovery in personal injury action. 77 ALR3d 366.

Application of collateral source rule in actions under Federal Tort Claims Act (28 USCS sec. 2674). 104 ALR Fed. 492.

Appeal by plaintiff and defendants Holly Lee Williams and Frank Mahoney from judgment entered 28 January 1994 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 3 April 1995.

E. Gregory Stott for plaintiff-appellant.

Smith & Holmes, P.C., by Robert P. Holmes, for defendant-appellants Holly Lee Williams and Frank Mahoney.

JOHN, Judge.

Plaintiff filed suit against defendants Raymond Jensen (Jensen), Hall-Lane Moving and Storage Company, Inc. (Hall-Lane), Holly Lee Williams (Williams) and Frank Mahoney (Mahoney) for personal injuries sustained when an automobile owned by Mahoney and oper-

ated by Williams collided with a vehicle in which plaintiff was a passenger. Williams and Mahoney appeal the judgment entered upon a jury verdict finding them liable for plaintiff's injuries. Williams and Mahoney assign error to the trial court's refusal to admit evidence of a pre-trial settlement agreement between plaintiff and defendants Jensen and Hall-Lane. Plaintiff also appeals, citing as error the trial court's reduction of her damages award by the amount she received in settlement from Jensen and Hall-Lane. We find no error by the trial court.

Facts pertinent to this appeal are as follows: On 20 April 1991, plaintiff was injured in a collision on Interstate 40 while a passenger in her daughter's Dodge which was struck by a Toyota driven by Williams. Plaintiff filed suit in December 1991 against Jensen, a truck driver who was operating his vehicle on the highway near Williams' Toyota at the time of the accident, and Hall-Lane, which owned the truck being driven by Jensen. Plaintiff alleged in her complaint that Jensen struck Williams' automobile as he attempted to change lanes, thereby causing Williams to careen across the highway and collide with the oncoming Dodge. Jensen and Hall-Lane filed answer denying the essential allegations of plaintiff's complaint.

Plaintiff filed an amended complaint in June 1992, adding Williams and Mahoney as defendants. In addition to her original allegations against Jensen, plaintiff set forth as an alternative theory that Williams lost control of her automobile and collided with the Dodge due to Williams' own negligence as she attempted to overtake a vehicle ahead of her at too great a speed.

Hall-Lane and Jensen thereafter filed cross-claims against Williams and Mahoney for indemnity and contribution in the event the former were held liable. Williams and Mahoney followed with similar cross-claims against Jensen and Hall-Lane for contribution and indemnity as well as claims for personal and property damage incurred when Jensen's truck allegedly hit the vehicle occupied by Williams and Mahoney.

Trial began 18 January 1994. At the close of plaintiff's evidence, Jensen and Hall-Lane moved for directed verdict on grounds that plaintiff had presented no evidence that Jensen had caused the collision. After allowing plaintiff the chance to re-open her case, which opportunity plaintiff declined, the trial court granted the motion.

At that point, Williams and Mahoney became aware that plaintiff had settled with Jensen and Hall-Lane in the amount of $10,000 prior to trial based upon the contingency that Jensen and Hall-Lane continue as defendants at trial. Williams and Mahoney then dismissed without prejudice their claims against Jensen and Hall-Lane. The jury subsequently rendered a verdict finding Williams and Mahoney liable for plaintiff's injuries in the amount of $25,000. In a judgment filed 28 January 1994 and "pursuant to N.C.G.S. Chapter 1B," the trial court reduced the award to plaintiff by the $10,000 she had received in settlement with Jensen and Hall-Lane. The parties to this appeal filed timely notice thereof 21 February 1994.

[1] Williams and Mahoney argue that

> the trial court committed reversible error by refusing to allow evidence of the pretrial settlement between plaintiff and defendants Jensen and Hall-Lane where the pretrial settlement was kept secret from the trial court and from the other defendants until after the plaintiff rested her case-in-chief.

We disagree.

Williams and Mahoney contend the settlement between plaintiff and Jensen and Hall-Lane constituted a "Mary Carter" agreement. This is a type of settlement which derives its designation from a Florida case, *Booth v. Mary Carter Paint Company,* 202 So.2d 8 (Fla. Dist. Ct. App. 1967), *overruled by Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973), in which the plaintiff made a secret settlement arrangement with one defendant who then continued as a party at trial. This Court has defined a "Mary Carter" agreement as "one in which a co-defendant secretly settles a case and continues as an ostensible co-defendant." *Wright v. Commercial Union Ins. Co.*, 63 N.C. App. 465, 470, 305 S.E.2d 190, 193, *disc. review denied*, 309 N.C. 634, 308 S.E.2d 719 (1983).

The legality of "Mary Carter" agreements has not been addressed by North Carolina courts. Other states considering the propriety of such agreements have reached differing results, including banning the use of this type of agreement or requiring the existence and terms of such a settlement to be disclosed to the jury. *See* Christopher Vaeth, Annotation, *Validity and Effect of "Mary Carter" or Similar Agreement Setting Maximum Liability of One Cotortfeasor and Providing for Reduction or Extinguishment Thereof Relative to Recovery Against Nonagreeing Cotortfeasor*, 22 A.L.R.5th 483 (1994).

"Mary Carter" agreements characteristically set the amount of the settling defendant's financial responsibility as contingent upon the judgment ultimately obtained against the non-settling defendant, *i.e.*, as the judgment amount against the non-settling defendant increases, the settlement amount decreases, thereby giving the settling defendant an incentive to assist the plaintiff in obtaining as large an award as possible against the non-settling defendant. Vaeth, *supra*; *but see Dosdourian v. Carsten*, 624 So.2d 241, 247 (Fla. 1993) ("Mary Carter" agreement despite lack of evidence that settling defendant's liability could be reduced by participating in the trial).

By contrast, there is no contention in the case *sub judice* that the settlement between plaintiff and Jensen and Hall-Lane was not in the fixed, pre-determined amount of $10,000. The settling defendants, Jensen and Hall-Lane, thus had no *direct* incentive as a result of their settlement with plaintiff to assist her in obtaining any award against Williams and Mahoney, much less one as substantial as possible. However, Jensen and Hall-Lane *did* possess a motive to paint Williams and Mahoney as the sole tortfeasors due to the former's position as defendants in the cross-claim of Williams and Mahoney for personal and property damages. With or without a "secret" settlement with plaintiff, Jensen and Hall-Lane accordingly remained in an adversarial role against their co-defendants.

For the foregoing reasons, it is doubtful the settlement between plaintiff and Jensen and Hall-Lane may truly be characterized as a "Mary Carter" agreement. In any event, it is unnecessary to label the agreement definitively or reach the issue of the propriety of "Mary Carter" agreements in general in order to resolve the instant appeal against Williams and Mahoney. We conclude the latter were not prejudiced by ignorance until mid-trial of a settlement agreement between plaintiff and the co-defendants such that exclusion of evidence of that agreement constituted reversible error. *See Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986) ("[P]arty asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result."); *see also* N.C.R. Civ. P. 61 ("Harmless error").

Williams and Mahoney maintain they were victimized by an unfair trial, having based their trial strategy on the assumption plaintiff would attack all defendants with equal vehemence and that Jensen and Hall-Lane were equally likely to be found liable. For example, Williams and Mahoney claim to have selected a jury "sympathetic to

all of the injured parties," so as to enhance the opportunity to recover on their personal injury cross-claims against Jensen and Hall-Lane. They further assert concessions advanced during jury selection and in opening statement that plaintiff was entitled to recover from some party. Finally, Williams and Mahoney cite their election at trial not to dispute plaintiff's damages and their consequent failure to cross-examine plaintiff or her chiropractor in this regard.

Of the foregoing, only the lack of cross-examination—but not counsel's explanation—may be verified from the record. *See* N.C.R. App. P. 9(a) (appellate "review is solely upon the record on appeal"). In any event, we find unpersuasive the contention of Williams and Mahoney that they were surprised, and consequently prejudiced, when plaintiff failed to present evidence against Jensen and Hall-Lane. For example, plaintiff's attorney advised the court immediately preceding trial:

> [O]ur evidence will be—we don't have any evidence that Hall-Lane was actually at fault other than what we were told by Mrs. Williams and Mr. Mahoney through their agents early on. That's why the lawsuit was originally filed against the trucking company. Our evidence will be that we saw the Mahoney-Williams' vehicle going out of control so our evidence will only be that they were negligent. So, I think then that would be their responsibility, or then it would be their burden to show someone else may or may not have caused the accident.

Shortly thereafter, counsel for Jensen and Hall-Lane commented:

> This is sort of—this is not your typical case in terms of plaintiff versus defendants. This is sort of defendants scratching each others' [sic] eye's out. And I don't know whether—and so I say that because our interests are—and the stories, the testimony, is going to be so diametrically opposed to each other, I think, that there's no real alignment between defendants in this case.

Indeed, nothing in the record indicates any attempt by plaintiff to conceal her pursuit at trial of Williams and Mahoney as opposed to Jensen and Hall-Lane. To the contrary, as noted above, plaintiff's attorney insisted in open court before the trial began, "[O]ur evidence will *only* be that [Williams and Mahoney] were negligent." (emphasis added). Further, as also discussed above, Jensen and Hall-Lane had cause to present evidence that Williams and Mahoney were the sole tortfeasors in that the latter had filed indemnity and contribution

claims as well as cross-claims against Jensen and Hall-Lane for personal and property damage.

Williams and Mahoney also assert that

> [t]he mere fact that Jensen and Hall-Lane were suddenly absent from the courtroom probably caused the jury to believe that the Court had made some determination that Jensen and Hall-Lane were free of negligence . . . .

This argument is rank speculation and absent foundation in the record. We observe that, after giving counsel an opportunity to comment on "what, if anything, [counsel wished the court] to tell the jury about" the absence of Jensen and Hall-Lane following the close of plaintiff's evidence, the trial court properly instructed the jury to refrain from attaching significance to the defendants' absence. Counsel for Williams and Mahoney made no further objection nor requested special instructions. *See* N.C.R. App. P. 10(b)(1) (party must object at trial to preserve question for appellate review). The jury, moreover, is presumed to understand and comply with the instructions of the court. *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972). Lastly, it was *Williams and Mahoney* who made the tactical choice at trial to dismiss their cross-claims and claims for contribution and indemnity *after* learning of plaintiff's settlement agreement with Jensen and Hall-Lane. Williams and Mahoney thus were ultimately responsible for their co-defendants' absence from the courtroom.

In sum, the contention of Williams and Mahoney that the trial below was unfair because they had no advance warning it was going to be "two against one" rings false. We reiterate that plaintiff's pretrial comments unequivocally put all who would hear on notice that she was proceeding against Williams and Mahoney and not Jensen and Hall-Lane.

Accordingly, we find unavailing the argument of Williams and Mahoney that they were unduly prejudiced by the trial court's refusal to suspend the normal rule prohibiting evidence of settlements, N.C.G.S. § 8C-1, Rule 408 (1992), and to allow evidence of plaintiff's settlement with Jensen and Hall-Lane to come before the jury.

We similarly reject the contention of Williams and Mahoney that the trial court erred by denying their motion for mistrial "made after the court's refusal to allow evidence of the secret pretrial settlement between the plaintiff and the other defendants." It is well established

that the decision whether to declare a mistrial is one "resting in the sound discretion of the [trial court]." *Keener v. Beal*, 246 N.C. 247, 256, 98 S.E.2d 19, 25 (1957). In that we have determined Williams and Mahoney suffered no prejudice as the result of the trial court's exclusion of evidence of settlement, we find no abuse of discretion in the court's failure to grant the motion for mistrial based upon exclusion of that evidence.

[2] Plaintiff also appeals to this Court, challenging the trial court's reduction of her damages award from $25,000 to $15,000. The court acted pursuant to the "Uniform Contribution among Tort-Feasors Act," N.C.G.S. § 1B-4 (1983), which provides, *inter alia*, as follows:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater[.]

Plaintiff contends she did not allege the two sets of defendants were jointly liable for her injuries, but rather that each was liable in the alternative. She claims N.C.G.S. § 1B-4 is not operative unless the co-defendants involved are alleged to have acted jointly to cause the plaintiff's injury. We do not agree.

The Restatement (Second) of Torts § 885(3), at 333 (1979) provides:

> A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment.

The comments to this subsection state in part:

> Payments made by one who is not himself liable as a joint tortfeasor will go to diminish the claim of the injured person against others responsible for the same harm if they are made in compensation of that claim, as distinguished from payments from collateral sources such as insurance, sick benefits, donated medical

> or nursing services, voluntary continuance of wages by an employer, and the like. These payments are commonly made by one who fears that he may be held liable as a tortfeasor and who turns out not to be.

Id. at 335-36.

Our North Carolina Supreme Court anticipated the foregoing in a nearly identical statement:

> [T]he weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage.

Holland v. Utilities Co., 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935).

While the Supreme Court's statement in *Holland* seems dispositive of the issue herein, plaintiff directs our attention to *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990). Plaintiff focuses upon this Court's statement in *Cox* that the non-settling defendant would be entitled to a credit "only [when it] appear[s] that [all] defendants are tort-feasors [and] that the negligence of all . . . defendants caused an indivisible injury." *Id.* at 587, 397 S.E.2d at 360. However, a close reading of *Cox* reveals the Court's holding turned upon suit having been initiated against the defendants on the basis of an identical injury, rather than on the basis that the defendants' actions may have jointly, as opposed to alternatively, caused plaintiff's injury.

Similarly, in the case *sub judice*, both Jensen and Hall-Lane as well as Williams and Mahoney were alleged to have been liable for the entire harm done to plaintiff. Even assuming *arguendo* plaintiff correctly characterizes her complaint as setting out mutually exclusive claims against Williams and Mahoney on the one hand and the settling defendants on the other, we find unavailing plaintiff's contention that her settlement with one set of defendants should have no effect on the amount recoverable from the other. Plaintiff indisputably sued both sets of defendants to recover for but one indivisible injury. Her damages are limited to the "total recovery," *Holland*, 208 N.C. at 292, 160 S.E.2d at 594, for that single injury.

In conclusion, we hold the trial court did not err in declining to allow into evidence plaintiff's pre-trial settlement with Jensen and

Hall-Lane or in reducing the judgment against Williams and Mahoney by the amount plaintiff received in that settlement.

No error.

Chief Judge ARNOLD and Judge WYNN concur.

LIONEL L. LEWIS, EMPLOYEE, PLAINTIFF-APPELLANT v. CRAVEN REGIONAL MEDICAL CENTER, EMPLOYER; VIRGINIA INSURANCE RECIPROCAL, DEFENDANT-APPELLEES

No. COA95-522

(Filed 2 April 1996)

1. Appeal and Error § 426 (NCI4th)— printed matter submitted to Court—compliance with Rule 26 required

N.C. R. App. P. 26 requiring all printed matter submitted to the Court to be in 11 point type and permitting no more than 27 lines of double spaced text and no more than 65 characters (including spaces, punctuation, and letters) per line on a properly formatted 8.5 by 11 inch page will be applied by the Court of Appeals to all briefs, petitions, notices of appeal, responses and motions filed after 2 April 1996.

Am Jur 2d, Appellate Review §§ 566-568.

Effectiveness of stipulation of parties or attorneys, nothwithstanding its violating form requirements. 7 ALR3d 1394.

2. Workers' Compensation § 414 (NCI4th)— deputy commissioner's determination—adequate review by Commission

There was no merit to plaintiff's contention that the Industrial Commission did not fulfill its statutory duty pursuant to N.C.G.S. § 97-85 to review the determination of the deputy commissioner because the opinion and award of the Commission was a verbatim recital of the deputy commissioner's decision, since the Commission fulfilled its duty by stating that plaintiff had not shown good ground to reconsider the evidence, receive further evidence, rehear the parties or their representatives or amend the opinion and award.

Am Jur 2d, Workers' Compensation § 687.

3. Workers' Compensation § 426 (NCI4th)— back condition—no change of condition

The evidence was sufficient to support the conclusion of the Industrial Commission that plaintiff had not sustained a material change for the worse in his back condition where the evidence tended to show that plaintiff developed scar tissue as a result of surgery and had a continuing, preexisting stenosis; this development and continuing incapacity was of the same kind and character and for the same injury which gave rise to plaintiff's compensation pursuant to I.C. Form 26; the scar tissue was not a change of condition within the meaning of N.C.G.S. § 97-47; and plaintiff's exaggerated complaints of pain could not support a change of condition based upon increased pain.

Am Jur 2d, Workers' Compensation § 652.

4. Workers' Compensation § 221 (NCI4th)— finding of exaggerated pain—denial of treatment by Commission—no error

The Industrial Commission did not err in denying payment for medical treatment offered by one of plaintiff's doctors, since the Commission found that plaintiff's complaints of pain were exaggerated, and this finding supported a conclusion that the treatment recommended by the doctor would not give relief of the exaggerated pain.

Am Jur 2d, Workers' Compensation § 435.

Appeal by plaintiff from Opinion and Award for the Full Commission filed 23 February 1995. Heard in the Court of Appeals 28 February 1996.

Monroe, Wyne & Lennon, P.A., by George W. Lennon, and Hugh D. Cox, for plaintiff-appellant.

Sumrell, Sugg, Carmichael & Ashton, P.A., by James R. Sugg and Elliot Zemek, for defendant-appellees.

GREENE, Judge.

Lionel L. Lewis (plaintiff) appeals from the 23 February 1995 Opinion and Award for the Industrial Commission (Commission) in which the Commission determined that plaintiff had not suffered a material change in condition and was not entitled to certain medical treatment.

It is undisputed that while working for Craven Regional Medical Center (Medical Center) as a general maintenance worker, plaintiff suffered a compensable injury by accident on 23 February 1990, which required surgery. Following his surgery, plaintiff's condition improved and plaintiff was released for work on 1 November 1990, with the restriction that he not lift over forty pounds. Plaintiff did not return to work at that time, because the Medical Center would not allow plaintiff to return to work with restrictions. On 21 January 1991, Dr. Gerald Pelletier, Jr., who performed plaintiff's surgery, determined that plaintiff had reached maximum medical improvement. In agreements, which were approved by the Commission pursuant to N.C. Gen. Stat. § 97-82, Medical Center and The Virginia Insurance Reciprocal (defendants) admitted liability and paid plaintiff worker's compensation. The Form 21 Agreement, which was approved on 31 October 1991, provided temporary total disability from 30 March 1990 through 28 January 1991. The Form 26 Agreement, approved on 10 October 1991, provided worker's compensation for a fifteen percent permanent partial disability to plaintiff's back, beginning 28 January 1991 for forty-five weeks, pursuant to N.C. Gen. Stat. § 97-31. Both agreements state that plaintiff is entitled to future medical benefits.

Subsequently, plaintiff asserted that his level of pain had increased and on 14 May 1992 plaintiff sought additional compensation from defendants pursuant to N.C. Gen. Stat. § 97-47, because of his alleged changed condition. Because defendants believed their obligation to plaintiff had ended, they denied compensation and plaintiff requested a hearing pursuant to N.C. Gen. Stat. § 97-83, seeking additional medical care, as recommended by Dr. David E. Tomaszek, and the resumption of worker's compensation for temporary total disability.

After the execution of the Form 26, plaintiff continued to see Pelletier and reported increased pain, for which Pelletier could find no cause. A second opinion, rendered by Dr. James C. Harvell, Jr., who did not testify at the hearing, agreed with Pelletier's findings that plaintiff had a degenerative disk condition as a result of his prior surgery and "further surgery was [not] warranted."

Plaintiff saw Tomaszek on 23 December 1992, who stated that plaintiff did not "need or require" any further medical treatment, but suggested treatment of plaintiff's pain with a nerve block and discussed the possibility of fusion surgery. According to plaintiff's report to Tomaszek, plaintiff's back pain, while more than immediately after

the surgery, is the same as before his surgery and his leg pain is better. Although Tomaszek stated that plaintiff's "permanent partial disability has not changed," he also stated that "the issue . . . is whether . . . [plaintiff] has a legitimate pain problem" and if so, there are options which will decrease the pain.

Dr. Murray K. Seidel, whom plaintiff saw on 19 August 1993, stated that plaintiff's responses to certain tests were inconsistent with each other. Based on his examination of plaintiff, Seidel opined that plaintiff's fifteen percent disability rating, given postop, had not changed three years later. Seidel disputed Tomaszek's recommended treatment, because plaintiff does not "have nerve root type pain" and the injection may have a difficult time reaching the area of pain through scar tissue that exists after surgery.

The deputy commissioner made findings and conclusions, which the Commission adopted in its own opinion and award. Specifically the Commission found that plaintiff "did not return to work" after signing the Form 26 agreement, but "continued to complain of back pain." It is not disputed that in "June 1992 plaintiff underwent an MRI which revealed some scar formation and some mild [preexisting] stenosis, but there were no findings indicative of nerve root compression." The Commission further found that in Seidel's examination of plaintiff, ordered by defendants, "[t]here were inconsistencies in the examination which indicated that [plaintiff] was exaggerating his symptoms." Seidel "recommended against the nerve block and was of the opinion that fusion surgery was contraindicated in plaintiff's case." Finally, the Commission made the following findings:

> 8. Although plaintiff has complained of worse pain since early 1993, he has not sustained a material change for the worse in his back condition. In fact, he has exaggerated his symptoms and limitations and has understated his abilities. His condition has remained essentially the same since he reached maximum medical improvement. Although he has continued to experience pain of some degree, his symptoms have not been as disabling as he has represented. Despite his very limited education and his work history of manual labor, he has had wage earning capacity. His only restrictions were to not lift over forty pounds and to not crawl in tight places. He had not returned to work because he has not been motivated to return to work. His allegation that he has been totally disabled is not accepted as credible.

9. Considering the nature of plaintiff's symptoms and the fact that they are not as severe as he has indicated, the medical treatment recommended by Dr. Tomaszek should not be approved.

The Commission finally concluded that "[p]laintiff has not sustained a material change for the worse" in his back condition, denied plaintiff's request for additional compensation and for treatment recommended by Tomaszek.

[1] Before considering the issues presented, we note that defendants have failed to comply with Rule 26(g) of the Rules of Appellate Procedure, which requires that "[a]ll printed matter must appear in at least 11 point type." Defendants' brief to this Court appears in eight point type and contains twelve characters per horizontal inch. Rule 26 requires all type to be "at least 11 point," while Appendix B specifies "10-12 point type." To the extent that Appendix B conflicts with Rule 26, Rule 26 governs and no brief shall be submitted in less than eleven point type. The term "point" refers to the height of a letter, extending from the highest part of any letter, such as "b" to the lowest part, such as "y." *The American Heritage College Dictionary* 1461 (3d ed. 1993) (hereinafter *American Heritage*). There are seventy-two points per vertical inch. *Id.* at 1055. A brief presented in eleven point type will contain no more than three lines of double spaced text in a single, vertical inch, or twenty-seven (27) lines of double-spaced text on a properly formatted 8.5 by 11 inch page. N.C. R. App. P. 26(g). The numbering of the pages, as provided in Appendix B of the Rules of Appellate Procedure, is not included in the text of the page and shall be centered in the one-inch margin at the top of the page. Characters per inch, referred to in some modern word processing systems as "cpi," is not equivalent to point size and defines only the width or "set" size of a character, which includes spaces, punctuation, and letters. *See American Heritage* at 1461. Rule 26 does not speak in terms of characters per inch, however, in order to provide a uniform construction of this Rule and prevent unfair advantage to any litigant, it is necessary to provide for a limit on the characters per inch. Ten characters per inch is the standard used in the slip opinions of this Court and the Supreme Court and the standard we will apply to the briefs filed with this Court. Using this standard, a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line. Because defendants have not complied with Rule 26, we could elect not to consider their brief, N.C. R. App. P. 25(b) & 34(b), however, because neither the Rule nor this Court has previously construed Rule 26, we consider the arguments presented in defendants' brief.

Rule 26, as herein construed will be applied by this Court to briefs, petitions, notices of appeal, responses and motions filed after the date of this opinion.

The issues on appeal are whether (I) the Commission's verbatim recital of the deputy commissioner's decision was sufficient to fulfill the Commission's duty, pursuant to N.C. Gen. Stat. § 97-85; (II) the fairness of the Form 26 agreement was properly raised before the Commission; (III) the Commission's findings of fact are supported by competent evidence; (IV) the findings support the conclusion of law that no change of condition occurred which would support an increase in plaintiff's worker's compensation; and (V) the findings support the Commission's denial of plaintiff's choice of medical care.

I

[2] Plaintiff argues that the Commission did not fulfill its statutory duty, pursuant to N.C. Gen. Stat. § 97-85, to review the determination of the deputy commissioner, because the opinion and award of the Commission was a "verbatim recital of the deputy commissioner's decision." The Commission, however, utilized the very form suggested by this Court in *Crump v. Independence Nissan*, 112 N.C. App. 587, 590-91, 436 S.E.2d 589, 593 (1993), and stated that "[t]he appealing party has not shown good ground to reconsider the evidence, receive further evidence, rehear the parties or their representatives or amend the Opinion and Award." Thus, the Commission fulfilled its minimum statutory duty pursuant to N.C. Gen. Stat. § 97-85.

II

The plaintiff argues that the Form 26 Agreement was improvidently approved by the Commission and must therefore be set aside as not being "fair and just" as required by *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 432, 444 S.E.2d 191, 195 (1994). We do not, however, address this argument, because there has been no motion to set aside the Form 26 agreement before the Commission. *See Vernon*, 336 N.C. at 428, 444 S.E.2d at 192 (argument regarding impropriety of From 26 raised by motion before Commission); *see also Brookover v. Borden, Inc.*, 100 N.C. App. 754, 754-55, 398 S.E.2d 604, 605 (1990), *disc. rev. denied*, 328 N.C. 270, 400 S.E.2d 450 (1991). A close examination of the record reveals that plaintiff raised the issue of the validity of the Form 26 agreement only as an assignment of error in its Form 44, which gave notice of appeal from the deputy commissioner to the Commission. Whether the Form 26 Agreement is "fair and just"

remains an issue, however, that can be addressed by the Commission upon the filing of a proper and timely motion.

III

The plaintiff argues that many of the findings of the Commission are not supported by the evidence. We disagree. We have reviewed the evidence and the findings and determine that there is competent evidence "that a reasonable mind might accept as adequate" to support each of the contested findings. *Andrews v. Fulcher Tire Sales and Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995). We are thus bound by the findings of the Commission. *Id.*

IV

[3] Plaintiff argues that the findings do not support the conclusion of the Commission that the plaintiff "has not sustained a material change for the worse in [his] back condition." Whether the facts amount to a change of condition pursuant to N.C. Gen. Stat. § 97-47 is a "question of law," and reviewable *de novo* by this Court. *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987).

A change of condition " 'refers to conditions different from those' " in existence when an award was originally made and " 'a continued incapacity of the same kind and character and for the same injury is not a change in condition.' " *Sawyer v. Ferebee & Son, Inc.*, 78 N.C. App. 212, 213, 336 S.E.2d 643, 644 (1985) (quoting *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33-34 (1960)), *disc. rev. denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). To merit an increase or decrease in disability compensation, the change must be " 'a substantial change . . . of physical capacity to earn.' " *Id.*

The Commission found, and plaintiff does not dispute, that tests on plaintiff's back revealed scar tissue and "mild stenosis." All the evidence before the Commission regarding plaintiff's stenosis is that it was a condition which existed prior to the surgery. There was no evidence or findings that plaintiff's complaints of pain resulted from anything other than the development of scar tissue. The findings and evidence reveal that plaintiff developed scar tissue as a result of his surgery and had a continuing, preexisting stenosis. Thus, this development and continuing incapacity is "of the same kind and character and for the same injury" that gave rise to plaintiff's compensation pursuant to Form 26. *See Sawyer*, 78 N.C. App. 213-14, 336 S.E.2d 644. Accordingly, the scar tissue is not a "change of condition within the

meaning of section 47." *See id.* While we recognize that plaintiff's increased pain could result in a change of condition warranting additional compensation pursuant to section 47, *see Dinkins v. Federal Paper Bd. Co.*, 120 N.C. App. 192, 195, 461 S.E.2d 909, 911 (1995), the Commission found that plaintiff's complaints of pain were exaggerated and this finding could not support a change of condition based upon increased pain. Accordingly, the Commission correctly concluded that there has been no change in plaintiff's condition.

V

[4] Plaintiff finally argues that the Commission incorrectly denied payment for the medical treatment offered by Tomaszek.

Defendant does not dispute that it must pay plaintiff's future medical benefits as was stated in the parties' Form 26 agreement, but argues instead that the treatment sought by Tomaszek is not reasonably required to effect a cure or give relief, as required by N.C. Gen. Stat. § 97-25. N.C.G.S. § 97-25 (before 1991 amendment). Although " 'relief from pain constitutes "relief" ' " pursuant to section 25, *see Radica v. Carolina Mills*, 113 N.C. App. 440, 450-51, 439 S.E.2d 185, 192 (1994), (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 43, 415 S.E.2d 105, 107 (1992)), the Commission found that plaintiff's complaints of pain were exaggerated and this finding supports a conclusion that the treatment recommended by Tomaszek would not give relief of the exaggerated pain.

Affirmed.

Judges LEWIS and SMITH concur.

JIMMY MAHONEY AND JUDY MAHONEY, PLAINTIFFS v. RONNIE'S ROAD SERVICE, INDIAN HEAD INDUSTRIES, INC., AND MGM BRAKES, DEFENDANTS

No. COA94-706

(Filed 2 April 1996)

1. Constitutional Law §§ 92, 128 (NCI4th); Limitations, Repose, and Laches § 27 (NCI4th)— personal injury from allegedly defective product—six-year statute of repose—constitutionality

The statute providing that no action for personal injuries or property damage arising out of any alleged defect or failure in

relation to a product can be brought more than six years after the initial date of purchase for use, N.C.G.S. § 1-50(6), violates neither the equal protection clauses of the state or federal constitutions nor the open courts clause of Article I, § 18 of the North Carolina Constitution.

Am Jur 2d, Constitutional Law §§ 613-617, 786; Limitation of Actions §§ 27-30.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period. 79 ALR2d 1080.

Medical malpractice statutes of limitation minority provisions. 62 ALR4th 758.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery of product. 30 ALR5th 1.

2. **Courts § 149 (NCI4th)— breach of warranty claim—applicability of Arizona or North Carolina statute of repose—most significant relationship between North Carolina and parties or transaction**

North Carolina's six-year statute of repose, rather than Arizona's twelve-year statute, applied to plaintiffs' breach of warranty claims against the manufacturer of a brake assembly, since the brake assembly was manufactured in North Carolina and then distributed to Kentucky where it was incorporated into a vehicle which was eventually purchased by a business in Arizona; the injury in question took place in North Carolina; and North Carolina thus had the most significant relationship to the transaction and the parties. N.C.G.S. § 25-1-105.

Am Jur 2d, Conflict of Laws §§ 98-106.

What is place of tort causing personal injury or resultant damage or death, for purpose of principle of conflict of laws that law of place of tort governs. 77 ALR2d 1266.

Modern status of rule that substantive rights of parties to a tort action are governed by the law of the place of the wrong. 29 ALR3d 603.

Modern status of choice of law in application of automobile guest statutes. 63 ALR4th 167.

Judge WYNN dissenting.

Appeal by plaintiff from order entered 19 May 1994 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 22 March 1995.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams, and Gate & Mathers, Ltd., by Martin H. Mathers, for plaintiff-appellants.

Yates, McLamb & Weyher, L.L.P., by Kirk G. Warner and Suzanne S. Lever, for defendant-appellees.

JOHN, Judge.

Plaintiffs appeal the trial court's grant of summary judgment in favor of defendants. Plaintiffs contend the statute of repose under N.C. Gen. Stat. § 1-50(6) (1983 & 1995 Cum. Supp.) is unconstitutional, and further argue that the provision in any event has no application to the breach of warranty claims in the case *sub judice*. We disagree.

Relevant background information is as follows: On 14 August 1991, plaintiff Jimmy Mahoney, an Arizona resident, was travelling through North Carolina in the course of his employment as a long distance moving van driver. Plaintiff discovered that an air brake on his trailer had malfunctioned and telephoned defendant Ronnie's Road Service (Ronnie's) of Jacksonville, North Carolina, for assistance. Plaintiff was instructed by Ronnie's to remove the covering of the air brake in order to facilitate replacement. As plaintiff attempted to remove the covering, it suddenly discharged and struck him in the face. He was knocked unconscious and suffered serious injuries as a result of the blow.

The air brake assembly in the trailer driven by plaintiff was manufactured on 5 December 1983 by defendant MGM Brakes (MGM), a division of defendant Indian Head Industries, Inc. (Indian Head), at a plant located in Murphy, North Carolina. The product subsequently was shipped to a company in Kentucky for incorporation into a particular vehicle. That vehicle was invoiced to a distributor in Missouri and subsequently to a business in Arizona in late December 1983.

Plaintiff and his wife, Judy, filed suit 12 August 1993 alleging negligence against all defendants, and further alleging claims of breach of warranties, strict liability, and absolute liability against MGM and

Indian Head. The complaint also sought punitive damages from MGM and Indian Head and included a claim for loss of consortium by Judy Mahoney. MGM and Indian Head answered and asserted several affirmative defenses, including North Carolina's six year statute of repose.

On 19 January 1994, MGM and Indian Head moved for summary judgment. Based on affidavits and other materials submitted, the trial court granted defendants' motion by order filed 19 May 1994. Pursuant to N.C.R. Civ. P. 54(b), the court certified there was no just cause for delay of appeal, and plaintiffs entered notice of appeal 25 May 1994.

Plaintiffs advance two primary arguments in support of their contention that the trial court erred by granting the motion for summary judgment of MGM and Indian Head. After carefully considering plaintiff's arguments, we conclude the court did not err.

[1] Plaintiffs first maintain North Carolina's statute of repose under N.C.G.S. § 1-50(6) is unconstitutional. The statute provides as follows:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

Plaintiffs argue the section violates the open courts clause contained in Article I, § 18 of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution. However, the constitutionality of N.C.G.S. § 1-50(6) was upheld years ago in *Tetterton v. Long Manufacturing*, 314 N.C. 44, 49-59, 332 S.E.2d 67, 70-75 (1985). *Tetterton* held N.C.G.S. § 1-50(6) violates neither the equal protection clauses of the state or federal constitutions nor Article I, § 18 of the North Carolina Constitution. 314 N.C. at 49-54, 332 S.E.2d at 70-73. While plaintiffs strenuously assert that "[t]he time has come for the North Carolina Courts . . . to rule [the statute] is unconstitutional," it is elementary that we are bound by the rulings of our 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). Plaintiff's first argument is thus resolved in favor of MGM and Indian Head.

[2] In the alternative, plaintiffs maintain that Arizona law governs their breach of warranty claims and that Arizona's twelve year statute

of repose, Ariz. Rev. Stat. Ann. § 12-551 (1956), applies rather than the six year limit imposed by N.C.G.S. § 1-50(6). We conclude to the contrary.

N.C. Gen. Stat. § 25-1-105 (1995) controls choice of law questions with regards to actions under the Uniform Commercial Code, including breach of warranty claims. *Bernick v. Jurden*, 306 N.C. 435, 442, 293 S.E.2d 405, 410 (1982). The statute provides that, in the absence of an agreement between the parties, North Carolina law will apply to "transactions bearing an appropriate relation to this State." N.C.G.S. § 25-1-105. Operation of the "appropriate relation" standard involves application by North Carolina courts of the law of the state with the "most significant relationship" to the transaction in question. *Boudreau v. Baughman*, 322 N.C. 331, 338, 368 S.E.2d 849, 855 (1988); *see also Terry v. Pullman Trailmobile*, 92 N.C. App. 687, 691, 376 S.E.2d 47, 49 (1989) (substantive law of state with the "most significant relationship to the transaction and the parties" applies (citing Restatement (Second) of Conflict of Laws § 188(1) (1971)).

In *Boudreau*, the Supreme Court determined that Florida law should apply to the plaintiff's warranty claims under circumstances in which a chair was manufactured in North Carolina, sold to a furniture store in Florida, and purchased by Florida residents whose guest in Florida injured his foot on the metal surface of the chair. *Boudreau*, 322 N.C. at 334, 336-39, 368 S.E.2d at 853-856. This Court held in *Terry* that North Carolina law was applicable where a Texas resident was injured in New York while operating a tractor-trailer manufactured in Texas and thereafter sold in North Carolina to a Virginia business as part of a shipment for a North Carolina corporation; the tractor-trailer was eventually resold and obtained by another North Carolina corporation. *Terry*, 92 N.C. App. at 688, 691-94, 376 S.E.2d at 48-51.

Finally, in *Bernick*, our Supreme Court held that in the instance where a mouthguard, manufactured in Canada and purchased in Massachusetts, shattered during a hockey game in this state, North Carolina law should apply. *Bernick*, 306 N.C. at 443, 293 S.E.2d at 410. The Court reasoned that "[t]he plaintiff did not suffer the damages from any breach of warranty for which he seeks recovery until the hockey game in North Carolina." *Id.*

While the *Boudreau* and *Terry* courts appear to have resolved the "significant interest" test in favor of the state of sale and distribution, the *Bernick* court thus suggested a preference for the law of the location of injury. We do not interpret any of these decisions as mandat-

ing a rule according greater significance to the site of injury or to the place of sale and distribution. Rather we estimate each to reflect a considered examination of the circumstances in order to determine the state with "the most significant relationship," *Boudreau*, 322 N.C. at 338, 368 S.E.2d at 855, to the transaction in question.

Our own similar analysis of the circumstances *sub judice* indicates that North Carolina, the site of manufacture, initial distribution, and injury, bears the "most significant relationship to the transaction and the parties," *Terry*, 92 N.C. App. at 691, 376 S.E.2d at 49. Defendants MGM and Indian Head manufactured the allegedly defective brake assembly in North Carolina, but did not thereafter directly distribute it into Arizona. Rather it was shipped to Kentucky and incorporated into a vehicle. From Kentucky, the vehicle was invoiced to a Missouri dealer, which then sold it to an Arizona corporation.

Considering that the North Carolina manufacturer initially distributed the brake assembly from North Carolina into Kentucky, and that the injury in question took place in North Carolina, we hold North Carolina law applies to plaintiffs' breach of warranty claims. Because the moving van being operated by plaintiff was purchased on or about 27 December 1983 and his injury occurred 14 August 1991, more than six years passed between the purchase of the allegedly defective brake assembly and the injury to plaintiff. Application of North Carolina's statute of repose therefore operates to bar plaintiff's claims for breach of warranty. *See* N.C.G.S. § 1-50(6).

Under our rules of civil procedure, 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). As we have held plaintiff's breach of warranty claims to be barred by the statute of repose set out in N.C.G.S. § 1-50(6), defendants MGM and Indian Head are entitled to judgment as a matter of law on those claims. The trial court therefore did not err in entering summary judgment in their favor.

Affirmed.

Chief Judge ARNOLD concurs.

Judge WYNN dissents.

Judge WYNN dissenting,

I agree that this Court is bound by our Supreme Court's ruling in *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985) which upheld the constitutionality of our statute of repose, N.C.G.S. § 1-50(6). However, in my opinion, our Supreme Court should reconsider its rejection of Judge (now Justice) Whichard's persuasive reasoning in *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 590-91, 284 S.E.2d 188, 189-90 (1981):

> We hold G.S. 1-50 (6) unconstitutional on its face, and therefore reverse. The courts have a duty when it is clear a statute transgresses the authority vested in the legislature by the Constitution . . . to declare the act unconstitutional." *Wilson v. High Point*, 238 N.C. 14, 23, 76 S.E.2d 546, 552 (1953); *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953); *Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781 (1936). Article I, section 18 of the North Carolina Constitution, quoted *infra*, guarantees access to the courts for redress of injuries. The attempt by enactment of G.S. 1-50 (6) to abrogate the right of access to the courts of persons who sustain injury, death, or property damage due to a defect or failure of a product, violates that provision . . . .

Notwithstanding our constraints on the issue of constitutionality, I believe that the Arizona statute of repose is the applicable statute for this case. As the majority indicates, for claims based upon breach of implied warranty, the courts must use the substantive law of the state which has the most significant relationship to the matters in controversy. *See Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988); *Terry v. Pullman*, 92 N.C. App. 687, 376 S.E.2d 47 (1987). *Boudreau* and *Terry*, as the majority points out, resolve the "significant interest" test in favor of the state of sale and distribution.

In the subject case, the brake assembly was sold, distributed and used in Arizona. It follows that the law of Arizona applies with respect to plaintiff's breach of warranty claims.

KEVIN RAY YOUNG, BY & THROUGH HIS GUARDIAN AD LITEM, MYRA YOUNG, & GENE RAY YOUNG & MYRA YOUNG, INDIVIDUALLY, PLAINTIFFS, V. FUN SERVICES-CAROLINA, INC., MOONWALK INTERNATIONAL, INC. AND AGRONOMICS INTERNATIONAL, INC., DEFENDANTS

No. COA95-585

(Filed 2 April 1996)

1. Games, Amusements, and Exhibitions § 24 (NCI4th)— injury sustained in moonwalk—insufficiency of evidence of proximate cause

In an action to recover for personal injuries sustained by plaintiff twelve-year-old child who was playing in an inflated "moonwalk" operated by defendant, the trial court properly entered summary judgment for defendant where the depositions of plaintiff and his mother satisfied defendant's burden of showing that an essential element of plaintiffs' claim was lacking—proximate cause, since both stated that they could not say with certainty what caused the accident; nothing in the record allowed the inference that a shifting of the moonwalk caused the accident; and the mere fact that the moonwalk had shifted earlier in the day, without more, was not enough to satisfy the definition of proximate cause.

Am Jur 2d, Amusements and Exhibitions § 94.

Liability to patron of scenic railway, roller coaster, or miniature railway. 66 ALR2d 689.

Liability for injury to one on or near merry-go-round. 75 ALR2d 792.

Liability of owner, lessee, or operator for injury or death on or near loop-o-plane, ferris wheel, miniature car, or similar rides. 86 ALR2d 350.

2. Trial § 64 (NCI4th)— discovery allegedly not complete—grant of summary judgment proper

The trial court did not abuse its discretion by granting summary judgment when discovery was incomplete where plaintiffs had fully eleven months between the filing of their complaint and the granting of summary judgment. N.C.G.S. § 1A-1, Rule 56(f).

Am Jur 2d, Summary Judgment §§ 12, 20.

Appeal by plaintiffs from judgment entered 16 March 1995 by Judge Catherine B. Eagles in Davidson County Superior Court. Heard in the Court of Appeals 26 February 1996.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for plaintiffs-appellants.

Hutchins, Doughton & Moore, by Kent L. Hamrick & David L. Hall, and Petree Stockton, by Richard J. Keshian & Christopher C. Fox, for defendants-appellees.

WYNN, Judge.

On 20 April 1991, twelve year old plaintiff Kevin Young suffered an eye injury while playing inside an amusement device called a moonwalk, leased by defendant Fun Services-Carolina, Inc. (hereinafter Fun Services) for use during a festival at Welcome Elementary School. A moonwalk is an inflatable vinyl device that resembles a large air pillow, and is inflated in order that children may jump up and down on it like a trampoline. It is enclosed by a canvas shell, with a flap for entry and exit.

On the day of the injury, Myra Young (Kevin's mother) served as the initial superviser for the moonwalk. Chuck Garner, a Fun Services employee, instructed her to—allow only children of about the same size in the moonwalk at any given time; not allow sharp objects in the moonwalk; require the children to take off their shoes before entering the moonwalk; not allow rough playing; generally supervise the children; and make sure that if "[the children] bounced and the moonwalk slid over, to call them and to let them slide it back over because it was sliding up against the other booths."

While supervising the children playing on the moonwalk, Mrs. Young noticed that it slid across the floor to the point that Mr. Garner had to move the moonwalk back to its original position. Later, after Mrs. Young left and another parent supervised the moonwalk, Kevin and three other boys went into the moonwalk. While they all jumped and played in the moonwalk, Kevin fell and struck his left eye socket on the back of another boy's head. Following treatment and two surgeries, he retains a permanent disability which results in double vision and other visual defects.

Plaintiffs commenced this action contending that Fun Services negligently failed to secure the moonwalk in violation of administrative regulations, failed to warn the participants of the danger involved

and the proper precautions necessary, and failed to have a trained operator during use of the moonwalk in violation of N.C. Gen. Stat. § 95-111.11 (1993). Fun Services denied negligence and asserted contributory negligence on the part of Kevin and Mrs. Young. Following several months of discovery, Fun Services moved for summary judgment. In a judgment dated 16 March 1995, Judge Catherine B. Eagles granted Fun Services' motion. Plaintiffs appeal.

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[1] On appeal, plaintiffs contend that the trial court erred in granting summary judgment. We affirm.

In *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 452 S.E.2d 233 (1994) our Supreme Court stated that a defendant moving for summary judgment may prevail by affirmatively showing by affidavits or depositions offered by any party, or other devices permitted by Rule 56, that an essential element of a plaintiff's claim is lacking. *Id.* at 357-58, 452 S.E.2d at 244 (citations and internal quotation marks omitted); N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990).

The essential elements of negligence are: Duty, breach of duty, proximate cause, and damages. *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995). In this case, the parties contest only the element of proximate cause. Proximate cause is defined as "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." *Adams v. Mills*, 312 N.C. 181, 192, 322 S.E.2d 164, 172 (1984) (internal quotation marks omitted). The initial issue in the case before us is whether defendants met their burden of affirmatively showing that proximate cause was lacking in plaintiffs' claim.

In *Holloway*, our Supreme Court allowed the defendant to meet its burden by showing that the plaintiff's deposition affirmatively demonstrated that an essential element of the plaintiff's claim was lacking. Likewise, in the instant case, defendants rely upon plaintiffs' depositions for an affirmative showing that the element of proximate cause is lacking. Plaintiff Kevin's deposition states:

> Q. Tell me what happened inside the moonwalk [at the time of the accident].
>
> A. One of the boys tried to jump off the wall, off the side of the wall, and he fell down, and it kind of knocked everybody else down.

. . .

Q. Well, you say a boy jumped off the side of the wall. How did he do that? Help me understand that.

A. Because the walls were air filled, but they were thin, and he just tried to jump off the side.

Q. The walls would have been at a right angle to the floor, right?

A. Yes.

Q. How could he have jumped off the wall?

A. He just jumped up and tried to put his feet on the wall and bounce off the wall.

Q. How many times did he do that?

A. That was the first time.

Q. What happened when he did that?

A. He knocked somebody down, and then they kind of knocked everybody else down.

. . .

Q. So the boy jumped off the side of the wall, and then he bumped into another child?

A. Yes.

Q. What happened to that other child?

A. He fell into Philip.

Q. The other child fell into Philip?

A. Yes, and Philip fell, and I fell on top of him.

. . .

Q. Did you trip?

A. No, whenever Philip fell, he fell into me.

. . .

Q. Was there anything inside that moonwalk that amounted to a vision obstruction as—and I'm assuming it wasn't foggy or cloudy inside that thing.

A. No.

. . .

Q. So you could see fine in there?

A. Yes.

. . .

Q. Did you hit something when you fell?

A. Yes, I hit the boy's head.

. . .

Q. Had you seen this moonwalk moving on the floor before you got inside it?

A. No, I really didn't pay any attention.

Q. So if the moonwalk moved on the floor, you weren't aware of it before you got inside of it?

A. No.

. . .

Q. [M]y question to you is, as we sit here today and as you're under oath, are you certain how your accident happened?

A. Not exactly.

Furthermore, plaintiff Myra Young's deposition indicates that the moonwalk was not secured and moved slowly across the floor in reaction to jumping by the boys. She requested and received assistance from an employee of Fun Services in moving the moonwalk back to its original position. Significantly, she stated that she had no personal knowledge of how Kevin's accident occurred, since she did not witness the accident.

We find that the depositions of Myra and Kevin Young satisfy the defendant's burden of showing that an essential element of plaintiffs' claim was lacking—proximate cause. Nothing in the record demonstrates that the moonwalk shifted immediately before Kevin's accident. Nothing in the record allows the inference that a shifting of the moonwalk caused Kevin's accident. The mere fact that the moonwalk shifted earlier in the day, without more, is not enough to satisfy our Supreme Court's definition of proximate cause set forth in *Adams*, 312 N.C. 181, 322 S.E.2d 164.

Since Fun Services successfully shifted the burden to plaintiffs, they were required to "produce a forecast of evidence demonstrating that they will be able to make out at least a *prima facie* case at trial." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992); *See also Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 55, 442 S.E.2d 316, 319 (1994) ("holding that [w]hen a party charged with negligence moves for summary judgment and makes a forecast of evidence which would entitle him to a directed verdict if it were introduced at trial, the nonmovant must offer a forecast of evidence which if offered at trial would defeat a motion for a directed verdict"). Plaintiffs offer no such evidence. Rather, plaintiffs' evidence as presented would require speculation or conjecture on the part of the factfinder, which is impermissible. "Plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper." *Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345; *See Gardner v. Gardner*, 334 N.C. 662, 665, 435 S.E.2d 324, 327 (1993) ("holding that [s]ummary judgment . . . is proper where the evidence . . . establishes that the alleged negligent conduct was not the . . . proximate cause of [plaintiff's] injury").

[2] Finally, plaintiffs argue that the trial court improperly granted summary judgment because discovery was incomplete. Plaintiffs assert that they may be able to procure deposition testimony of the other boys in the moonwalk at the time of the accident, which testimony may produce *prima facie* evidence of proximate cause.

N.C.G.S. § 1A-1, Rule 56(f) states:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Assuming *arguendo* that discovery was not complete, the court below was permitted to grant summary judgment in its discretion. "A trial court is not barred in every case from granting summary judgment before discovery is completed." *North Carolina Council of Churches v. State*, 120 N.C. App. 84, 92, 461 S.E.2d 354, 359 (1995); *Bryant v. Adams*, 116 N.C. App. 448, 461, 448 S.E.2d 832, 838-39 (1994), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995).

"Further, the decision to grant or deny a continuance is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion." North Carolina Council of Churches, 120 N.C. App. at 92, 461 S.E.2d at 359.

Plaintiffs filed their complaint on 18 April 1994. Summary judgment was granted in a judgment filed 16 March 1995, fully eleven months later. There is no evidence in the record that the trial judge abused her discretion in granting the motion for summary judgment, and we hold that she did not.

The decision of the trial court is,

Affirmed.

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

IN RE: ERIC YOUNG, MINOR CHILD

No. COA95-533

(Filed 2 April 1996)

Parent and Child § 101 (NCI4th)— termination of parental rights—sufficiency of evidence of neglect

The evidence was sufficient to support the trial court's order terminating respondent's parental rights based on neglect of the child where it tended to show that respondent lived in filth and clutter, allowing roaches to crawl on her child, in his car seat and diaper bag, and on dirty clothes, allowing cat feces and cat urine in her home, and allowing dirty dishes and dirty clothes to pile up; she allowed these conditions to exist even after her move to another home; and she gave her child a "milk bottle with contents looking similar to cottage cheese." N.C.G.S. § 7A-289.32(2) and (21).

Am Jur 2d, Parent and Child § 7.

Validity of state statute providing for termination of parental rights. 22 ALR4th 774.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.

Validity, construction, and application of statute limiting physician-patient privilege in judicial proceedings relating to child abuse or neglect. 44 ALR4th 649.

Judge WYNN dissenting.

Appeal by respondent from order entered 3 November 1994 by Judge Michael E. Beale in Moore County District Court. Heard in the Court of Appeals 21 February 1996.

On 1 November 1994, the trial court entered an adjudication order holding that grounds existed to terminate respondent mother's parental rights based on neglect under N.C. Gen. Stat. § 7A-289.32(2) (1995). A subsequent dispositional order terminated her parental rights. From this order, respondent appeals.

Lapping & Lapping, by Stephan Lapping, for petitioner appellee.

Brown & Robbins, L.L.P., by Carol M. White, for respondent appellant.

David G. Crockett Law Offices, by Jerry D. Rhoades, Jr., Guardian Ad Litem.

ARNOLD, Chief Judge.

On appeal, respondent contends the trial court erred in terminating her parental rights because the trial court's findings of fact were not based on clear, cogent and convincing evidence that neglect or the probability of its repetition existed at the time of the termination proceeding. We disagree.

Under G.S. § 7A-289.32(2), parental rights may be terminated if the child is neglected by the parent as defined under N.C. Gen. Stat. § 7A-517(21) which provides:

> [A neglected juvenile is] [a] juvenile who does not receive proper care, supervision, or discipline from . . . [his] parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to . . . [his] welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7A-517(21) (1995).

The trial court must base its findings of fact on "clear, cogent and convincing evidence," a requirement which establishes an intermediate standard of proof, greater than the preponderance of the evidence standard, but less than the requirement of proof beyond a reasonable doubt. *In re Montgomery*, 311 N.C. 101, 109-110, 316 S.E.2d 246, 252 (1984); N.C. Gen. Stat. § 7A-289.30(e) (1995). In a termination case in which the appealing party raises questions about the evidence, our task is to review the evidence to determine whether there is clear, cogent, and convincing evidence to support the findings of fact and to decide whether those findings support the conclusions of law. *Id.* at 111, 316 S.E.2d at 253.

In the present case, the trial court found that Alvina Street, friend of respondent, observed a roach on the child's face on one occasion and also saw roaches on the car seat, diaper bag, and dirty clothes. Furthermore, on one occasion, Street observed respondent give the child a "milk bottle with contents looking similar to cottage cheese." Additionally, Street testified that respondent's Aberdeen apartment was "extremely cluttered" and that dirty diapers and dirty litter and cat feces were in the apartment. When Street later visited respondent's Pinebluff home, she observed dirty dishes accumulating and dirty clothes piled up. Finally, the trial court found that a few weeks prior to the hearing, Sue Stubbs, an acquaintance of respondent, visited respondent's Carthage home unannounced and found the home smelled of cat urine and found cat feces on the kitchen floor, conditions similar to those she observed at respondent's Pinebluff residence.

Considering this and other evidence, we find the trial court's findings of fact were based on clear, cogent and convincing evidence that neglect or the probability of its repetition existed at the time of the termination proceeding. The evidence showed that the problems which caused the injurious environment had continued and probably would recur. Accordingly, we conclude the trial court did not err in terminating respondent's parental rights.

Affirmed.

Judge MARTIN, Mark D., concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting,

In my opinion the evidence terminating Dawn Christina Hayward's rights as a biological parent was not based on clear, cogent and convincing evidence that neglect or the probability of its repetition existed at the time of the termination proceeding. Accordingly, I dissent.

A petitioner who seeks termination of parental rights must show that clear, cogent and convincing evidence of neglect exists at the time of the termination proceeding. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). "[T]ermination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist." *Id. at* 714, 319 S.E.2d at 231-32.

Manifestly, the termination of parental rights is a grave and drastic step. *In re Dinsmore*, 36 N.C. App. 720, 726, 245 S.E.2d 386, 389 (1978). As such, "where there is a reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is given discretion not to terminate rights." *In re Montgomery*, 311 N.C. 101, 108, 316 S.E.2d 246, 251 (1984).

In the subject case, the trial court found in pertinent part, that Alvina Street, a friend of Ms. Hayward, observed a roach on the child's face on one occasion and also saw roaches on the car seat, diaper bag, and dirty clothes. Additionally, Mrs. Street testified that the apartment was "extremely cluttered" and that dirty diapers and dirty litter and feces were in the apartment. Furthermore, on one occasion, Mrs. Street observed Ms. Hayward give the child a "milk bottle with contents looking similar to cottage cheese." Mrs. Street also alleged that on many occasions she had to baby-sit the minor child so that Ms. Hayward could go out dancing or on dates. Ultimately, Mrs. Street confronted Ms. Hayward about the dirty conditions of her home and Ms. Hayward responded that she had financial problems.

Because the determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*, *In re Ballard*, 311 N.C. at 716, 319 S.E.2d at 232, the court made the following relevant findings of fact regarding Ms. Hayward's present ability to care for the minor child:

> 56. The Court finds clear, cogent and convincing evidence that such neglect is likely to continue in light of Respondent's prior

history regarding her first minor child, Morgan and evidence presented through witness Sue Stubbs that as recently as four to six weeks prior to this hearing she found Respondent's home smelling of cat urine and cat feces on the kitchen floor, similar to the residences in Aberdeen and Pinebluff.

57. The Court also finds clear, cogent and convincing evidence that such neglect will continue by evidence that the Respondent spent $2,000.00 on the purchase of a convertible automobile rather that [sic] spending the money of pursuing custody of the minor child Eric.

58. The Court also finds clear, cogent and convincing evidence that neglect is likely to reoccur in light of Respondent's refusal to make changes in her lifestyle after advice from Jamie Bransford and Alvina Street. There is evidence that respondent has exercised weekly visits with her child since May, 1994 and, according to Kelvin Clark, she has cleaned her home.

59. The Court finds that the Respondent graduated from high school and studied religion and art at Tennessee Temple for four years, but did not graduate. The evidence of neglect and abandonment is especially disturbing in light of this Respondent's education and obvious intelligence.

These findings, in my opinion, were not based on clear, cogent and convincing evidence that neglect or the probability of its repetition existed *at the time of the termination proceeding.* Indeed, the record shows a considerable change in conditions. Ms. Hayward offered evidence tending to show that she was attempting to improve the conditions which had led to removal of her child and that she was making some progress in doing so. Since May 1994, Ms. Hayward has been allowed twenty-four one hour visits with her son since Alvina Street received legal custody, and she only missed two visits. Additionally, Kelvin Clark, a family therapist, employed by the court to conduct a home study, stated in his report that Ms. Hayward's house was neat and clean and that Ms. Hayward had "shown a good aesthetic sense in arranging flowers and art work to create a warm ambiance." Mr. Clark also testified about Ms. Hayward's willingness to become a better parent. He stated that her change in attitude primarily has been due to the fact that after the removal of the child, Ms. Hayward discovered that she has breast cancer and has a 60% chance that the cancer will not recur and that she will survive. Mr. Clark testified as follows:

I can't predict the future, but I do know that when people face death and trauma they change. I work with a lot of people who are recovering alcoholics, for example, I have worked with. And sometimes you see a man who has been drinking all his life and then, say, has a bad accident or a doctor says, "You're going to die if you don't stop drinking," and then he stops. And I think there are—pain is life's best teacher, and I think that's happened in Dawn's life.

On the other hand, the trial court found as a fact that Sue Stubbs testified that a few weeks prior to the trial, she made an unannounced visit to Ms. Hayward's home and found cat feces on the kitchen floor and the kitchen smelled like a cat. However, Mr. Clark stated in his testimony that "I don't know a cat owner who hasn't had cat feces on their floor; I do think it's a sign of negligence, but again, I don't think—I think if we focus on these sorts of things, all of us could be caught with a problem."

I also find it significant to note that the trial court found as a fact that "neglect is likely to continue in light of Respondent's prior history regarding her first minor child . . . ." However, the record indicates that no evidence was presented that Ms. Hayward had neglected her first child. Rather, Ms. Hayward gave her first child up for adoption.

Termination of parental rights is indeed the most drastic remedy available in cases where the protection of children is at issue. The evidence in this case is both isolated and equivocal. I would find that the trial court erred in terminating Ms. Hayward's parental rights.

MILTLAND RALEIGH-DURHAM (A PARTNERSHIP), INDIVIDUALLY AND IN THE RIGHT OF MYERS MILTLAND RALEIGH-DURHAM, LIMITED PARTNERSHIP, PLAINTIFF v. PETER W. MUDIE, DEFENDANT

No. COA95-313

(Filed 2 April 1996)

Attachment and Garnishment § 13 (NCI4th)— prejudgment attachment of property—no notice and hearing—exigent circumstance—no denial of due process

Defendant's due process rights were not violated because he did not receive notice and hearing prior to attachment of his

property, since defendant was not a resident of this state at the time the attachment proceedings were commenced; defendant refused to accept service several times at an address he had verified; and this evasion of the judicial system was sufficient to constitute an exigent circumstance evidencing a likelihood that defendant would avoid not only the lawsuit but also any potential judgment against him, and the circumstance thus allowed attachment without a prior hearing. N.C.G.S. § 1-440 *et seq.*

Am Jur 2d, Attachment and Garnishment § 293.

Appeal by defendant from order entered 15 December 1994 by Judge D. Jack Hooks, Jr. in Durham County Superior Court. Heard in the Court of Appeals 22 January 1996.

Hunter, Wharton & Stroupe, L.L.P., by V. Lane Wharton, Jr., for plaintiff-appellee.

Wallace, Creech, Sarda & Zaytoun, L.L.P., by John R. Wallace and Peter J. Sarda, for defendant-appellant.

LEWIS, Judge.

At issue in this case is the entry of an order of attachment. Because we determine that the order did not violate plaintiff's due process rights, we affirm the trial court's denial of defendant's motion to dissolve the attachment.

This case arises out of a 1985 purchase of property in Durham by Myers Miltland Raleigh-Durham ("Myers"), a Texas limited partnership. Plaintiff Miltland Raleigh-Durham ("Miltland"), a New York general partnership, is the sole limited partner in Myers. Defendant Mudie allegedly conspired against Miltland representatives, causing Myers to pay an inflated amount for the property. Miltland sued defendant for fraud, breach of duty and unfair and deceptive practices.

In October 1992, after checking Durham County tax records and records at the Department of Motor Vehicles, Miltland attempted to serve defendant at the listed addresses in Durham, North Carolina, London, England, and St. -Guilhem-le-Dèsert, France. The complaint was returned unserved. The next month an Alias and Pluries Summons was sent by registered mail to defendant at his address in France but was returned unclaimed. On 2 December 1992 defendant sent a letter to representatives of Miltland stating that he was

presently living at the address in France. Miltland then sought to attach property owned by the defendant in Durham pursuant to N.C. Gen. Stat. section 1-440 et seq. on the basis that defendant was a non-resident. On 9 December 1992 an order of attachment was signed.

Beginning 8 January 1993 Miltland published a Notice of Service of Process by Publication in the Durham County Herald-Sun newspaper for three successive weeks. The notice also contained notice of the attachment. Following this, Miltland sent two more Alias and Pluries Summons to the address in France on 20 January 1993 and 5 April 1993, both of which were refused.

On 2 June 1994, making a special appearance, defendant sought an order increasing the amount of the bond which Miltland was required to post prior to the attachment order. The court raised the bond from $5,000 to $10,000. On 7 July 1994 defendant moved to dissolve the order of attachment on the grounds that, among others, it was unconstitutional and plaintiff had no grounds for attachment. This motion was denied by order of the trial court entered 15 December 1994. Defendant appeals from this order.

On appeal defendant has made one very broad assignment of error which he then proceeds to break down into nine arguments in his brief. Rule 10 of the Rules of Appellate Procedure states that each assignment of error "shall . . . 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.R. App. P 10(c)(1) (1996). This rule exists to " 'identify for the appellee's benefit all the errors possibly to be urged on appeal . . . so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position' " and to "enable[] the appellate court to 'fairly and expeditiously' consider the assignments of error as framed without 'making a voyage of discovery' through the record in order to determine the legal questions involved." *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988) (quoting N.C.R. App. P. 10(c), commentary).

Defendant's assignment of error reads as follows:

> 1. The court's denial of Defendant's motion to dissolve the order of attachment on the grounds that the attachment order was improperly entered and in violation of Defendant's due process rights. Further, the attachment statute, as applied to this defendant is in violation of the Constitution of the United States.

This assignment clearly violates Rule 10. It is not confined to a single issue of law and fails to state the legal basis for the assertion that the order was "improperly entered." Therefore, plaintiff's exceptions should be deemed abandoned. *See id.* However, using our Rule 2 discretionary powers, we have chosen to consider whether the order of attachment violated appellant's due process rights, as it is the only legal basis provided by appellant in his assignment of error. Similarly, we do not consider appellant's argument that our attachment statute is unconstitutional because appellant only assigned error to the application of the statute in this case. *See* N.C.R. App. P. 28(b)(5) (1996).

In arguing that his due process rights were violated in the application of G.S. section 1-440 et seq., appellant relies on a line of United States Supreme Court cases beginning with *Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556 (1972). He argues that the attachment of his property did not comply with the safeguards required by the Supreme Court in prejudgment attachment proceedings. We disagree.

Defendant argues that his due process rights were violated because he did not receive notice and hearing prior to the attachment of his property. This Court has already addressed the issue of whether notice and a hearing are required prior to attachment under G.S. section 1-440 et seq. In *Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267, *disc. review denied*, 289 N.C. 615, 223 S.E.2d 392 (1976), this Court analyzed our attachment statute and found that it complied with the tests set out by the Supreme Court in *Fuentes*, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L. Ed. 2d 406 (1974) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 42 L. Ed. 2d 751 (1975), three cases relied on by appellant. 28 N.C. App. at 539-40, 222 S.E.2d at 272-273; *accord Hutchinson v. Bank of North Carolina*, 392 F.Supp. 888, 898 (M.D.N.C. 1975). In *Properties*, this Court concluded that prior notice and hearing is not required in an attachment proceeding. 28 N.C. App. at 542, 222 S.E.2d at 273; *see also Connolly v. Sharpe*, 49 N.C. App. 152, 270 S.E.2d 564 (1980) (finding attachment statute in compliance with federal due process requirements).

Appellant cites two United State Supreme Court cases decided subsequent to *Properties* and *Connolly*. In *Connecticut v. Doehr*, 501 U.S. 1, 115 L. Ed. 2d 1 (1991), the court held that due process requires a finding of "some exigent circumstance" before attaching property without a prior hearing. 501 U.S. at 18, 115 L. Ed. 2d at 18. *United States v. Good Real Property*, —— U.S. ——, 126 L. Ed. 2d 490 (1993),

dealt with the ex parte seizure, not prejudgment attachment, of real property. However, the court mimicked the language of *Doehr*, stating that pre-deprivation notice and hearing are required unless exigent circumstances are present. *Id.* at —, 126 L. Ed. 2d at 508-09.

After reviewing these recent cases, we conclude that appellant's due process rights were not violated by the failure to provide pre-attachment notice and hearing under the present facts. The record shows that Mr. Mudie was not a resident of this state at the time the attachment proceedings were commenced and that he refused to accept service several times at an address he had verified. We hold that under these facts, this evasion of the judicial system is sufficient to constitute an "exigent circumstance" which evidences a likelihood on Mr. Mudie's part to avoid not only the lawsuit but also any potential judgment against him.

Defendant Mudie also argues that the attachment violates his due process rights because the damages at issue were "unliquidated." However, the attachment order specifies a sum certain, namely $330,000. This argument fails.

As stated above, we do not address any of the arguments set forth by appellant based on the constitutionality of G.S. section 1-440 *et seq.*, jurisdiction, capacity or sufficiency of the bond as they were not properly preserved for our review.

The order of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge WALKER concur.

ELIZABETH ELSIE UPCHURCH v. JAMES ELMON UPCHURCH AND JAMES E. UPCHURCH, JR.

No. COA95-643

(Filed 2 April 1996)

1. Divorce and Separation § 119 (NCI4th)— property titled in third persons—marital property

Property titled in the name of a person other than the parties to the marriage can be "marital property" within the meaning of

N.C.G.S. § 50-20, since both legal and equitable interests in real and personal property are subject to distribution under that statute, and an equitable interest in property can be established in express, resulting, and constructive trusts.

Am Jur 2d, Divorce and Separation §§ 878-880, 896.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation. 63 ALR3d 373.

2. Divorce and Separation § 172 (NCI4th)— equitable distribution—third party as necessary party

When a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with the participation of such party being limited to the issue of the ownership of that property.

Am Jur 2d, Divorce and Separation §§ 878-880, 896.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation. 63 ALR3d 373.

3. Divorce and Separation § 119 (NCI4th)— bonds and notes titled in names of third parties—marital property—insufficiency of findings to support conclusion

The findings of the trial court were insufficient to support its conclusion that bonds and notes titled either partly or wholly in the names of third parties were marital properties.

Am Jur 2d, Divorce and Separation §§ 878-880, 896.

Propriety of consideration of, and disposition as to, third persons' property claims in divorce litigation. 63 ALR3d 373.

Appeal by defendants from order entered 7 February 1995 in Durham County District Court by Judge Richard G. Chaney. Heard in the Court of Appeals 28 February 1996.

Harriss, Embree & Marion, P.L.L.C., by Joseph W. Marion, for plaintiff-appellee.

E.C. Harris for defendant-appellant James Elmon Upchurch, Sr.

Browne, Flebotte, Wilson & Horn, P.L.L.C., by Daniel R. Flebotte, for defendant-appellant James E. Upchurch, Jr.

GREENE, Judge.

James Elmon Upchurch, Sr. (Husband) and James E. Upchurch, Jr. (Son) (collectively defendants) appeal an equitable distribution order entered 7 February 1995 pursuant to an action filed by Elizabeth Elsie Upchurch (Wife) for equitable distribution.

The complaint seeking equitable distribution names both Husband and Son as party defendants and in pertinent part alleges that the ownership of certain municipal bonds and notes is "intertwined between" Husband and Son and that Son "is a necessary party." The complaint prayed, among other things, that the trial court enter an order "determining which [of these intertwined] assets, or portion of such assets . . . are marital property." Husband and Son filed an answer denying the allegations of the complaint.

After hearing evidence offered by all the parties, the trial court noted its "difficulty ascertaining the assets of [Husband], and the mingling of [Husband's] assets with those of [Son] and possibly of Jack Upchurch." The trial court found as a fact that "there is a significant possibility" that some of the transactions of Husband were "a sham." The trial court then concluded, after "giving the benefit of [the] doubt" to Wife, that the following items of personal property were either entirely or partially marital property: (1) the municipal bonds titled in the Son's name; (2) the note executed by Paul McGhee and Brenda Vaughan to Husband and Son; (3) the note executed by Marlene Harmon to Husband "or" Jack A. Upchurch; (4) the note executed by John Houk to Husband and Son; and (5) the note executed by Phillip Arnold to Husband "or" Son. The trial court then valued and distributed these and other marital assets.

The issues are (I) whether property titled in the name of a person other than the parties to the marriage can be "marital property" within the meaning of section 50-20; (II) if so, whether the titled or legal owner of those properties is a necessary party to the equitable

distribution proceeding; and (III) whether the findings in this case support the conclusion that the bonds and notes titled in the names of third parties are marital properties.

I

[1] Our equitable distribution statute provides that the trial court is to classify, value and distribute the "marital property." N.C.G.S. § 50-20 (1995). Marital property is defined as "all real and personal property *acquired* by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently *owned*." N.C.G.S. § 50-20(b)(1) (emphasis added). Property "acquired" is property received or gained "in whatever manner," legal or equitable. *Black's Law Dictionary* 41 (4th ed. 1968). Property is "owned" if a person has either legal or equitable title. *Id.* at 1259. Thus, both legal and equitable interest in real and personal property are subject to distribution under section 50-20. *See Ravenscroft v. Ravenscroft*, 585 S.W.2d 270, 274 (Mo. App. 1979); *see also Wolf v. Wolf*, 514 A.2d 901, 904 (Pa. 1986).

In North Carolina an equitable interest in property can be established in several situations, namely express, resulting and constructive trusts. James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 28-1, at 1083 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994) [hereinafter *Webster's*]. An express trust is one "created by contract, express or implied." *Id.* A resulting trust is one "arising from the presumed intent of the parties at the time title is taken by one party under facts and circumstances showing that the beneficial interest in the real [or personal] property is in another." *Id.*; *see Mims v. Mims*, 305 N.C. 41, 46, 286 S.E.2d 779, 783 (1982). "A constructive trust is a duty . . . imposed by courts of equity to prevent the unjust enrichment of the holder of title to . . . property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it." *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988) (quoting *Wilson v. Development Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970)). It is not necessary to show fraud in order to establish a constructive trust. *Roper*, 323 N.C. at 465, 373 S.E.2d at 425. Such a trust will arise by operation of law against one who "*in any way* against equity and good conscience" holds legal title to property which he should not. *Id.* The burden is on the party wishing to establish a trust to show its existence by "clear, strong and convincing" evidence. *Webster's* § 28-5, at 1095; *Electric Co. v. Construction* Co., 267 N.C. 714, 719,

148 S.E.2d 856, 860 (1966); *see* George G. Bogart and George T. Bogart, *The law of Trusts and Trustees* § 472, at 44 (2d ed. revised 1978). The determination of whether a trust arises on the evidence requires application of legal principles and is therefore a conclusion of law. *See Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982).

II

[2] "When a person is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence, such person is a necessary party to the action." *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968); *see* N.C.G.S. § 1A-1, Rule 19(b) (1990). It thus follows that when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. *Ravenscroft*, 585 S.W.2d at 274; *see generally* Frank D. Wagner, Annotation, *Propriety of Consideration of, and Disposition as to, Third Persons' Property Claims in Divorce Litigation*, 63 A.L.R.3d 373 (1975); *see Swindell v. Lewis*, 82 N.C. App. 423, 426, 346 S.E.2d 237, 240 (1986) (heirs of deceased spouse necessary parties to equitable distribution proceeding). Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property. *See Lucas v. Felder*, 261 N.C. 169, 171, 134 S.E.2d 154, 155 (1964).

III

[3] In this case, the conclusions of the trial court are silent on whether Wife met her burden of showing a trust for the benefit of the marital estate with regard to the various bonds and notes. Even if such a conclusion is implied, the findings do not reflect that a trust was established by clear and convincing evidence. Indeed, the findings suggest that although the trial court believed there was only a "possibility" that a trust existed for the marital estate, it proceeded to resolve any doubts in the evidence in favor of Wife. This was error and requires that the conclusion that the bonds and notes are marital property be reversed and remanded. On remand, the trial court shall reconsider the evidence, with respect to the bonds and notes, in light of this opinion and enter a new equitable distribution order.

We do observe that one of the notes distributed by the trial court was executed for the benefit of Husband "or" Jack A. Upchurch. To

the extent of Jack A. Upchurch's interest in this note, N.C.G.S. § 25-3-110(d) (1995) (where instrument is payable to persons alternatively, it is payable to any of them), the trial court is without jurisdiction to adjudicate that interest because he is not a party to this action.

We have reviewed the other assignments of error raised by Husband and Son and overrule them.

Affirmed in part, reversed in part, and remanded.

Judges LEWIS and SMITH concur.

LEXINGTON TELEPHONE COMPANY, INC., PLAINTIFF v. DAVIDSON WATER, INC., DEFENDANT

No. COA94-1402

(Filed 2 April 1996)

Utilities § 2 (NCI4th)— marking of utility lines after business hours—plaintiff not entitled to compensation

The trial court properly determined pursuant to the Underground Damage Prevention Act, N.C.G.S. § 87-100 *et seq.*, that plaintiff telephone utility could not charge defendant water utility for marking its underground cable lines for defendant after business hours where defendant requested the location of plaintiff's lines in order to make emergency excavations to assure the continuity of utility services. N.C.G.S. § 87-106.

Am Jur 2d, Public Utilities § 9.

Liability of one excavating in highway for injury to public utility cables, conduits, or the like. 73 ALR3d 987.

Appeal by plaintiff from judgment entered 25 October 1994 by Judge Samuel A. Cathey in Davidson County District Court. Heard in the Court of Appeals 22 August 1995.

Stoner, Bowers & Gray, P.A., by Bob W. Bowers, for plaintiff appellant.

Hedrick Harp & Michael, by Robert C. Hedrick; and Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., for defendant appellee.

COZORT, Judge.

Plaintiff appeals from judgment denying recovery in *quantum meruit*. Plaintiff (a telephone utility) located its underground cable lines for defendant (a water utility), after normal business hours, over a period of approximately fourteen months. Defendant then refused to pay for the after-hours cable locations, claiming it was under no obligation to make such payment pursuant to the Underground Damage Prevention Act ("Act" or "Chapter 87"), N.C. Gen. Stat. § 87-100 to § 87-114 (1994). Plaintiff argued it was due compensation for marking its cable. The trial court, sitting without a jury, concluded that the Act prevents plaintiff from charging defendant for locating its underground cables when the location of such lines is necessary to assure the excavating utility's maintenance of service to customers. We affirm.

Plaintiff, Lexington Telephone Company, Inc., is a public telecommunications utility. Defendant, Davidson Water, Inc., provides water to customers in Davidson County, North Carolina, through underground pipelines. Plaintiff's underground cables and defendant's underground pipes are often in close proximity to one another. Several times between 10 July 1992 and 17 September 1993, after "normal working hours," defendant alerted plaintiff that it needed to perform emergency excavations on its underground pipes. Prior to each excavation, defendant requested that plaintiff locate and mark the positions of its underground cables. Locating and marking cable is done in this manner to avoid accidental damage during excavations.

Plaintiff did in fact mark its cables in response to defendant's requests during the period in question. Because performance of the cable locations occurred outside of normal working hours, plaintiff paid its employees additional compensation. In response to the after-hours requests, plaintiff billed the defendant $5,206.00 for services rendered. (During normal business hours, plaintiff did not attempt to charge defendant for finding its cable.) Defendant refused to pay for the after-hours cable locations. In response, plaintiff filed this action in *quantum meruit*, seeking payment for marking the cable. Plaintiff maintains the after-hours service was compensable, with costs recoverable in *quantum meruit*. We disagree.

An action in *quantum meruit* is based upon the equitable principle that a person should not be enriched unjustly at the expense of another. *Atlantic C.L.R. Co. v. State Highway Comm.*, 268 N.C. 92,

96, 150 S.E.2d 70, 73 (1966). However, *quantum meruit* will not lie if services are rendered pursuant to a preexisting statutory obligation. *Id.* The polestar of plaintiff's argument is that the Underground Damage Prevention Act's cable location provisions do not apply here. We find plaintiff's premise is flawed, for by the plain language of the Act, Chapter 87 does apply to the instant situation.

The Act addresses logistical problems which arise when excavation is necessary in the vicinity of a utility company's underground cable lines. Utility companies normally lay their individual cables in substantially the same location as those of other utility companies. For a utility to undertake excavations, it must know the position of other cables or lines in an area. The Act outlines the framework that should be followed prior to excavating in an area where underground utility lines are present. Generally, a person planning to excavate near underground utility lines must provide at least two days' notice to the utility. N.C. Gen. Stat. § 87-102 (1994). Once notified, the onus is on the utility company to locate and describe all of its lines to the excavating party. N.C. Gen. Stat. § 87-107 (1994). Failure to identify proprietary cable lines, after a proper request by the excavating party, absolves an excavator from liability for damage to the notified utility's line. N.C. Gen. Stat. § 87-108 (1994).

Two days' notice is not always required. The section entitled "Exceptions" specifically exempts from a strict notice requirement emergency excavations done to "assure the continuity of utility services." N.C. Gen. Stat. § 87-106(4) (1994). In such an emergency situation, notice must be given "as soon as is reasonably possible." *Id.* Plaintiff's own evidence indicates defendant's requests for underground cable location were made in response to emergency situations. Emergency situations are directly addressed by § 87-106, entitled "Exceptions." The trial court did not find defendant's notice unreasonable. It merely recognized that defendant's requests were "made at a time other than plaintiff's normal business hours." The Act delineates no such "normal business hour" requirement. In its judgment, the trial court found and concluded that "the defendant [had] notified the plaintiff, in accordance with N.C.G.S. 87-106 . . . ."

It is well established that " '[w]here the trial judge sits as the trier of facts, his findings of fact are conclusive on appeal when supported by competent evidence.' " *Institution Food House v. Circus Hall of Cream*, 107 N.C. App. 552, 556, 421 S.E.2d 370, 372 (1992) (quoting *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d

658, 660 (1979)). Our review of the record in this case indicates that ample evidence exists to support the trial court's finding of fact on the notice issue.

The remaining question is whether the trial court correctly determined, as a conclusion of law, that a properly notified utility may not assess a fee for locating proprietary lines for an excavating party. In reviewing the decision of a trial court sitting without a jury, we must determine " 'whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts.' " *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1987) (quoting *In re Norris*, 65 N.C. App. 269, 310 S.E.2d 25 (1983), *disc. review denied*, 310 N.C. 744, 315 S.E.2d 703 (1984)).

We hold the trial court correctly concluded that the issues involved here are resolvable by the Act. "In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished. The best indicia of that legislative purpose are the language of the act and what the act seeks to accomplish." *Wagoner v. Hiatt*, 111 N.C. App. 448, 450, 432 S.E.2d 417, 418 (1993). "A court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented. If the rule were otherwise, the ills which prompted the statute's passage would not be redressed." *Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979) (citation omitted). The essence of Chapter 87 is captured by its short title, the "Underground Damage Prevention Act." On its face, this title suggests that the Legislature intended the Act to serve as a mechanism for the orderly preservation of utility services to customers.

Our analysis of the Act and review of the record supports the trial court's conclusion of law that plaintiff is not entitled to a fee for utility line location. Section 87-107 of the Act, titled "Duties of the utility owners," states that a notified utility "*shall*, before the proposed start of excavating," provide the requested cable location information to the excavating party. (Emphasis added.) "Shall" is an obligatory term. Allowing the locating party to charge the excavator would frustrate the plain intent of the Act.

So long as the excavating party provides notice in conformance with Chapter 87, the Act prohibits the locating utility from charging the party making the request. We therefore hold that the trial court's

legal conclusions regarding the Act were properly based upon, and consistent with, its findings of fact. The trial court's judgment is

Affirmed.

Judges WALKER and McGEE concur.

GLORIA ANN EVANS v. JUDITH R. COWAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR OF STUDENT HEALTH SERVICES, UNC-CH; BRUCE VUKOSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE AFTERHOURS PROGRAM AT STUDENT HEALTH SERVICES, UNC-CH; AND JANE M. HOGAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSOCIATE DIRECTOR OF STUDENT HEALTH SERVICES, UNC-CH

No. COA95-700

(Filed 2 April 1996)

Judgments § 215 (NCI4th)— state and federal constitutional claims not identical—prior federal trial—dismissal of state claims based on res judicata error

Though both the North Carolina and United States Constitutions contain similar provisions proclaiming certain principles of liberty, the state courts, when construing provisions of the North Carolina Constitution, are not bound by opinions of the federal courts construing even identical provisions in the United States Constitution; therefore, free speech and due process claims asserted by plaintiff in the state court on the basis of the North Carolina Constitution were not identical to free speech and due process claims asserted by plaintiff in the federal court on the basis of the United States Constitution, and dismissal of her state claims on the basis of *res judicata* was error.

Am Jur 2d, Judgments§ 523.

Collateral estoppel effect, in federal court, of judgment resting on independent grounds. 29 ALR Fed. 764.

Res judicata effect of judgment in class action upon subsequent action in federal court. 48 ALR Fed. 675.

Federal or state law as governing in matters of res judicata and collateral estoppel in Federal Tort Claims Act. suit. 49 ALR Fed. 326.

Appeal by plaintiff from order entered 7 March 1995 in Orange County Superior Court by Judge Donald W. Stephens. Heard in the Court of Appeals 1 March 1996.

McSurely & Dorosin, by Alan McSurely and Mark Dorosin, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko and Associate Attorney General Celia Grasty Jones, for defendant-appellees.

GREENE, Judge.

Gloria Ann Evans (plaintiff) appeals an order granting Judith R. Cowan's, Bruce Vukoson's, and Jane M. Hogan's (defendants) motion for summary judgment on plaintiff's claim that the defendants violated her rights under the North Carolina Constitution.

The undisputed facts are that the plaintiff was employed on 9 April 1990 as the Associate Director of AfterHours for the University of North Carolina at Chapel Hill Student Health Services. She was discharged on 6 May 1992 because she was unable to meet the medical credentials required for the position. The medical credentials required that she have a supervising physician willing to sign her annual application to the Board of Medical Examiners (Board). Dr. Bruce Vukoson (Vukoson), her supervising physician, notified the Board that on 1 January 1992 he would no longer be the plaintiff's supervising physician. The UNC-CH Student Health Services active medical staff passed a resolution on 14 November 1991 which in effect prevented any physician other than Vukoson from being plaintiff's supervising physician.

A pre-termination hearing was held on 24 April 1992, and plaintiff appealed her termination "through the highest level available to an employee with her amount of seniority." The University determined that Vukoson did not act improperly in removing plaintiff from her license, and plaintiff's discharge was upheld.

Plaintiff filed her complaint in Orange County Superior Court (State Court), alleging violation of her constitutional rights under the First and Fourteenth Amendments of the United States Constitution and Article 1, Sections 14 and 19 of the North Carolina Constitution, and slander. The action was removed to the United States District Court for the Middle District of North Carolina (Federal Court). In the Federal Court, the defendants moved for summary judgment. The

Federal Court granted summary judgment for defendants as to all but the state constitutional claims against defendants in their official capacities, which were remanded to the State Court.

On remand to the State Court, defendants moved for summary judgment on plaintiff's state constitutional claims. The State Court found "that the doctrine of res judicata bars the Plaintiff from litigating in this court her state constitutional claims" because

> the evidence and allegations of state constitutional violation claims are identical to the federal claims upon which the Plaintiff did not prevail in federal court. The Plaintiff had a full and fair opportunity to litigate these issues and claims in federal court which resulted in a determination that the evidence was insufficient to sustain any such claims as a matter of law.

The issue is whether plaintiff's state constitutional claims against defendants are barred by *res judicata*.

"The essential elements of *res judicata* are: '(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits.' " *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985) (quoting *Hogan v. Cone Mills Corp.*, 63 N.C. App. 439, 442, 305 S.E.2d 213, 215 (1983)). In this case there is no dispute that there has been a final judgment on the merits in an earlier suit (summary judgment for the defendants in the Federal Court),[1] and an identity of parties in the Federal Court suit and the suit before the State Court. The only question is whether there is an identity of the causes of action in the suit before the Federal Court and the State Court. The defendants argue that "the state free speech and due process claims and issues are identical to the federal free speech and due process claims and issues." The plaintiff argues that the claims are not the same. We agree with the plaintiff.

It is true that both the North Carolina Constitution and the United States Constitution contain similar provisions proclaiming certain principles of liberty. John V. Orth, *The North Carolina State Constitution* 38 (1993). Our courts, however, when construing provisions of the North Carolina Constitution, are *not* bound by opinions

1. A cause of action determined by an order for summary judgment is a final judgment on the merits. *Loving Co. v. Latham*, 15 N.C. App. 441, 444, 190 S.E.2d 248, 250 (1972).

of the federal courts "construing even identical provisions in the Constitution of the United States." *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (construing Article I, Section 14); *Gaston Bd. of Realtors v. Harrison*, 64 N.C. App. 29, 33, 306 S.E.2d 809, 812 (1983) (construing Article I, Section 19), *rev'd on other grounds*, 311 N.C. 230, 316 S.E.2d 59 (1984). Even where two provisions are identical, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby afforded no lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). Only our courts can "[answer] with finality" "[w]hether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving such issues." *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984).

Therefore, an independent determination of plaintiff's constitutional rights under the state constitution is required, *Harrison*, 64 N.C. App. at 33, 306 S.E.2d at 812, and the state courts reserve the right to grant relief under the state constitution "in circumstances under which no relief might be granted" under the federal constitution. *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985) (construing Article I, Section 19). Accordingly, the claims asserted by the plaintiff in the State Court on the basis of the North Carolina Constitution are not identical to the claims asserted by the plaintiff in the Federal Court on the basis of the United States Constitution and dismissal of the state claims on the basis of *res judicata* was error.

Reversed and remanded.

Judges LEWIS and SMITH concur.

BARRETT v. BARRETT

[122 N.C. App. 184 (1996)]

LOUISE COMBS BARRETT, Plaintiff v. JAMES B. BARRETT, JR., Defendant

No. COA95-557

(Filed 2 April 1006)

Execution and Enforcement of Judgments § 31 (NCI4th)—posting of cash bond—forfeiture—no avoidance by claiming debtor's exemptions

A party should not be permitted to post a cash bond to stay execution of a money judgment and then avoid forfeiture of the bond after default by claiming debtor's exemptions. N.C.G.S. §§ 1C-160(a)(1), (c).

Am Jur 2d, Exemptions §§ 276, 277.

Appeal by defendant from order entered 27 March 1995 by Judge Alexander Lyerly in Watauga County District Court. Heard in the Court of Appeals 22 February 1996.

Kilby, Hodges & Hurley, by John T. Kilby, for plaintiff-appellee.

Paletta & Hedrick, by David R. Paletta, for defendant-appellant.

WALKER, Judge.

Plaintiff and defendant were married on 24 March 1961 and on 20 September 1988 they entered into a "Separation and Property Settlement Agreement" (Agreement) which in part provided:

9.

The parties agree that [plaintiff] shall continue to receive medical benefits through the U.S. Army for as long as she is eligible to receive said medical benefits. The parties also agree that the Survivor's Benefit Plan through the U.S. Army shall remain in effect.

10.

The parties agree that [plaintiff] shall receive [defendant's] retirement check from the U.S. Army, in the approximate amount of $545.55 per month, for [plaintiff] to use as she desires. Simultaneously with the signing of this agreement, [defendant] agrees to sign a limited Power of Attorney, giving [plaintiff] the authority to sign said retirement check and cash said check.

> The parties agree that [defendant's] disability check in the approximate amount of $133.00 per month shall be the sole and separate property of [defendant].

In November 1992, plaintiff brought suit against the defendant for breach of the Agreement. Specifically, plaintiff alleged that defendant failed to pay her the full amount of the retirement check and failed to maintain plaintiff as a beneficiary on defendant's Survivor's Benefit Plan. After the suit was filed, defendant ceased paying spousal support. Following a hearing on 27 September 1993, the trial court awarded plaintiff a money judgment for support arrearages in the amount of $4,909.95.

Defendant appealed and requested the trial court to set a bond and enter an order to stay the execution of the judgment. On 20 January 1994, the trial court granted defendant's motion to stay execution and directed defendant to make a security deposit in the amount of $7,000. On 7 February, the defendant elected to deposit a $7,000 cash bond in lieu of a surety bond.

This Court affirmed the judgment in an opinion filed on 20 December 1994. With the exception of the $7,000 deposited by the defendant to stay execution, he made no payment in satisfaction of the judgment. Both plaintiff and defendant then filed motions requesting disbursement of the cash bond. By order filed 27 March 1995, the trial court directed that the $7,000 cash bond be disbursed to the plaintiff "first to payment of the original Judgment in the amount of $4,909.94 under date of November 1, 1993, plus accrued interest; any balance not so applied shall then be disbursed in partial satisfaction of the Money Judgment entered under date of this Order [in the amount of $8,728.80]." From October 1993 until January 1995, additional arrearages in the amount of $8,728.80 had accumulated.

On appeal, defendant contends that the trial court erred in awarding the cash bond to plaintiff because the bond was exempt from defendant's creditors pursuant to N.C. Gen. Stat. § 1C-1601 (1995), N.C. Gen. Stat. § 97-21 (1995), 10 U.S.C. § 1408 (1982) and 42 U.S.C. § 407 (1983). Defendant first argues that a cash bond is different from a surety bond and as such, he retained a property interest in such funds. We disagree.

N.C. Gen. Stat. § 1-289 (1983) provides that in lieu of an approved surety, a party may deposit money in the amount of the bond.

Likewise, N.C. Gen. Stat. § 58-75-1 (1994) also provides that in lieu of any written undertaking or bond, a party may make a deposit in cash subject to all of the same conditions and requirements as are provided for in written undertakings or bonds. It is clear from the language of these provisions that cash bonds are subject to the same conditions and requirements as surety bonds.

Defendant contends that he retained exemptions in the cash bond because the majority of his income since January 1993 came from the following exempt sources: military retirement benefits, military disability benefits, workers' compensation benefits, and social security disability benefits. However, defendant failed to identify the actual source of the $7,000 deposited. Assuming *arguendo* that defendant could trace the $7,000 bond to exempt sources of income, we are not prepared to conclude that once defendant used these funds to post the bond they retained their exempt character.

Defendant also argues that any remaining income he received from non-exempt sources is protected by N.C. Gen. Stat. § 1C-1601. Again, assuming that these exemptions apply, defendant has waived any right to such exemptions. N.C. Gen. Stat. § 1C-1601(c) (1995) provides that the exemptions in this Article and in Sections 1 and 2 of Article X of the North Carolina Constitution, may be waived by: (1) transfer of exempt property, (2) a written waiver, or (3) failure to assert exemptions after service of notice to do so. For example, the law clearly provides that if an exempt residence ceases to be owned by the debtor, the property is no longer exempt under N.C. Gen. Stat. § 1C-1601(a)(1). *In re Love*, 42 B.R. 317 (Bankr. E.D.N.C. 1984). Accordingly, we find that defendant waived any exemption to which he otherwise may have been entitled when he elected to deposit these funds in lieu of a surety bond to stay the execution of the judgment.

The primary purpose of a bond is to provide a source of funds to be applied to the satisfaction of a valid judgment. As a matter of policy, a party should not be permitted to post a cash bond to stay execution of a money judgment, and then, avoid forfeiture of the bond after default by claiming debtor's exemptions. Accordingly, we affirm the order directing disbursement of the cash bond to the plaintiff.

Affirmed.

Judges EAGLES and JOHN concur.

THOMAS JEFFREY JOHNSON, PLAINTIFF v. DANIEL RICHARD HUDSON AND JASON LAMAR HUDSON, DEFENDANTS v. TEDDY SHANE ZIMMERMAN, THIRD-PARTY DEFENDANT

No. COA95-593

(Filed 2 April 1996)

Torts § 11 (NCI4th)— third-party defendant's execution of release in favor of defendants—plaintiff's UIM carrier not barred from pursuit of claim against third-party defendant

The right of plaintiff passenger's UIM carrier, as unnamed defendant, to pursue a claim against the third-party defendant who was the owner/driver of the car in which plaintiff was injured could not be defeated by third-party defendant's action of executing a release in favor of defendants, the driver and the owner of the truck which collided into the rear of the car in which plaintiff was a passenger, since plaintiff's UIM carrier was entitled under N.C.G.S. § 20-279.21(b)(4) to assert all claims which could have been asserted by its insured.

Am Jur 2d, Release § 34.

Liability insurer's settlement of claim against insured as bar to insured's tort action against person receiving settlement. 32 ALR2d 937.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative. 21 ALR4th 275.

Injured party's release of tortfeasor as barring spouse's action for loss of consortium. 29 ALR4th 1200.

Appeal by third-party defendant and unnamed defendant/third-party plaintiff, Utica Mutual Insurance Company, from order entered 20 February 1995 by Judge William C. Gore, Jr., in Stanly County Superior Court. Heard in the Court of Appeals 26 February 1996.

No brief for plaintiff.

No brief for defendants.

Bennett & Blancato, L.L.P., by William A. Blancato and Sherry R. Dawson, for unnamed defendant and third-party plaintiff-appellant/appellee, Utica Mutual Insurance Company.

Steven F. Blalock for third-party defendant-appellant, Teddy Shane Zimmerman.

WYNN, Judge.

Plaintiff-passenger, Thomas Jeffrey Johnson, rode in a car owned and operated by the third-party defendant-appellant, Teddy Shane Zimmerman, when defendant, Daniel Richard Hudson, collided into the rear of the Zimmerman car. Mr. Johnson sued Mr. Hudson and the owner of the truck, Jason Lamar Hudson (hereinafter "defendants") alleging that he suffered bodily injury as a result of defendants' negligence.

Under N.C. Gen. Stat. § 20-279.21(b)(4) (1993), Mr. Johnson's underinsured motorist carrier, unnamed defendant and third-party plaintiff-appellee/appellant, Utica Mutual Insurance Company ("Utica"), answered denying that the defendants were negligent and also denying coverage. Later, Utica filed a third-party complaint against Mr. Zimmerman seeking contribution and alleging that Mr. Zimmerman's negligence joined with the negligence of the defendants to cause Mr. Johnson's injuries.

In response, Mr. Zimmerman moved for summary judgment contending that (1) no genuine issue of material fact existed as to his negligence and (2) a release barred Utica from seeking contribution from Mr. Zimmerman. The trial court denied summary judgment on the ground that no genuine issue of material fact existed as to Mr. Zimmerman's negligence, but granted summary judgment on the ground that the third-party claim was barred by a release. The trial court certified the issues for immediate appeal to this Court.

On appeal, Mr. Zimmerman challenges the trial court's denial of his motion for summary judgment on the ground that no genuine issue of fact existed as to his negligence. It is sufficient to state that the denial of his motion for summary judgment on that ground is interlocutory and must be dismissed. *See Fraser v. DiSanti*, 75 N.C. App. 654, 331 S.E.2d 217, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985) (holding that denial of motion for summary judgment is interlocutory even though trial judge had stated that there was no just reason for delay because denial of motion for summary

judgment was not a final determination of defendants' rights and the appeal did not affect defendants' substantial rights); N.C. Gen. Stat. § 7A-27 (1995).

The focal issue on appeal is whether the trial court erred in granting summary judgment in favor of Mr. Zimmerman on the ground that he had executed a release in favor of defendants. Finding error, we reverse.

N.C.G.S. § 20-279.21(b)(4) provides in relevant part:

> Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party *may participate in the suit as fully as if it were a party.*

(emphasis supplied).

This statute allows the underinsured insurance carrier to assert all claims that could have been asserted by its insured, the plaintiff. Mr. Zimmerman contends that his release to defendants barred a claim of contribution by Utica. He is correct on this point. N.C. Gen. Stat. § 1B-1(b) (1983) provides, "The right of contribution exists *only in favor of a tort-feasor* who has paid more than his pro rata share of the common liability . . . ." (emphasis supplied). Utica is not a tort-feasor. The specific language of N.C.G.S. § 1B-1(b) controls over the more general provision of N.C.G.S. § 20-279.21(b)(4). *Utilities Comm. v. Electric Membership Corp.*, 3 N.C. App. 309, 314, 164 S.E.2d 889, 892 (1969). Thus, while N.C.G.S. § 1B-1(b) prohibits a claim of contribution by Utica, N.C.G.S. § 20-279.21(b)(4) allows Utica to assert a direct claim that could have been asserted by its insured, Mr. Johnson.

In short, Utica's right to pursue a claim against Zimmerman cannot be defeated by Zimmerman's action of executing a release in favor of the Hudsons. *See Blauvelt v. Landing*, 68 N.C. App. 779, 315 S.E.2d 524 (1984) (holding that a release between two parties cannot bind a third-party who was a stranger to the release).

Because Utica may assert all claims that the insured can under N.C.G.S. § 20-279.21 (b)(4), we reverse the trial court's entry of summary judgment on the ground that the third-party claim was barred by the release given by Mr. Zimmerman to defendants.

We have examined the remaining contentions of Utica and Mr. Zimmerman and find no basis for relief in any of them.

Dismissed in part and reversed in part.

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

HAROLD DEE HEMMINGS, PLAINTIFF v. ERNEST G. GREEN, DEFENDANT

No. COA94-1247

(Filed 2 April 1996)

Process and Service § 37 (NCI4th)— service of "Delayed Service of Complaint" form—no valid service

Plaintiff's service of a "Delayed Service of Complaint" form did not constitute valid service on defendant, since that form did not notify defendant of an obligation to appear at a certain place to answer the complaint, and it was thus not a substitute for a summons and was not a valid method of service. N.C.G.S. § 1A-1, Rule 4(b).

Am Jur 2d, Process § 148.

Appeal by plaintiff from order of dismissal entered 19 August 1994 by Judge William H. Freeman in Forsyth County Superior Court. Heard in the Court of Appeals 24 August 1995.

Gordon & Nesbit, P.L.L.C., by L. G. Gordon, Jr., and Thomas L. Nesbit, for plaintiff appellant.

Bowden & Rabil, P.A., by S. Mark Rabil, for defendant appellee.

COZORT, Judge.

The issue in this case is whether plaintiff's service of a "Delayed Service of Complaint" form constitutes valid service on defendant, since said form does not notify defendant of an obligation to appear at a certain place to answer the complaint. We hold that the form is not a substitute for a summons and is not a valid method of service. The trial court dismissed plaintiff's case for lack of service, and we affirm.

On 18 March 1994, plaintiff Harold Dee Hemmings commenced this action, alleging alienation of affections and criminal conversation by defendant Ernest G. Green. Plaintiff initiated said action by filing an application and obtaining an order extending his time to file a

complaint. Pursuant to this application, the clerk of court issued a summons on form AOC-CV-102, entitled "Civil Summons To Be Served With Order Extending Time To File Complaint" on 18 March 1994. Both the form and the order extending the time to file complaint were returned unserved as to defendant on 21 March 1994.

Next, on 7 April 1994, plaintiff filed his complaint, and the clerk issued a "Delayed Service of Complaint," form AOC-CV-103. The defendant was served with the Delayed Service of Complaint (AOC-CV-103) on 12 April 1994. On 28 April 1994, the clerk of court granted defendant's application for extension of time to answer or otherwise plead, extending defendant's reply deadline to 11 June 1994. Defendant then moved to dismiss plaintiff's complaint on 13 June 1994, said motion grounded upon the North Carolina Rules of Civil Procedure, alleging: lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process. N.C. Gen. Stat. § 1A-1, Rules 12(b)(2), (4), (5) (1990).

The trial court, after considering the documents of record and arguments of counsel, found that the plaintiff failed to "obtain an endorsement to the original summons or alias or pluries summons within the ninety (90) days allowed by Rule 4(d) of the North Carolina Rules of Civil Procedure." Further, the trial court found that defendant had never been served with a summons by plaintiff. As a result, the trial court concluded as a matter of law that: (1) the three-year statute of limitations applicable to plaintiff's action expired on 20 March 1994, N.C. Gen. Stat. § 1-52(5) (1983); and (2) that dismissal based on defendant's Rule 12(b) motion was warranted. Based on the foregoing, the trial court dismissed plaintiff's action with prejudice on 19 August 1994. The appropriateness of the trial court's dismissal for lack of proper service is the sole issue on appeal. We affirm.

We find our analysis in *Latham v. Cherry*, 111 N.C. App. 871, 433 S.E.2d 478, *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994), persuasive. In *Latham*, this Court held that a Delayed Service of Complaint form, served alongside the complaint itself, is not a legally adequate substitute for a summons. *Id.* at 874, 433 S.E.2d at 480-81. Although the information conveyed in a Delayed Service of Complaint is similar to that of a summons proper, it falls short because it only tells the defendant to answer, not to appear. *Id.* at 874, 433 S.E.2d at 481. By statute, a summons must "notify each defendant to *appear* and answer within 30 days." N.C. Gen. Stat. § 1A-1, Rule 4(b) (1990) (emphasis added).

The record below shows plaintiff failed to request defendant's appearance in its Delayed Service of Complaint. Accordingly, the trial court found that no summons had ever been served on the defendant and allowed defendant's motion to dismiss. In reviewing the decision of a trial court sitting without a jury, this Court's role is to determine " 'whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts.' " *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1987) (quoting *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *disc. review denied*, 310 N.C. 744, 315 S.E.2d 703 (1984)). We find ample evidence in the record to support the findings. We further find *Latham* controlling and dispositive on the trial court's conclusions of law. The dismissal of plaintiff's complaint is

Affirmed.

Judges WALKER and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 MARCH 1996

BLANTON v. ROBINSON No. 95-421	Cleveland (92CVS425)	New Trial
BROWN v. PARKER No. 95-638	Guilford (94CVS9366)	Affirmed
BUSSELL v. MOSS No. 95-456	Brunswick (92CVS283)	Affirmed
CAMPBELL v. E & J RESTAURANT No. 95-392	Ind. Comm. (027231)	Affirmed
CHUN v. CITY OF CHARLOTTE No. 95-1011	Ind. Comm. (140693)	Appeal Dismissed
COOKE v. BROWN No. 95-62	Transylvania (85CVD413) (93CVD209)	Affirmed
DAVIS v. VOYAGER COMMUNICATIONS, INC. No. 95-576	Guilford (94CVS9133)	Affirmed
DOCKERY v. DAY No. 95-534	Wake (93CVS03256)	Affirmed
FINCH v. QUALITY ELECTRIC CO. No. 95-492	Ind. Comm. (311397)	Affirmed and Remanded for Additional Attorney Fees
HOME v. FLACK No. 95-1036	Rutherford (80CVS492)	Affirmed
IN RE NORRIS No. 95-432	Mecklenburg (94J805YME)	Affirmed
MARTIN v. MARTIN No. 95-485	Rockingham (93CVD273)	Affirmed
MAXWELL v. CONSUMERS LIFE INS. CO. OF N.C. No. 95-603	Cumberland (92CVS4566)	Affirmed
MILLER v. SMITH CONCRETE & SUPPLY No. 95-493	Ind. Comm. (962444)	Affirmed
POWELL v. POWELL No. 95-753	Davie (91CVD26)	Affirmed

SIMMONS v. CONNELLY No. 95-561	Burke (89CVD1118)	Affirmed
STATE v. BAILEY No. 95-1081	Onslow (94CRS5604)	No Error
STATE v. BLANDING No. 95-730	Durham (94CRS3896) (94CRS7234)	No Error
STATE v. BLUE No. 95-684	Moore (94CRS118) (94CRS119)	No Error
STATE v. BOWEN No. 95-649	Mecklenburg (94CRS66119)	Vacated and Remanded
STATE v. BROOK No. 95-892	Forsyth (94CRS43274)	Affirmed
STATE v. CLAY No. 95-845	Alamance (94CRS27251) (94CRS27252) (94CRS27253)	No Error
STATE v. DAYS No. 95-859	Pender (94CRS4024)	No Error
STATE v. FRAZIER No. 95-758	Wake (93CRS3147)	No Error
STATE v. KING No. 95-691	Wilkes (93CRS117) (93CRS118)	No Error
STATE v. MABRY No. 95-1048	Forsyth (93CRS46277)	No Error
STATE v. McIVER No. 95-839	Cumberland (93CRS22849)	No Error
STATE v. MOOSE No. 95-627	Iredell (94CRS3973)	Affirmed
STATE v. NEAL No. 95-1035	Guilford (94CRS76609)	No Error
STATE v. PADGETT No. 95-506	Buncombe (94CRS64579) (94CRS64580)	Conviction for possession of stolen property—vacated; and conviction for felonious breaking and entering, and felonious larceny—no error.

STATE v. RIGGS No. 95-1102	Forsyth (95CRS6708)	No Error
STATE v. SAUNDERS No. 95-20	Pitt (93CRS21134) (93CRS21135) (93CRS21136)	Sentence vacated and remanded for resentencing
STATE v. UTLEY No. 95-630	Robeson (92CRS18188)	No Error
STATE v. WARREN No. 95-1085	Guilford (94CRS31229)	No Error
TEAGUE v. MASTIN No. 95-338	Wilkes (94CVS320)	Affirmed
TUCKER v. CENTRAL CAROLINA BANK No. 95-579	Johnston (92CVS0994)	No Error
VESTAL v. NEWMAN No. 95-513	Surry (93CVS1165)	No Error
WILKERSON v. CHALETELS, INC. No. 95-418	Moore (94CVS00271)	Affirmed

FILED 2 APRIL 1996

BENNETT v. BENNETT No. 93-1261	Wake (92CVD2566)	Vacated and Remanded in Part; Affirmed in Part
CANEEL COVE HOMEOWNERS ASSN. v. COURTLAND DEVELOPMENT No. 95-562	New Hanover (91CVS2808)	Dismissed
CAROLINA WATER SERVICE v. SUGAR MOUNTAIN RESORT No. 94-503-2	Utilities Commission (W-354,SUB 116)	Affirmed
CAUSEY v. EMPLOYMENT SECURITY COMM. No. 95-632	Mecklenburg (94CVS15553)	Affirmed
CRISP v. DILLS No. 95-376	Macon (92SP58)	No Error
HILTON v. LEGGETT & PLATT, INC. No. 95-31	Ind. Comm. (845270)	Affirmed

IN RE JACKSON No. 95-470	Mecklenburg (91J622)	Affirmed
MERRITT v. PRICE No. 95-367	Cumberland (93CVD5753)	Appeal by defendants Richard Price and Louise Price—Affirmed. Appeal by third party defendant, Price Invest, Inc.—Dismissed.
N.C. STATE BAR v. COLEMAN No. 95-531	N.C. State Bar (93DHC32)	Affirmed
STATE v. BUTLER No. 95-769	Guilford (94CRS17953) (94CRS17954)	No Error
STATE v. LITTLE No. 95-631	Guilford (94CRS1298)	No Error
STATE v. WHITLOR No. 95-728	Wayne (91CRS15231) (91CRS15232)	No Error
STUBBLEFIELD v. WAKE COUNTY SCHOOL SYSTEM No. 94-1107	Ind. Comm. (107873)	Affirmed
VIDEO CONTROL SYSTEMS v. MACHINE TOOL & DIE, INC. No. 95-671	Wake (92CVS12449)	Reversed and Remanded

HAMLET EPPS, ROBERT EPPS, MARY MONTGOMERY, JENNIFER DANIEL, AND HAZEL GADSON, PLAINTIFFS V. DUKE UNIVERSITY, INC., A NORTH CAROLINA CORPORATION, PRIVATE DIAGNOSTIC CLINIC, A NORTH CAROLINA PARTNERSHIP, JOHN PETER LONGABAUGH, M.D., NATHAN PULKINGHAM, M.D., RUSSELL HJELMSTAD, M.D., MICHAEL WILSON, M.D., AND KATHRYN LANE, M.D., DEFENDANTS

No. COA95-182

(Filed 16 April 1996)

1. Appeal and Error § 555 (NCI4th)— personal action against county medical examiners—valid claim—summary judgment for defendant properly denied

A prior decision in this case, *Epps v. Duke University*, 116 N.C.App. 305, established the law of this case as it related to the sufficiency of plaintiffs' pleadings, holding that plaintiffs correctly maintained a valid claim for wrongful autopsy against defendant county medical examiner in his individual capacity as a public officer.

Am Jur 2d, Appellate Review §§ 60 et seq.

Erroneous decision as law of the case on subsequent appellate review. 87 ALR2d 271.

2. Public Officers and Employees § 35 (NCI4th)— action against official in individual capacity—showing required—cases not inconsistent

Hare v. Butler, 99 N.C.App. 693, and the cases using *Hare* "mere negligence" language, comport with those cases using language similar to that in *Thompson Cadillac v. Silk Hope Auto*, 87 N.C.App. 467, and are not contrary statements of North Carolina's official immunity doctrine, which is that, as long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. A plaintiff bringing an individual capacity suit against an official must allege and prove more than mere negligence, but also some action performed under color of authority which falls within one of the exceptions rendering an official liable individually or personally.

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

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 ALR3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 ALR3d 90.

3. Coroners and Medical Examiners § 32 (NCI4th)— medical examiner—wrongful autopsy—genuine issue of fact

The trial court properly denied defendant county medical examiner's motion for summary judgment in an action against him in his individual capacity for wrongful autopsy where plaintiffs' forecast of evidence established a genuine issue of fact as to whether defendant exceeded the scope of his official duties during an autopsy to determine the cause of death of the decedent after heart surgery when he mutilated the body by removing decedent's eyes, spinal cord and spinal vertebrae.

Am Jur 2d, Coroners or Medical Examiners § 5.

Liability for wrongful autopsy. 18 ALR4th 858.

Appeal by defendant Hjelmstad from denial of summary judgment entered 6 December 1994 by Judge Henry V. Barnette, Jr., in Durham County Superior Court. Heard in the Court of Appeals 14 November 1995.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein and Ann Hubbard, for plaintiff appellees.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock, for defendant appellant.

SMITH, Judge.

In this appeal from the trial court's denial of summary judgment, defendant appellant Dr. Russell Hjelmstad (hereinafter "Hjelmstad") contends he is not individually liable to plaintiffs in tort, because of the doctrine of public official immunity. Defendant argues plaintiffs' complaint is defective because it asserts a claim against a state officer acting in his official capacity. Therefore, defendant contends plaintiffs' action is barred by public official immunity.

Plaintiffs argue denial of summary judgment was proper, due to this Court's prior ruling in *Epps v. Duke University*, 116 N.C. App. 305, 447 S.E.2d 444 (1994) (*Epps* I). In *Epps* I, this Court held that plaintiffs had stated a "valid claim against Hjelmstad in his individual capacity as a public officer." *Id.* at 311, 447 S.E.2d at 448. The instant appeal poses the same official immunity issue decided in *Epps* I, set now against the legal standards of a summary judgment motion.

[1] In disposing of defendant's arguments for summary judgment, we hold the following. First, we agree with plaintiffs that *Epps* I established the law of this case as it relates to the sufficiency of plaintiffs' pleadings. Plaintiffs have correctly maintained a personal or individual capacity claim against defendant Hjelmstad. Thus, defendant's arguments to the contrary are baseless in light of *Epps* I. In addition, we find the affidavits in the record squarely present disputed material facts, demonstrate that defendant is not entitled to judgment as a matter of law, and mandate affirmance of the trial court's denial of summary judgment against defendant.

The facts and posture of this case are as follows. The plaintiffs are the next of kin of Dora Epps McNair, who died in 1990, shortly after surgery involving a cardiac catheterization and attempted placement of an intra-aortic pump. The surgery was unsuccessful. Because of the manner of decedent's death, it was decided by the treating physician at Duke University Medical Center's Coronary Care Unit that an autopsy was required by state law.

Plaintiffs' action arises from the alleged wrongful autopsy of Dora Epps McNair, which autopsy was ordered and supervised by defendant Hjelmstad. Plaintiffs allege that "the excessive mutilat[ion] of Ms. McNair's body during [the] autopsy at Duke University Medical Center ("Duke") left her body disfigured and in a state that could not be embalmed and viewed as she had wished." At all times relevant to this dispute, Hjelmstad occupied dual roles as resident pathologist at Duke University Medical Center (Duke), and as Durham County Medical Examiner pursuant to N.C. Gen. Stat. § 130A-382 (1995). It is undisputed that Hjelmstad is being sued for activities performed under color of his authority as medical examiner. Defendant Hjelmstad is the only named defendant involved in this appeal.

Because defendant Hjelmstad performed the autopsy while acting under color of authority as medical examiner, he first moved to dismiss this case for failure to state a claim for relief on grounds of official immunity. Defendant's motion to dismiss was the basis of

Epps I. The *Epps* I Court upheld the trial court's denial of defendant's dismissal motion by holding that,

> because plaintiffs' complaint contains allegations indicating that Hjelmstad acted outside the scope of his official duties, they have stated a valid claim against Hjelmstad in his individual capacity as a public officer.

Epps I, 116 N.C. App. at 311, 447 S.E.2d at 448. On remand from the *Epps* I Court, defendant Hjelmstad moved for summary judgment against plaintiffs. The trial court denied this motion, which is now the subject of this appeal.

Usually, the denial of a motion for summary judgment is not immediately appealable, as it is interlocutory. *See Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991). However, denial of a motion for summary judgment " 'on the grounds of sovereign and qualified immunity is immediately appealable.' " *Id.* (citation omitted). Such is the case here, where defendant Hjelmstad seeks to interpose his official immunity as a shield against liability to plaintiffs. We allow interlocutory appeals in these situations because " 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.' " *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L.Ed.2d 411, 424 (1985)).

Plaintiffs maintain the law of the case doctrine necessitates a ruling in their favor. We have previously held, "[a] decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. '[O]ur mandate is binding upon [the trial court] and must be strictly followed without variation or departure.' " *Lea Co. v. N.C. Board of Transportation*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (citation omitted) (quoting *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966)). Thus the argument by plaintiffs is well made, for much of defendant Hjelmstad's brief addresses issues resolved by *Epps* I.

Indeed, it is the law of this case that plaintiffs "have stated a valid claim against Hjelmstad in his individual capacity as a public officer." *Epps* I, 116 N.C. App. at 311, 447 S.E.2d at 448. Thus, insofar as defendant now addresses the sufficiency of plaintiffs' complaint against Hjelmstad, that matter is settled. *Id.* The only remaining examination apropos to our review of this appeal is defendant's argument relevant to the legal standard for summary judgment.

A party will prevail on a motion for summary judgment only if the moving party (here, defendant) can show no material facts are in dispute and entitlement to judgment as a matter of law. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995). In addition, the record is to be viewed in the light most favorable to the nonmovant, giving it the benefit of all inferences which reasonably arise therefrom. *Id.* Evidence properly considered on a motion for summary judgment "includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

Defendant's argument and evidence fall far short of the "no material fact in dispute" standard long adopted by this Court. We held in *Epps* I that defendant Hjelmstad, acting in his capacity as a county medical examiner, is a public officer. *Epps* I, 116 N.C. App. at 311, 447 S.E.2d at 448. The *Epps* I Court also held that "because plaintiffs' complaint contains allegations indicating that Hjelmstad acted outside the scope of his official duties, they have stated a valid claim against Hjelmstad in his individual capacity as a public officer." *Id.* Thus, to prevail on his motion for summary judgment, defendant must show that plaintiffs' presentation of properly considered evidence falls short of the allegations found in their complaint. This the defendant has not done.

[2] The common law rules governing individual or personal capacity suits against a public official in tort have remained virtually unchanged for almost a century. *See* N.C. Supreme Court opinions: *Lewis v. White*, 287 N.C. 625, 643, 216 S.E.2d 134, 146 (1975); *Williamston v. R.R.*, 236 N.C. 271, 275, 72 S.E.2d 609, 612 (1952); *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787-88 (1952); *Teer v. Jordan*, 232 N.C. 48, 51-52, 59 S.E.2d 359, 362 (1950); *Schloss v. Highway Commission*, 230 N.C. 489, 492, 53 S.E.2d 517, 518-19 (1949); *Gurganious v. Simpson*, 213 N.C. 613, 616, 197 S.E. 163, 164 (1938); *Carpenter v. R.R.*, 184 N.C. 400, 404-06, 114 S.E. 693, 695-96 (1922); *Templeton v. Beard*, 159 N.C. 63, 65, 74 S.E. 735, 736 (1912). And, *see* N.C. Court of Appeals opinions: *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 193-94, 439 S.E.2d 599, 602-03, *disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993); *Dickens v. Thorne*, 110 N.C. App. 39, 45, 429 S.E.2d 176, 180 (1993); *Locus v. Fayetteville State University*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991); *Mazzucco v. N.C. Bd. of Medical Examiners*, 31 N.C. App. 47, 49-50,

228 S.E.2d 529, 531-32, *disc. review denied*, 291 N.C. 323, 230 S.E.2d 676 (1976).

A suit against a public official in his official capacity is basically a suit against the public entity (*i.e.*, the state) he represents. *Dickens*, 110 N.C. App. 39, 45, 429 S.E.2d 176, 180 (1993); *Lewis*, 287 N.C. at 643, 216 S.E.2d at 146. Therefore, an official capacity suit operates against the public entity itself, as the public entity is ultimately financially responsible for the compensable conduct of its officers. *Id.*; *see Mazzucco*, 31 N.C. App. at 49, 228 S.E.2d at 531. This state's doctrine of sovereign immunity is over a century old. *Steelman v. City of New Bern*, 279 N.C. 589, 591-94, 184 S.E.2d 239, 241 (1971) (discussing adoption of sovereign immunity by our Supreme Court in *Moffitt v. Asheville*, 103 N.C. 237, 254, 9 S.E. 695, 697 (1889)).

Official immunity is a derivative form of sovereign immunity. Sovereign immunity extends from feudal England's theory that the "king can do no wrong." *Steelman*, 279 N.C. at 592, 184 S.E.2d at 242. As such, entities representing the English monarchy could not be held liable for damages to its subjects. *Id.* In the modern day context, sovereign immunity extricates agencies and arms of the state from liability when state officials exercise discretionary authority for public benefit. *Lewis*, 287 N.C. at 643, 216 S.E.2d at 146. Sovereign immunity is not a monolithic bar to tort liability, as exceptions to this form of immunity exist. *See Golden Rule*, 113 N.C. App. at 193, 439 S.E.2d at 603 (discussing consent and waiver as exceptions to sovereign immunity).

The public official immunity doctrine "proscribes, among [other things], 'suits to prevent a State officer or Commission from performing official duties or to control the exercise of judgment on the part of State officers or agencies.' " *Golden Rule*, 113 N.C. App. at 193, 439 S.E.2d at 602-03 (quoting *Smith v. State*, 289 N.C. 303, 310, 222 S.E.2d 412, 417 (1976)). If governmental officials were constantly exposed to the threat of personal liability at the hands of disgruntled or damaged citizens, the basis of our democracy might well be jeopardized. The historic rule in this state has been that:

> "As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office [*viz.*, a medical examiner], keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability."

Golden Rule, 113 N.C. App. at 194, 439 S.E.2d at 603 (quoting *Smith*, 289 N.C. at 331, 222 S.E.2d at 430). The exceptions to official immunity have expanded over the years, with bad faith and willful and deliberate conduct now operating as additional common law bases for liability. *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993); *see Dickens*, 110 N.C. App. at 44-45, 429 S.E.2d at 179-80 (1993); and *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985).

The official immunity doctrine is deceptively simple. Actual prosecution of a tort claim against a public official, though, reveals the complex nature of the doctrine. The tort must arise from some action taken while the tortfeasor-public official is acting under color of state authority. *Carpenter*, 184 N.C. at 404, 114 S.E. at 695. The complainor must decide whether to sue the public official in his official capacity, in his personal/individual capacity, or both. *See Golden Rule*, 113 N.C. App. at 193-94, 439 S.E.2d at 603. Assuming a plaintiff asserts a well-pleaded claim against the public officer in both official and individual capacities, the doctrine of governmental (or official) immunity interposes several barriers to liability. *Id.*

First, the official capacity suit will be tenable only if the State consents to the suit, or a statutory waiver of immunity applies. *Id.*; *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493-94, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). Otherwise, sovereign or official immunity is an absolute bar, and the case is subject to dismissal. *Golden Rule*, 113 N.C. App. at 193, 439 S.E.2d at 603. Whether or not the official capacity suit moves forward, the plaintiff may simultaneously proceed against the official as an individual, but only in limited circumstances. *Locus*, 102 N.C. App. at 526, 402 S.E.2d at 865.

In *Locus*, this Court held that, while "named defendants may be shielded from liability in their official capacities, they remain *personally* liable for any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties." *Locus*, 102 N.C. App. at 526, 402 S.E.2d at 865 (this is essentially the same rule espoused in *Lewis, et alia*, and *Golden Rule, et alia*, enumerated *supra*). Official immunity " 'does not extend to the individuals [acting in an official capacity] who in disregard of law invade or threaten to invade the personal or property rights of a citizen even though they assume to act under the authority of the State.' " *Williamston*, 236

N.C. at 275, 72 S.E.2d at 609 (quoting *Teer*, 232 N.C. at 51, 59 S.E.2d at 362).

Prosecution of the tort suit against the official rests on a procedural legal fiction. The personal or individual capacity suit is against an official, for an act presumably done by that official, under color of official authority. "The distinction between official-capacity suits and personal-capacity suits is more than 'a mere pleading device.' " *Hafer v. Melo*, 502 U.S. 21, 27, 116 L.Ed.2d 301, 310 (1991) (quoting *Will v. Michigan Dept. of St. Police*, 491 U.S. 58, 71, 105 L.Ed.2d 45, 58 (1989) (cited as authority in *Corum v. University of North Carolina*, 330 N.C. 761, 772, 413 S.E.2d 276, 283 (1992)). "State officers sued for damages . . . assume the identity of the government that employs them. By contrast, officers sued in their personal capacity *come to court as individuals*." *Hafer*, 502 U.S. at 27, 116 L.Ed.2d at 310 (emphasis added).

To sustain the personal or individual capacity suit, the plaintiff must initially make a *prima facie* showing that the defendant-official's tortious conduct falls within one of the immunity exceptions, *i.e.*, that the official's conduct is malicious, corrupt, or outside the scope of official authority. *Locus*, 102 N.C. App. at 526, 402 S.E.2d at 865. Once the plaintiff makes out its *prima facie* case that an exception applies, "[o]fficers who seek to defend an action on the ground of sovereign immunity must show they are acting within the scope of their authority." *Lewis*, 287 N.C. at 644, 216 S.E.2d at 146 (citing *Schloss*, 230 N.C. at 492, 53 S.E.2d at 519).

The defendant must assert official immunity as an affirmative defense, because

> he is the actor, and hence he must establish his allegations in such matters by the same degree of proof as would be required if he were plaintiff . . . . This is not a shifting of the burden of proof; it simply means that each party must establish his own case.

Speas v. Bank, 188 N.C. 524, 531, 125 S.E. 398, 402 (1924); and *see* 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 32 n.29, at 120 (4th ed. 1993).

If the defendant cannot meet this burden of production, "he is not entitled to protection on account of his office, *but is liable for his acts like any private individual*." *Gurganious*, 213 N.C. at 616, 197 S.E. at 164 (emphasis added); *see Locus*, 102 N.C. App. at 526, 402 S.E.2d at 865. The public official "stands, then, stripped of his official

character, and confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense." *Carpenter*, 184 N.C. at 405, 114 S.E. at 695. In essence, it is as if the *official* never committed the tortious act, as once stripped of the cloak of office, the tortfeasor is then liable for simple negligence. The "former official," now a mere individual, is subject to the standard liabilities of a tortfeasor, and must defend accordingly.

The foregoing restates the law of official immunity as established by our Supreme Court. However, in the 1990's, this Court began to propound a line of cases containing language which could be construed as at odds with Supreme Court precedent. Particularly, we refer to *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990), wherein this Court commented: "A public officer sued individually is normally immune from liability for 'mere negligence.' " *Id.* (quoting *Harwood v. Johnson*, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404 (1988)).

This "mere negligence" statement from *Hare* has been cited *in toto* or paraphrased by this Court in subsequent cases, including: *Cherry v. Harris*, 110 N.C. App. 478, 480, 429 S.E.2d 771, 772, *disc. review denied*, 335 N.C. 171, 436 S.E.2d 371 (1993); *Reid*, 112 N.C. App. at 224, 435 S.E.2d at 119; and *Epps* I, 116 N.C. App. at 309, 447 S.E.2d at 447. In a vacuum, the *Hare* Court's "mere negligence" statement could be read to infer that an official *qua* individual may not be held liable for simple negligence. Our analysis of the precise holding in *Hare* indicates the Court intended to act and, in fact, acted in accordance with the rule espoused by our Supreme Court in *Lewis*, *Carpenter* and *Gurganious*.

Close scrutiny of the analysis in *Hare*, and subsequent cases employing *Hare*'s language, compels us to conclude that this Court's comment "[a] public officer sued individually is normally immune from liability for 'mere negligence,' " was never intended to operate as a substantive revision of the historical official immunity rule. *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. We read the *Hare* statement only as a truncated, or "shorthand" version of the official immunity doctrine. We acknowledge the statement is, on its face, an ambiguous explication of the rule.

In an "as applied" context, it is *absque dubio* that the *Hare*, *Cherry*, *Reid*, and *Epps* I Courts employed the official immunity doctrine in a manner consistent with Supreme Court precedent. When so considered, it is patent that the meaning intended by this Court was

the following: a public official sued individually is not liable for "mere negligence"—because such negligence *standing alone*, is insufficient to support the "piercing" (hereinafter, the "piercing" exceptions) of the cloak of official immunity. *Locus*, 102 N.C. App. at 526, 402 S.E.2d at 865; *Reid*, 112 N.C. App. at 224, 435 S.E.2d at 119.

Once stripped of the "cloak" of office, the public official *qua* individual is undoubtedly liable just like any other private individual. This we have already established. *Gurganious*, 213 N.C. at 616, 197 S.E. at 164; *Carpenter*, 184 N.C. at 405, 114 S.E. at 695. But, if a plaintiff wishes to sue a public official in his personal or individual capacity, the plaintiff must, at the pleading stage and thereafter, demonstrate that the official's actions (under color of authority) are commensurate with one of the "piercing" exceptions.

The plaintiff may not *just* allege negligent behavior and expect his personal capacity action to survive. Our recent holding in *Whitaker v. Clark*, 109 N.C. App. 379, 383-84, 427 S.E.2d 142, 145, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993), makes exactly this point:

> Absent any allegations in the complaint [or an adequate later showing] *separate and apart* from official [actions] which would hold a nonofficial liable for negligence, the complaint cannot be found to sufficiently state a claim against defendants individually.

(Emphasis added.) This paragraph from *Whitaker* means that the first order of business for a plaintiff bringing an individual capacity suit against an official is a showing of an applicable "piercing" exception. Mere allegations of negligence, in and of themselves, will not suffice. For instance, in *Thompson Cadillac v. Silk Hope Auto*, the Court held that the plaintiff had

> alleg[ed] nothing more than mere negligence. There [were] no allegations of corrupt or malicious actions, actions outside the scope of defendants' duties . . . .
>
> * * * *
>
> . . . Accordingly, we find [defendant] to be a public officer, and we hold that the complaint alleging mere negligence fails to state a claim against [the public officer] . . . .

Thompson, 87 N.C. App. 467, 469-70, 361 S.E.2d 418, 420 (1987), *disc. review denied*, 321 N.C. 480, 364 S.E.2d 672 (1988).

The qualitative difference between the "mere negligence" language used in *Hare*, and the more illuminative but similar language in *Whitaker* and *Thompson*, is *de minimis*. When read in the context of *Whitaker* and *Thompson*, the statements in *Hare* are quite understandable and are well within the confines of our historical official immunity rule.

The public officer under discussion in *Hare* was Edwin Chapin, the Director of Mecklenburg County's Department of Social Services. *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 234. The *Hare* defendants moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). The *Hare* Court determined that the plaintiff's complaint alleged *only negligence* against Chapin (the plaintiff did not allege that Chapin's acts exceeded the scope of his authority, or any other piercing exception). Because the *Hare* plaintiff failed to allege that Chapin had committed a tortious act, performed under color of his authority, that fell within one of the exceptions rendering an official liable individually or personally, "Mr. Chapin [was held] immune from the negligence claim brought against him in his individual capacity." *Hare*, 99 N.C. App. at 701, 394 S.E.2d at 234.

Then, in *Cherry*, 110 N.C. App. at 480, 429 S.E.2d at 772, this Court assessed the sufficiency of the plaintiff's pleadings (the *Cherry* plaintiff appealed from defendant's successful motion to dismiss) as to whether the plaintiff had properly stated a personal or individual claim against a government official. In its discussion of the official immunity doctrine, the *Cherry* Court quoted the *Hare* "mere negligence" language above. *Cherry*, 110 N.C. App. at 480, 429 S.E.2d at 772. The reason the *Cherry* Court denied the plaintiff's attempt to pierce defendant's cloak of official immunity was because

> [t]he [plaintiff's] materials before the trial court additionally tended to show that defendant acted in *good faith* and *within the scope* of his responsibilities . . . . Furthermore, there is no allegation, and we find no evidence that defendant acted with any *ill will or malice* toward [plaintiff]. We therefore find that defendant is entitled to the immunity afforded a public official.

Cherry, 110 N.C. App. at 481-82, 429 S.E.2d at 773 (emphasis added).

Thus, while the *Cherry* Court ostensibly followed *Hare*'s mere negligence "shorthand" language, its analysis mirrored *Thompson* in its application of the piercing concept. For all intents and purposes, the "mere negligence" language from *Hare* has become an alter ego

for the concept applied in *Thompson* and *Whitaker*. We are of the view that *Hare*, and the cases utilizing the *Hare* language, comport with those cases utilizing *Thompson*-style language, and are not contrary statements of our official immunity doctrine.

For instance, in 1993, the *Reid* Court quoted *Hare*'s "mere negligence" passage *in toto*, and paraphrased its gist as follows: "The defendants who are public officers, rather than employees, cannot be held individually liable for mere negligence." *Reid*, 112 N.C. App. at 224, 435 S.E.2d at 119. In *Reid*, this Court determined the plaintiff's pleadings were insufficient to withstand a motion to dismiss, because the plaintiff's allegations did not state a piercing exception applicable to the defendants, and the plaintiff's allegations were only equivalent to simple negligence. *See Reid*, 112 N.C. App. at 225-26, 435 S.E.2d at 119-20.

Then in *Epps* I, this Court repeated the *Hare* "shorthand": "[I]f a public officer is sued in his individual capacity, he is entitled to immunity for actions constituting mere negligence, *Cherry*, 110 N.C. App. at 480, 429 S.E.2d at [772]." *Epps* I, 116 N.C. App. at 309, 447 S.E.2d at 447. Once again, while *citing* the *Hare* comment, the *Epps* I Court reviewed the sufficiency of the plaintiffs' pleadings against defendant Hjelmstad in his individual capacity. In doing so, the *Epps* I Court employed (without attribution) the same form of analysis applied in *Thompson* and *Whitaker*, not the facially inconsistent standard implied by *Hare*. *Epps* I, 116 N.C. App. at 309-10, 447 S.E.2d at 447-48.

The *Epps* I Court held

> that plaintiffs did not contend malice or corruption on the part of Hjelmstad in ordering the autopsy, plaintiffs did include allegations in the complaint indicating that Hjelmstad and the other defendants exceeded the permissible scope of the autopsy.

Epps I, 116 N.C. App. at 310, 447 S.E.2d at 448. Since plaintiffs had properly alleged that defendant Hjelmstad's autopsy exceeded the scope of his authority (and thus demonstrated a piercing exception), the Court denied the defendant's motion to dismiss. *Id.*

[3] We now turn to the instant summary judgment analysis. In *Gurganious*, the Supreme Court addressed a case whose factual context and procedural posture were strikingly similar to the instant one. The *Gurganious* Court expressly held that a county coroner and physicians performing an autopsy under the coroner's direction may be held liable for the wrongful mutilation of a cadaver. *Gurganious*,

213 N.C. at 614, 197 S.E.2d at 163. The *Gurganious* Court observed the applicability of official immunity to the facts before it, and held:

> It follows that an unauthorized autopsy to determine the cause of death where foul play is not suspected, though ordered by the coroner under color of his office, is in violation of the rights of the next of kin of the deceased, and *that the coroner is not protected by the official capacity in which he purports to act.* The duty to ascertain the limits of his authority and to observe the law, particularly where the rights of others were affected, was incumbent upon this defendant.
>
> The *general rule* is that when an officer goes outside the scope of his duty he is not entitled to protection on account of his office, *but is liable for his acts like any private individual.* 46 C.J., 1043; *Moffitt v. Davis*, 205 N.C., 565, 172 S.E., 317; *Coty v. Baughman*, 50 S.D., 372; 48 A.L.R., 1205; 52 A.L.R., 1447.

Gurganious, 213 N.C. at 616, 197 S.E.2d at 164 (emphasis added).

Given the clarity of the rule in *Gurganious* (and the other Supreme Court cases discussing official immunity), and the identicality of the facts between *Gurganious* and the instant matter, we are compelled to apply the Supreme Court's version of the official immunity rule to our summary judgment analysis here. The remaining question is singular. Have the instant plaintiffs set forth, in their opposition to summary judgment, evidence tending to show that defendant Hjelmstad performed his duties in a fashion exposing him to liability under the tenets of *Lewis*, *Gurganious*, *Carpenter*, *et alia*? The answer to this question is manifestly yes.

For instance, the affidavit, in the record, of Richard Page Hudson, M.D. (formerly Chief Medical Examiner for the State of North Carolina) unequivocally states: "It is my opinion that the autopsy which was performed on Dora Epps McNair at Duke University Medical Center went far beyond the scope of a medical examiner autopsy." More particularly, Dr. Hudson explained exactly what aspects of the autopsy were beyond the scope of a medical examiner's duties. His affidavit states, in part:

> 9. In my opinion, there was no reason to believe that study of the eyes would contribute to the determination of the cause or manner of Mrs. McNair's death, or provide evidence within the scope of the medical examiner's responsibilities.

10. In my opinion, it was a departure from the standard of care for the persons performing the medical examiner autopsy on the body of Mrs. McNair to remove the eyes from her body.

* * * *

12. In my opinion, there was no reason to believe that study of the spinal vertebral and spinal cord would contribute to the determination of the cause or manner of Mrs. McNair's death, or provide evidence within the scope of the medical examiner's responsibilities.

13. In my opinion, it was a departure from the standard of care for the persons performing the medical examiner autopsy on the body of Mrs. McNair to remove the spinal vertebrae and spinal cord from her body.

(Emphasis added.)

We also acknowledge the affidavit of Mr. D.W. Richardson, a licensed funeral director and embalmer. In Mr. Richardson's affidavit, he describes from his personal observation of decedent's cadaver and his professional experience that: "The mutilation of Mrs. McNair's body went far beyond what I have seen in other medical examiner or hospital autopsies performed to determine cause of death." Defendant Hjelmstad's affidavit describes decedent's cause of death as "a result of coronary vasospasm caused by the cardiac catheterization." Defendant's affidavit described all the "procedures performed [as] necessary and appropriate components of a complete autopsy examination." Quite simply, defendant Hjelmstad's affidavit cannot meaningfully co-exist with the affidavits of Dr. Hudson and Mr. Richardson. Either removal of eyeballs and a spinal cord is within the scope of an autopsy into a death from decedent's cardiac trauma, or it is not.

Under our standards for summary judgment, defendant's motion is patently without merit. Material facts are in dispute, as the affidavits make evident. As the affidavits presented by plaintiffs mirror the allegations in their complaint (*i.e.*, that the autopsy exceeded defendant's scope of authority), defendant is not entitled to judgment as a matter of law. Accordingly, we affirm the trial court's denial of summary judgment against defendant Hjelmstad.

Affirmed.

Judges JOHNSON and WALKER concur.

PROFESSIONAL LIABILITY CONSULTANTS, INC., PLAINTIFF, v. HOMER U. TODD AND INSURANCE MANAGEMENT CONSULTANTS, INC., DEFENDANTS

No. COA95-726

(Filed 16 April 1996)

1. Labor and Employment § 82 (NCI4th)— covenant not to compete—validity and enforceability

A covenant not to compete which prohibited defendant insurance agent, for a period of five years after termination of his employment with plaintiff insurance agency, from directly or indirectly contacting or soliciting business from plaintiff's clients who were clients when defendant left plaintiff's employment or were clients three years prior to his leaving was valid and enforceable since defendant had access to certain aspects of plaintiff's accounts and was fully acquainted with plaintiff's methods of conducting business; protection against use of this information by defendant to further his own personal interest was a legitimate business interest of plaintiff; and the five-year time limitation was not unreasonable.

Am Jur 2d, Master and Servant §§ 106, 107.

2. Labor and Employment § 89 (NCI4th)— covenant not to compete—evidence of breach—preliminary injunction

Plaintiff insurance agency established that it is likely to succeed on the merits of its claim for breach of a covenant not to compete so that the trial court did not err by issuing a preliminary injunction in favor of plaintiff where there was evidence to support the trial court's finding that defendant opened his own insurance agency in active competition with plaintiff and, after indirect solicitation, wrote several insurance policies with plaintiff's customers.

Am Jur 2d, Master and Servant §§ 23, 106, 107.

Covenants to reimburse former employer for lost business. 52 ALR4th 139.

Judge SMITH dissenting.

Appeal by defendants from order entered 13 April 1995 in Guilford County Superior Court by Judge Howard R. Greeson. Heard in the Court of Appeals 1 March 1996.

Roberson Haworth & Reese, P.L.L.C., by Robert A. Brinson, for plaintiff-appellee.

The Austin Law Firm, by William O. Austin, for defendant-appellants.

GREENE, Judge.

Homer U. Todd (Todd) and Insurance Management Consultants, Inc. (defendants), a corporation owned solely by Todd, appeal an order granting Professional Liability Consultants, Inc.'s (plaintiff) request for a preliminary injunction enforcing a covenant not to compete (covenant) against defendants.

Plaintiff is an insurance agency, selling and servicing liability and malpractice insurance to professionals. Todd was employed by plaintiff as an insurance sales and service representative from July 1989 to July 1993. Plaintiff and Todd entered into an employment contract, including the covenant, which reads:

> [Todd] recognizes and acknowledges that information regarding the customers and clients of [plaintiff] . . . is a valuable and unique asset of its businesses.
>
> Accordingly, [Todd] agrees that during the term of his agreement with [plaintiff] and for a period of five (5) years thereafter he will not, unless acting as an officer or employee of the [plaintiff] or with its prior written consent, directly or indirectly: (i) contact or in any way attempt to solicit insurance business from any individual, corporation or organization which is then or during the preceding three years was such a customer or client of [plaintiff], or (ii) disclose any information . . . which would enable any other individual, corporation or organization to solicit insurance business from such customers or clients.
>
> [Todd] acknowledges that the remedies at law for any breach by him of this Agreement will be inadequate and that the [plaintiff], as the injured party, shall be entitled to injunctive relief therefor, in addition to all other remedies available to it for any such breach . . . .

Todd left plaintiff's employment in August 1993 and opened his own insurance agency actively competing with the plaintiff. In March 1995, the plaintiff filed a complaint alleging that Todd was engaged in soliciting and writing "insurance business for clients who were

clients and customers of the Plaintiff during . . . Todd's employment with the Plaintiff." The plaintiff claimed, among other things, a breach of contract. The plaintiff requested a preliminary and permanent injunction, as well as damages.

At a hearing on the preliminary injunction, evidence was presented that while Todd was an employee "he became fully acquainted with Plaintiff's methods in conducting its business and . . . personally acquainted with Plaintiff's clients and . . . [their] accounts, including . . . the nature of the clients' business, services required, past informational records, billings, expiration dates, renewal dates, claims information and premiums." Plaintiff also "confirmed with [eight]. . . former clients that Mr. Todd has solicited and written their insurance business since his termination with the Plaintiff." These former clients were "clients and customers of the Plaintiff during Mr. Todd's employment with the Plaintiff."

The trial court found the following pertinent facts:

> 15. Plaintiff's legitimate business interests include certain aspects of its clients' accounts known to the Defendant only through his employment with the Plaintiff, including the nature of the clients' business, services required, past informational records, billings, expiration dates, renewal dates, claims information and premiums.
>
> . . . .
>
> 20. During the time of his employment, Defendant Todd became fully acquainted with Plaintiff's methods of conducting its business, and became personally acquainted with Plaintiff's clients and the various aspects of such clients' accounts, including among other things, the nature of the clients' business, services required, past informational records, billings, expiration dates, renewal dates, claims information and premiums.

The court also found the covenant to be "reasonable and necessary for the protection of the legitimate business interests of the Plaintiff," Todd breached the covenant by "indirectly contacting, soliciting and writing insurance business," and "[i]t appears likely that Plaintiff will prevail on the merits of its claims at trial." The trial court granted plaintiff a preliminary injunction, restraining defendants from:

> 1. Directly or indirectly contacting or in any way attempting to solicit insurance business from any individual, corporation or

organization who was a client or customer of the Plaintiff while [Todd] was employed by the Plaintiff or who were customers or clients of the Plaintiff within the previous three years from his date of termination.

. . . .

5. However, occasional, inadvertent, and casual social contact or conversation with such clients about matters unrelated to insurance or to the issuance, quoting or renewal of insurance policies, and that does not otherwise provide insurance information or counseling, shall not be deemed to be a violation of this Order.

The issues are whether (I) the covenant is valid and enforceable; and if so, (II) defendant breached the covenant.

I

[1] A preliminary injunction may be issued by the trial court when the evidence reveals that (1) plaintiff is likely to succeed on the merits of its case and (2) will suffer irreparable loss unless the injunction is issued. *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 868, 433 S.E.2d 811, 813 (1993). The defendants only argue that the plaintiff failed in showing that it is likely to succeed on the merits and we address only that issue.

Employment agreements in restraint of trade (covenants), in writing, part of the employment contract and based on reasonable consideration, are valid if they are reasonably necessary for the protection of a legitimate business interest and reasonable as to time and territory. *A.E.P. Indus. v. McClure*, 308 N.C. 393, 404, 302 S.E.2d 754, 761 (1983). A covenant is reasonably necessary for the protection of a legitimate business interest if:

> the nature of the employment is such [1] as will bring the employee in personal contact with patrons or customers of the employer, *or* [2] enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers . . . .

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 650, 370 S.E.2d 375, 380-81 (1988) (quoting *McClure*, 308 N.C. at 408, 302 S.E.2d at 763). The defendants do not dispute that the covenant at issue was in writing, a part of an employment contract and for valuable consideration.

Legitimate Business Interest

The findings in this case, which are not disputed by the defendants, are that Todd had access to certain aspects of plaintiff's accounts (nature of client's business, expiration dates, services required, etc.) and was fully acquainted with plaintiff's methods of conducting business. Protection against use of this information by Todd to further his own personal interest is "well recognized as a legitimate protectable interest of the employer," *Kuykendall*, 322 N.C. at 651, 370 S.E.2d at 381, and a covenant (reasonable as to time and territory) preventing such use is reasonably necessary for the protection of that interest.

Time and Territory

When evaluating whether the time and territory restrictions are reasonable, each must be considered in determining the reasonableness of the other. *Hartman v. Odell and Assoc., Inc.*, 117 N.C. App. 307, 311-12, 450 S.E.2d 912, 916 (1994), *disc. rev. denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). In this case, the covenant places no geographic restrictions on where defendants may conduct their business. The only restriction is that defendants may not, for a period of five years after terminating Todd's employment with the plaintiff, directly or indirectly contact or solicit business from plaintiff's clients who were clients when Todd left plaintiff's employment or three years prior to his leaving. Five year covenants have been upheld as reasonable where the protected territory is relatively small, *see Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 250, 120 S.E.2d 739, 743 (1961) (five years reasonable where only restricted from conducting business in Fayetteville); *Industries, Inc. v. Blair*, 10 N.C. App. 323, 335, 178 S.E.2d 781, 788 (1971) (five years in thirteen specified states held to be reasonable), and in the context of the limited scope of this covenant, we determine that five years is not unreasonable.

II

[2] Defendants argue in the alternative that even if the covenant is valid there is no evidence that defendants have breached the agreement. We disagree. Although the evidence is conflicting, there is evidence to support the finding of the trial court that the defendants "indirectly" solicited and wrote insurance "for a number of clients" who were clients of the plaintiff while Todd was employed by the plaintiff. Although there is no evidence that the defendants directly solicited plaintiff's customers (which is expressly prohibited by the

covenant), it is undisputed that Todd, after leaving plaintiff's employment, opened his own insurance agency in active competition with the plaintiff and wrote several insurance polices with plaintiff's customers. This fact alone supports the finding of the trial court that, after indirect solicitation, defendants wrote insurance business for plaintiff's customers. We are thus bound by this finding. *Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 339-40 (1995), *disc. rev. denied*, 342 N.C. 653, 467 S.E.2d 709 (1996). We do note that the plaintiff does not contend that the covenant prevents the defendants from competing in the open market with the plaintiff for insurance business. The plaintiff does not dispute that the defendants are permitted to open an office to sell insurance, even though this constitutes an indirect solicitation of plaintiff's customers. Therefore, it is only the selling of insurance to plaintiff's customers who contact defendants as a result of this indirect solicitation that is at issue in this case.

We are also unpersuaded by the argument that the defendants developed their "customer base [from] . . . membership directories of professional associations, a source readily available to anyone," and thus cannot be held to have violated the covenant. Although potential customers may be ascertained from public documents, "information concerning [plaintiff's] customers and their specific needs . . . was intimate knowledge, obtainable only because of [Todd's] employment with plaintiff," and their solicitation violated the covenant. *See Kuykendall*, 322 N.C. at 653, 370 S.E.2d at 382.

Plaintiff has thus shown that it is likely to succeed on the merits of its breach of contract claim and issuance of the preliminary injunction was proper. We note our agreement with the trial court that the language in the covenant preventing "*contact* . . . [with] any individual, corporation or organization which is then or during the preceding three years was such a customer or client of the [plaintiff]," is much too broad, does not serve any legitimate business interest and is therefore not enforceable. *See Whittaker Gen. Medical Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) (emphasis added). It is the direct or indirect solicitation of these customers that is legitimately prohibited, not casual contact with them.

Affirmed.

Judge LEWIS concurs.

Judge SMITH dissents.

Judge SMITH dissenting.

As the majority correctly states, a trial court may issue a preliminary injunction when the plaintiff's evidence demonstrates: (1) a likelihood of success on the merits; and (2) irreparable loss if the injunction is not granted. *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 868, 433 S.E.2d 811, 813 (1993). Because I find this Court's analysis in *Hartman v. Odell and Assoc., Inc.*, 117 N.C. App. 307, 311-18, 450 S.E.2d 912, 916-20 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995), controlling, I do not believe plaintiff has shown a likelihood of success on the merits.

According to the *Hartman* Court, viable covenants not to compete must meet five requirements. A covenant must be:

> "(1) in writing; (2) *reasonable as to time and territory*; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a *legitimate business interest* of the employer (citations omitted)."

Hartman, 117 N.C. App. at 311, 450 S.E.2d at 916 (emphasis added) (quoting *Young v. Mastrom, Inc.*, 99 N.C. App. 120, 122-23, 392 S.E.2d 446, 448, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 239 (1990)). Under *Hartman*'s analysis, it is inescapable that the instant covenant overreaches, as it is unreasonable as to time and territory. *See Hartman*, 117 N.C. App. at 311-15, 450 S.E.2d at 917-20. The covenant's time and territory terms are so broad that it cannot claim to serve any legitimate business interest. Accordingly, the covenant should not be "blue penciled" (saved) by this Court. *Id.*

Time and Territory

The majority states that "the covenant places no geographic restrictions on where defendants may conduct their business. The only restriction is that defendants may not, for a period of five years after terminating Todd's employment . . . solicit business from plaintiff's clients . . . ." Under *Hartman*, this restriction formulation is insufficient. The *Hartman* Court held that

> to prove that a geographic restriction in a covenant not to compete is reasonable, an employer must first show *where its customers are located* and that the *geographic scope* of the covenant is necessary to maintain those customer relationships.

Hartman, 117 N.C. App. at 312, 450 S.E.2d at 917 (emphasis added).

Plaintiff's brief describes "[t]he geographic restriction [of the covenant as consisting of its customers] during the prior 3 years from Todd's resignation." Neither this description, nor the majority's analysis that "no geographic restrictions" exist in the covenant, demonstrate the numerical or geographic scope of its customer base. *Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917. Plaintiff's assertion that the covenant's geographic scope equals its customer base is no more than a tautology. *Id.* At no point in the record has plaintiff shown the number or location of its customer base.

The covenant prohibits "contact . . . to solicit insurance business from any individual, corporation or organization which is then or during the preceding three years was such a customer . . . ." It is plaintiff's burden to demonstrate the geographic scope of its customer base. Plaintiff has failed to do so, leaving the Court with no basis upon which to assess the reasonableness of the territory covered by the covenant.

Hartman dictates that time and territory provisions in an anti-competition covenant are to be read in tandem. Each requirement must be considered conjunctively with the other in order to determine the reasonableness of the covenant. *Hartman*, 117 N.C. App. at 311-12, 450 S.E.2d at 918. I agree with the majority that the covenant contains no particularized geographic restriction. It follows that I cannot adjudge the reasonableness of a nonexistent geographic description, or assess the same in tandem with a time provision.

Our Supreme Court has held that "only 'extreme conditions' will support a five-year covenant . . . ." *Hartman*, 117 N.C. App. at 315, 450 S.E.2d at 917 (quoting *Engineering Associates, Inc. v. Pankow*, 268 N.C. 137, 139, 150 S.E.2d 56, 58 (1966). On an operative level, the instant covenant is in essence an eight-year restriction. This restriction is for five years, plus any customer of plaintiff's during the three years prior to defendant's separation date.

The three-year provision impacts retrospectively for three years, transforming what purports to be a five-year covenant into an eight-year restriction. For instance, if a customer has ended its relationship with plaintiff 2 years and 364 days prior to defendant's separation date, the customer may not be contacted for five years thereafter. Plaintiff has provided the Court with no compelling reason to uphold such an expansive time restriction, and I find this covenant to be "patently unreasonable." *Hartman*, 117 N.C. App. at 315, 450 S.E.2d at 918.

Legitimate Business Interest

A covenant must be no wider in scope than is necessary to protect the business of the employer. *Manpower of Guilford Co. v. Hedgecock*, 42 N.C. App. 515, 521, 257 S.E.2d 109, 114 (1979). If the covenant at issue is too broad to be reasonable, it will not be enforced. *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828, *reh'g denied*, 325 N.C. 231, 381 S.E.2d 792 (1989). As this dissenter has previously noted, neither the time nor territory provisions of the instant covenant are reasonable. Under this covenant, defendant would be prohibited from transacting business in the year 1998 with clients (how many we cannot determine) that plaintiff lost in 1990.

This " 'approach to drafting [the covenant] produces oppressive results and [the covenant is thus] invalid.' " *Hartman*, 117 N.C. App. at 316, 450 S.E.2d at 919 (quoting *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 168, 385 S.E.2d 352, 357 (1989), *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990)).

The instant covenant prohibits defendants from "directly or indirectly . . . contact[ing] or in any way attempt[ing] to solicit insurance business from any individual, corporation or organization which is . . . [or was] a customer or client of the Company . . . ." Defendant Homer Todd, in his affidavit, states unequivocally: "All such policies that I have written have resulted from *those clients contacting me* and asking that I provide insurance for them. *At no time did I first solicit or contact* any of those clients after I left PLC [plaintiff's firm] in 1993." (Emphasis added.)

The covenant explicitly prohibits defendants from *affirmative* contact; it does not speak to the issue of former or current customers of PLC (plaintiff) contacting defendants for the purpose of conducting business. Defendant Todd's denial of any affirmative contact stands uncontested, as the portion of plaintiff Stuart C. Thomas's (Thomas is an officer and director of PLC) affidavit dealing with defendants' alleged solicitations is not based on the personal knowledge of the affiant. It is the long-standing rule of this Court that affidavits must be made on the affiant's personal knowledge. *Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972). Thus, any portion of plaintiff Thomas's affidavit not based on personal knowledge "could not have been properly considered by the trial judge" in granting the preliminary injunction. *Id.*

Paragraph nine of the Thomas affidavit (2 March 1995) states: "Either I or my staff has confirmed with each of these former clients [listed in paragraph eight] that Mr. Todd has solicited and written their insurance business since his termination with the Plaintiff." Since this allegation forms the central premise of plaintiff's case, and we cannot discern whether or not it is based on the affiant's personal knowledge, we are bound by *Singleton* not to consider this information.

Application of the Blue Penciling Doctrine

"When the language of a covenant not to compete is overly broad, North Carolina's 'blue pencil' rule severely limits what the court may do to alter the covenant." *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920. If part of an unreasonable covenant may be severed so as to save the contract and render the provision reasonable, this Court may elect to do so. *Id.* In this case, severing the overly broad time and territory provisions would eliminate clauses inherently necessary to a covenant not to compete. *Id.* at 311, 450 S.E.2d at 916.

This Court may not resurrect, in whole cloth, a covenant not to compete by erasing and replacing offending, but key, portions of a contract. *Id.* at 311, 317, 450 S.E.2d at 916, 920. Yet this is exactly the necessity raised by the instant facts. As plaintiff's covenant fails the *Hartman* analysis, it logically follows they will not succeed at trial. Thus, the covenant not to compete is void, and the trial court should be reversed. Therefore, I respectfully dissent.

BELINDA DALE RUFF, PLAINTIFF v. REEVES BROTHERS, INC., A DELAWARE CORPORATION; JAMES PROCTOR; SANDY ARROWOOD; ROY KNICK; TERRY ANDERS; AARON "BUD" BYERS; CHARLES MARTIN; FRED FIGGERS; HARRY WATERS; AND DONALD SANE, DEFENDANTS

No. COA95-596

(Filed 16 April 1996)

Intentional Infliction of Mental Distress § 2 (NCI4th)— intentional and negligent infliction of emotional distress—jury question—action not barred by statute of limitations

Plaintiff's forecast of evidence in an action for the intentional infliction of emotional distress created a genuine issue of material fact as to whether defendant Martin's behavior was so extreme

or outrageous so as to result in serious emotional harm where it tended to show that defendant, a co-worker of plaintiff, held plaintiff's arms while another co-worker pulled up plaintiff's shirt and bra; defendant stated that he would like to have sex with plaintiff on a satellite dish; defendant told plaintiff that he had had sex with a woman on a riding lawn mower; defendant and another person pulled plaintiff's legs apart, stating that they were going to "eat" her; and there were other incidents at work of a non-sexual nature which occurred at various unspecified times. Furthermore, plaintiff's cause of action did not accrue until October 1989 when plaintiff's severe emotional distress manifested itself and she was placed in the care of a psychologist and a psychiatrist, and this action against defendant Martin, filed in February 1992, was therefore not barred by the statute of limitations.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4 et seq., 17.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 ALR4th 853.

Appeal by plaintiff from Order entered 30 December 1994 by Judge Zoro J. Guice, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 27 February 1996.

Leonard & Biggers, P.A., by William T. Biggers, and Roberts, Stevens & Cogburn, P.A., by Frank P. Graham, for plaintiff-appellant.

Bridges, Gilbert & Foster, P.A., by Gwynn Radeker, for defendant-appellee Charles Martin.

JOHNSON, Judge.

From 1988 to 1990, plaintiff Belinda Dale Ruff was employed by defendant Reeves Brothers, Inc. in the Vulcanizing Department of the Grace Plant, which is located in Rutherford County, North Carolina. Plaintiff was the only female in the department, where her job as a stripper consisted of stripping rubber from large drums. Defendant James Proctor was her immediate supervisor and other employees in the department included defendants Sandy Arrowood, Terry Anders, Aaron "Bud" Byers, Charles Martin and Donald Sane.

On 6 February 1992, plaintiff instituted this action against her employer, Reeves Brothers, Fred Figgers, the plant manager, Roy Knick, the assistant plant manager, Harry Waters, the plant human resources director, James Proctor, her immediate supervisor, and co-workers, Sandy Arrowood, Terry Anders, Aaron "Bud" Byers, Donald Sane, and Charles Martin, alleging intentional and negligent infliction of emotional distress. Plaintiff's deposition was taken in the summer of 1994, in preparation for trial. Thereafter, defendant Charles Martin made a Motion for Summary Judgment stating, "As shown on the face of the Complaint and as described in Plaintiff's testimony in oral deposition[,] any alleged acts committeda [sic] aginst [sic] [plaintiff] by the Defendant Charles Martin occurred more than three years prior to the filing of the Plaintif's [sic] action against said Defendant." This motion was heard by Judge Zoro J. Guice, Jr. on 2 December 1994.

The plaintiff's forecast of evidence, as presented to the trial court, tended to show the following. Plaintiff began to experience harassment and unwanted attention of a sexual nature from the men in the Vulcanizing Department, after she separated from her husband in December 1988. Defendant Martin was originally plaintiff's friend but, subsequently, his relationship with plaintiff changed. One of the acts of harassment, in which defendant Martin was alleged to have participated, was stated in plaintiff's Complaint to have occurred in the summer of 1989. It was later determined, however, that this particular act had in fact occurred in the fall of 1988—more than three years before this action was commenced. There were other incidents, alleged to have occurred on various *unspecified* occasions in plaintiff's Complaint and deposition, in which defendant Martin had participated. These acts of harassment continued until 1990, when plaintiff was laid off.

Plaintiff complained about these incidents to her supervisor and the plant management on a regular basis, to no avail. According to plaintiff, in October 1989, after defendant Arrowood had exposed himself to her, she was summoned to the plant human resources director's office where she was confronted by defendant Waters, who asked plaintiff, "What the hell is wrong with you? How much more do I owe you[?] I brought them in and fussed with them. Do you want Sandy Arrowood's job[?]" In response, plaintiff hyperventilated and fainted. Plaintiff was then taken to Spindale Family Practice where she was seen by Dr. Guyton Winker. Thereafter, plaintiff was referred to Woodridge Psychological Associates, P.A., where she was placed

under the care of Dr. H. Dean Perry, II, a psychologist, and Dr. C. Phillip Stevenson, a psychiatrist. At the time of the 2 December hearing, plaintiff remained under the treatment of Dr. Perry and Dr. Stevenson.

After hearing the evidence, Judge Guice, on 30 December 1994, entered an Order of Summary Judgment for defendant Martin, dismissing with prejudice plaintiff's claim against defendant Martin. Plaintiff appeals.

At the outset, we must note that the Order granting defendant Martin's Motion for Summary Judgment is interlocutory since other defendants remain in this action. An interlocutory order is not ordinarily appealable. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982), *quoted in Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 136 (1984). However, as "multiple trials against different members of the same allegedly collusive group could result from dismissal of this appeal," *Jenkins*, 69 N.C. App. at 142, 316 S.E.2d at 356, we find that the Order affected a substantial right of plaintiff and will cause substantial injury to her if not addressed before an appeal from the final judgment. *See Jenkins*, 69 N.C. App. 140, 316 S.E.2d 354; *see also Plummer v. Kearney*, 108 N.C. App. 310, 423 S.E.2d 526 (1992) (explaining that there is a substantial right where the dismissal involves issues which overlap those addressed in the action against the remaining parties). Thus, the trial court's Order granting defendant Martin's Motion for Summary Judgment and dismissing plaintiff's action against him is immediately appealable. N.C. Gen. Stat. § 1-277 (1983); *Jenkins*, 69 N.C. App. 140, 316 S.E.2d 354.

On appeal, plaintiff brings forth two assignments of error which both, in essence, question the propriety of the trial court's grant of defendant Martin's Motion for Summary Judgment. Initially, we will address plaintiff's second assignment of error—that the trial court erred in granting defendant's Motion for Summary Judgment.

Summary judgment is properly granted under North Carolina General Statutes section 1A-1, Rule 56(c) when the pleadings, depositions, answers to interrogatories, and admissions on file, along with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party to the action is entitled to a 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). An

issue is deemed to be material if " 'the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Northwestern Bank v. Gladwell*, 72 N.C. App. 489, 493, 325 S.E.2d 37, 40 (1985) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901, *reh'g denied*, 281 N.C. 516 (1972)). Once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth "specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e); *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602, *disc. review denied*, 316 N.C. 374, 342 S.E.2d 889 (1986). At this time, the non-movant must come forward with a forecast of his own evidence. *Amoco Oil*, 78 N.C. App. at 718, 338 S.E.2d at 602.

In order to maintain an actionable claim for intentional infliction of emotional distress, one must prove the following: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). In *Hogan v. Forsyth Country Club Company*, this Court extended a claim of infliction of emotional distress to include that which arises as a result of one's reckless indifference to the likelihood that one's actions will cause severe emotional distress. 79 N.C. App. 483, 340 S.E.2d 116, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). Extreme and outrageous conduct has been defined as that " 'conduct which exceeds all bounds usually tolerated by decent society.' " *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E.2d 611, 622 (1979) (quoting Prosser, *The Law of Torts* § 12, at 56 (4th ed. 1971)), *quoted in Dickens*, 302 N.C. at 447, 276 S.E.2d at 331. Our Court has previously stated,

> It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery . . . However, once conduct is shown which may be reasonably regarded as extreme and outrageous, it is for the jury to determine, upon proper instructions, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability.

Brown v. Burlington Industries, Inc., 93 N.C. App. 431, 436, 378 S.E.2d 232, 235 (1989), *disc. review dismissed*, 326 N.C. 356, 388

S.E.2d 769 (1990); (quoting *Hogan*, 79 N.C. App. at 490-91, 340 S.E.2d at 121). Further, in *Waddle v. Sparks*, our Court established the level of evidence sufficient to show severe emotional distress in the context of an action for intentional and/or negligent infliction of emotional distress:

> the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992). The statute of limitations for the tort of intentional infliction of emotional distress is three years. *Dickens*, 302 N.C. at 442, 276 S.E.2d at 330. Moreover, section 1-15 of the North Carolina General Statutes provides that a civil action may only be commenced after the cause of action has accrued. N.C. Gen. Stat. § 1-15 (1983).

In the instant case, defendant filed a Motion for Summary Judgment, alleging that he was entitled to such, since plaintiff's claim was barred by the statute of limitations. Our Court has previously stated, " '[o]nce a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.' " *Waddle*, 331 N.C. at 85-6, 414 S.E.2d at 28-9 (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985), and citing *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974)). Plaintiff, then, bore the burden of showing that her action was brought within the three-year statute of limitations that applies to an intentional and/or negligent infliction of emotional distress claim.

In the case *sub judice*, plaintiff presented a forecast of evidence which tended to show that defendant Martin engaged in the following acts of sexual harassment:

1. In the fall of 1988—more than three years before this action was commenced—defendant Martin held plaintiff's arms while defendant Arrowood pulled plaintiff's bra and shirt up.

2. On an unspecified occasion, defendant Martin stated that he would like to have sex with plaintiff on a satellite dish.

3. On another unspecified occasion, defendant Martin told plaintiff that he had had sex with a woman on a riding lawn mower.

4. On yet another unspecified occasion, defendant Martin and defendant Arrowood pulled plaintiff's legs apart, stating that they were going to "eat" her.

Moreover, there were other incidents of a non-sexual nature, which occurred at various unspecified occasions, involving defendant Martin: (1) horseplay during which rubber pieces where thrown at and amongst members of plaintiff's department; (2) employees, including defendant Martin, drinking on the job; (3) defendant Martin placing mayonnaise or grease in plaintiff's gloves; (4) defendant Martin and three other employees telling plaintiff that "she'd got so low she'd come to a black person"; (5) defendant Martin "shooting a birdie" at plaintiff outside of the plant; and (6) defendant Martin calling plaintiff a deadbeat and unfit mother. These incidents culminated in plaintiff's hyperventilating and passing out in October 1989, resulting in plaintiff being placed in the care of a psychologist and a psychiatrist.

The facts in the instant case are quite similar to those found in *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 437 S.E.2d 519 (1993), *appeal dismissed and disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994), and defendant Martin's attempts to distinguish the two cases are unpersuasive. In *Bryant*, as we must in the case at bar, this Court found that the tort of intentional infliction of emotional distress "does not come into existence until the continued conduct of the defendant causes extreme emotional distress," 113 N.C. App. at 12, 437 S.E.2d at 525, and further that "[i]f all of the elements of the tort were not present, then no cause of action for intentional infliction of emotional distress existed at that time." *Id.* at 13, 437 S.E.2d at 526. "As our courts have frequently noted, '[i]n no event can a statute of limitations begin to run until the plaintiff is entitled to institute [an] action. . . . 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*. . . .' " *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 594, 284 S.E.2d 188, 191 (1981), *decision modified on other grounds*, 306 N.C. 364, 293 S.E.2d 415 (1982) (quoting *Raftery v. Construction Co.*, 291 N.C. 180, 183-4, 230 S.E.2d 405, 407 (1976)). In *Bryant*, as in the instant action, the plaintiff's cause of action did not accrue until the actions of the defendant did, in fact, cause severe emotional distress.

In this case, prior to the October 1989 incident in the plant human resources director's office, there was insufficient evidence of the third prong of the intentional infliction claim and, therefore, no separate and complete tort was present prior to that time. Further, this Court has previously stated, "[e]vidence of the elements of the tort would not be barred by the statute of limitations in section 1-52(5) unless the elements were part of a completely separate cause of action that was in fact time barred." *Bryant*, 113 N.C. App. at 13, 437 S.E.2d at 526. As the Court sagely noted in *Bryant*, "[t]o parse out the intentional or reckless acts of a defendant due to the statute of limitations, when those acts have not yet caused the damage required to complete the tort, would allow persons to continually harass potential plaintiffs until such time as the emotional damage became severe enough to cause the extreme result, then exclude much of their conduct giving rise to the damage." *Id.*

We find that plaintiff's evidence does create a genuine issue of material fact as to whether defendant Martin's behavior was so extreme or outrageous, so as to result in serious emotional harm. Accordingly, the question of defendant's liability for his behavior is a matter for the jury to decide. *Brown*, 93 N.C. App. at 436, 378 S.E.2d at 235; *Hogan*, 79 N.C. App. at 491, 340 S.E.2d at 121. Further, we also find, as we did in *Bryant*, that plaintiff's cause of action did not accrue until October 1989 when plaintiff's severe emotional distress manifested itself, and therefore, this action against defendant Martin, filed in February 1992, is not barred by the statute of limitations. As such, the trial court erred in granting defendant's Motion for Summary Judgment.

In light of this determination, the trial court's finding that plaintiff could not sustain a claim for relief against defendant Martin was also error. Consequently, the trial court's decision must be reversed.

Reversed.

Judges MARTIN, JOHN C. and McGEE concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. ROBERT ANCEL WILLIAMSON, DEFENDANT.

No. COA95-571

(Filed 16 April 1996)

1. Evidence and Witnesses § 222 (NCI4th)— failure of defendant to appear for trial—evidence of flight—admissibility

The trial court did not err in admitting evidence of defendant's failure to appear for trial, since such evidence was admissible as evidence of flight.

Am Jur 2d, Evidence §§ 532 et seq.

2. Evidence and Witnesses § 2485 (NCI4th)— violation of sequestration order—witness's testimony properly excluded

The trial court did not err in refusing to allow defendant to present the testimony of his girlfriend, since the court's decision was made after hearing the testimony of the witness as to her extended presence in the courtroom in violation of a sequestration order and her discussion of the testimony of defendant's accomplices with defendant's sister.

Am Jur 2d, Trial §§ 245 et seq.

3. Criminal Law § 808 (NCI4th)— erroneous instruction—error cured by guilty verdict on lesser offense

Though the trial court erred in instructing the jury with respect to assault with a deadly weapon with intent to kill inflicting serious injury by failing to require a specific intent by defendant separate from that of his accomplices, defendant was not prejudiced, since error in the instruction was rendered harmless by the jury's verdict convicting plaintiff of the lesser offense of assault with a deadly weapon inflicting serious injury, which required no finding of specific intent.

Am Jur 2d, Trial § 1434.

4. Criminal Law § 796 (NCI4th)— requested instruction unsupported by evidence

The trial court did not err in denying defendant's requested instruction that "Defendant cannot be convicted of a crime if he was merely present when others committed it," since it was clear

from the evidence that defendant was an active participant in the events rather than a mere bystander.

Am Jur 2d, Trial § 724.

5. Criminal Law § 869 (NCI4th)— additional jury instructions—consultation with parties not required

Where the trial court, in response to the jury's questions, merely repeated and clarified instructions it had previously given in its original charge to the jury and did not add substantively to those instructions, the instructions were not "additional instructions" as contemplated by N.C.G.S. § 15A-1234(c), and it was unnecessary for the trial court to consult with the parties and give them an opportunity to be heard prior to reinstructing the jury.

Am Jur 2d, Trial § 1481.

Appeal by defendant from judgments entered 7 October 1994 by Judge James U. Downs in Jackson County Superior Court. Heard in the Court of Appeals 30 January 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Lorinzo L. Joyner, for the State.

Mark R. Melrose, P.A., for defendant-appellant.

MARTIN, John C., Judge.

In true bills of indictment returned by the grand jury, defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury upon Willie Benjamin Spurlock, Jr., in violation of G.S. § 14-32(a), and with the felonious breaking or entering of a residence occupied by Benjamin Spurlock and his brother, Clifton Spurlock, in violation of G.S. § 14-54(a). Defendant entered pleas of not guilty.

At trial, the State offered evidence which, in summary, tended to show that on 30 March 1994, Christopher Milo and Jason Abrams went to see defendant to ask him if he would help them beat up Clifton Spurlock. Mr. Milo and Mr. Abrams had been hired by Lisa Sabbarth to beat up Clifton Spurlock because he had allegedly failed to pay her for some marijuana. Defendant agreed to help them.

The three men travelled together by car to the Spurlock residence. Mr. Abrams and Mr. Milo talked to Clifton Spurlock, pretend-

ing to be asking directions. After receiving the directions, the three men got in their car and left. They drove for approximately a half a mile, then parked their car along the side of the road, and returned on foot to the Spurlock residence. Mr. Milo carried a wooden baseball bat; Mr. Abrams carried a small metal bar, which defendant had brought.

They were greeted at the front door by Benjamin Spurlock, Clifton Spurlock's brother. After some small talk, Mr. Abrams asked for a glass of water. When Benjamin Spurlock went to get the glass of water, Clifton Spurlock and Clifton Spurlock's friend, Gina Bryson, could be seen inside the one room house watching television. Benjamin Spurlock returned with the glass of water, which he gave to Mr. Abrams. After taking a drink, Mr. Abrams threw the remaining water in Benjamin Spurlock's face, then hit him repeatedly with his fists and ran into the house. A scuffle ensued inside between Mr. Abrams, Clifton Spurlock and Ms. Bryson, during which Mr. Abrams struck Clifton Spurlock on the arm with the metal bar and Ms. Bryson hit Mr. Abrams with a shovel. Outside, defendant struck Benjamin Spurlock with his fists and Mr. Milo beat Benjamin Spurlock with the baseball bat.

Eventually, defendant, Mr. Milo and Mr. Abrams withdrew from fighting and left the Spurlock residence, returning to their car. They left the metal bar at the house and threw the bat into the woods. They were apprehended by police as they drove away. Benjamin Spurlock suffered a broken neck, a broken finger and hearing and vision problems as a result of the attack. The State also offered evidence tending to show that defendant failed to appear at the session of superior court at which his case was first scheduled for trial and that an order for his arrest was issued.

Defendant presented no evidence. The jury found defendant guilty of the lesser included offenses of assault with a deadly weapon inflicting serious injury and nonfelonious breaking or entering. He appeals from judgments entered upon the jury verdicts imposing concurrent terms of imprisonment.

Defendant brings forward eighteen separate assignments of error directed to the trial court's rulings admitting and excluding evidence, its rulings with respect to the sufficiency of the evidence to support the charges against him, its control of the jury arguments, its instruc-

tions to the jury, and its award of attorneys' fees to defendant's counsel. We find no prejudicial error in defendant's trial.

I.

[1] Defendant contends he is entitled to a new trial because the court erroneously allowed, over defendant's objection, a deputy clerk of court for Jackson County to testify that defendant did not appear at the session of superior court for which his case was first scheduled for trial. Defendant contends this evidence should have been excluded because it was not relevant to the issue of his guilt and was very prejudicial. We disagree.

When evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" it is relevant, G.S. § 8C-1, Rule 401, and is generally admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (1992). Evidence of flight is a relevant circumstance to be considered by the jury, together with other circumstances, in determining the issue of a defendant's guilt. *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. Self*, 280 N.C. 665, 187 S.E.2d 93 (1972). However, even though relevant, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (1992). "The decision whether to exclude relevant evidence under Rule 403 'is a matter left to the sound discretion of the trial court.' " *State v. Collins*, 335 N.C. 729, 734-35, 440 S.E.2d 559, 562 (1994), (quoting *State v. Stager*, 329 N.C. 278, 308, 406 S.E.2d 876, 893 (1991)).

We find no abuse of discretion in the trial court's admitting evidence of defendant's failure to appear for trial. One reasonable view of this evidence is that defendant, by failing to appear for trial, attempted to avoid prosecution for the offenses charged. Similar evidence has been held sufficient to support an instruction on flight. *See State v. Robertson*, 57 N.C. App. 294, 291 S.E.2d 302, *disc. review denied*, 305 N.C. 763, 292 S.E.2d 16 (1982).

Defendant also attempts to argue that the trial court erred by instructing the jury with respect to defendant's alleged "flight." However, his argument does not correspond to any assignment of error contained in the record on appeal. The scope of appellate review on appeal is confined to those issues presented by assignments of error set out in the record on appeal. N.C.R. App. P. 10(a).

Thus, the matter of the trial court's jury instruction on flight is not properly before this Court. *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992); *State v. Burton*, 114 N.C. 610, 442 S.E.2d 384 (1994). In any event, we find no error in the trial court's instructions with respect to flight. *Robertson*, 57 N.C. App. 294, 291 S.E.2d 302.

II.

[2] Defendant also contends that the trial court deprived him of his constitutional right to present witnesses in his own defense by refusing to allow him to present the testimony of his girlfriend, Angela Hopper. The assignment of error is based on the trial court's ruling declining to grant defendant relief from a sequestration order entered upon defendant's motion. After the State completed its evidence, defendant moved to be permitted to present Ms. Hopper's testimony, even though she had not been listed as a potential witness for defendant and had been present in the courtroom during at least a portion of the State's evidence. The court conducted a *voir dire* hearing at which Ms. Hopper testified that she had been present during the testimony of two witnesses and had discussed other testimony with defendant's sister who had been present in the courtroom throughout the trial.

A ruling on matters involving the sequestration of witnesses is within the sound discretion of the trial judge, and is not reviewable absent a showing of abuse of discretion. *State v. Stanley*, 310 N.C. 353, 312 S.E.2d 482 (1984). A discretionary ruling is reversible only where it is shown that it could not have been the result of a reasoned decision. *State v. Gay*, 334 N.C. 467, 434 S.E.2d 840 (1993). Sequestration of witnesses deters them from tailoring their testimony based upon the testimony of earlier witnesses and aids in detecting testimony that is less than candid. *State v. Harrell*, 67 N.C. App. 57, 312 S.E.2d 230 (1984). Where a sequestration order has been violated, the trial court has discretion to exclude the witnesses' testimony. *State v. Williamson*, 110 N.C. App. 626, 430 S.E.2d 467 (1993).

The trial court's decision in this case was made after hearing the testimony of Ms. Hopper as to her extended presence in the courtroom in violation of the sequestration order and her discussion of the testimony of Mr. Abrams and Mr. Milo with defendant's sister. The trial court also heard arguments from both counsel and noted that the sequestration order had been entered upon defendant's motion. Under these circumstances, the ruling was not an abuse of discretion. This assignment of error is overruled.

III.

[3] By several assignments of error, defendant contends the trial court committed reversible error in its instructions to the jury with respect to the State's theory of defendant's guilt based on the doctrine of acting in concert. Specifically, he contends that the instructions and subsequent reinstructions given to the jury on acting in concert as applicable to the offense of assault with a deadly weapon with intent to kill inflicting serious injury were incorrect and relieved the State of its burden of proving that defendant had the requisite specific intent to kill Benjamin Spurlock, necessary for conviction of the offense.

Under the doctrine of acting in concert, where a single crime is involved, one may be found guilty of committing the crime if he is at the scene acting together, in harmony or in conjunction with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime. *State v. Abraham*, 338 N.C. 315, 346, 451 S.E.2d 131, 147 (1994). Where multiple crimes are charged,

> when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators . . . . As a corollary to this latter principle, one may not be criminally responsible as an accomplice under the theory of acting in concert for a crime which requires a specific intent, unless he, himself, is shown to have the requisite specific intent . . . . In other words, one may not be found guilty of a crime requiring a specific intent under the acting in concert doctrine unless the crime was part of the common purpose or the specific intent on the part of the one sought to be charged is independently proven (citations omitted).

Id.

In this case, the trial court instructed the jury, in pertinent part:

> Now, Members of the Jury, as to the business of whether the Defendant is guilty of assault with a deadly weapon with the intent to kill, inflicting serious injury, the State must prove the following things and all these things beyond a reasonable doubt. First, that the Defendant, or someone with whom he was acting in concert, assaulted Willie Benjamin Spurlock with a ball bat without justification or excuse. Second, that the Defendant,

> individually, or someone with whom the Defendant was acting in concert, used a deadly weapon . . . . *Third, the State must prove beyond a reasonable doubt that the Defendant, or someone with whom he was acting, had the specific intent to kill the victim* . . . . Fourth, that the Defendant, or someone with whom he was acting in concert, inflicted serious injury upon Mr. Benjamin Spurlock (emphasis added).

The trial court also gave a similar instruction in response to a request by the jury to redefine acting in concert and the elements of felonious assault.

We agree with defendant that the italicized portion of the instruction was susceptible of interpretation by the jury as permitting defendant's conviction of the specific intent crime of assault with a deadly weapon with intent to kill inflicting serious injury based upon the specific intent to kill harbored, presumably, by Mr. Milo or Mr. Abrams and without finding such a specific intent to kill independently on the part of defendant. However, any error in the instruction was rendered harmless by the jury's verdict convicting defendant of the lesser offense of assault with a deadly weapon inflicting serious injury, which requires no finding of specific intent. *State v. Berkley*, 56 N.C. App. 163, 287 S.E.2d 445 (1982). Defendant made no showing that the verdict of guilty of the lesser crime was affected by the error with respect to the greater. We are satisfied that no prejudicial error was committed by the trial court.

IV.

[4] Defendant also assigns error to the denial of his requested instruction that "the Defendant cannot be convicted of a crime if he was merely present when others committed it . . . ." When a requested instruction is not supported by the evidence, it is not error for the court to refuse to give such an instruction. *State v. Haskins*, 60 N.C. App. 199, 298 S.E.2d 188 (1982). In this case, the evidence tended to show that defendant knew that he was going to help his friends "scare" someone, and that he provided one of the weapons, the metal pipe, just in case it was needed to carry out their purpose. The evidence also showed that defendant helped to beat up Benjamin Spurlock, that he entered the Spurlock residence without the consent of the occupants, and that he subsequently grabbed and held Clifton Spurlock so that Mr. Abrams could escape from the house. Thus, it is clear that defendant was an active participant in the events, rather than a mere bystander, and the trial court did not err in refusing the requested instruction.

V.

[5] Defendant also contends the trial court erred when it responded to questions by the jury without first consulting with counsel and permitting defendant an opportunity to be heard concerning the instructions the court gave. Defendant argues the trial court acted in violation of G.S. § 15A-1234(c). We disagree.

After the jury retires to deliberate, the trial court may give appropriate additional instructions in response to an inquiry of the jury made in open court. N.C. Gen. Stat. § 15A-1234(a) (1988). Before the court gives such additional instructions, however, it "must inform the parties generally of the instructions [it] intends to give and afford them an opportunity to be heard." N.C. Gen. Stat. § 15A-1234(c) (1988).

Review of the instructions given by the trial court in response to the jury's questions discloses that the trial court merely repeated and clarified instructions it had previously given in its original charge to the jury, and did not add substantively to those instructions. Thus, the instructions were not "additional instructions" as contemplated by G.S. § 15A-1234(c) and it was unnecessary for the trial court to consult with the parties and give them an opportunity to be heard prior to reinstructing the jury. *See State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994); *State v. Buchanan*, 108 N.C. App. 338, 423 S.E.2d 819 (1992); *State v. Farrington*, 40 N.C. App. 341, 253 S.E.2d 24 (1979). This assignment of error is overruled.

VI.

Defendant assigns error to the alleged failure of the trial court to reasonably compensate his court-appointed counsel, in violation of G.S. § 7A-458, though he fails to argue how his defense may have been prejudiced, or how he may otherwise be entitled to appellate relief, by reason of the award of fees to his counsel. In any event, the amount of an award of indigent counsel fees is clearly discretionary with the trial court and we specifically decline defendant's entreaty to hold the award in this case to be arbitrary, capricious or unreasonable.

VII.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit. Defendant received a fair trial, free from prejudicial error.

No error.

Judges EAGLES and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. TONY RAY McGIRT

No. COA95-701

(Filed 16 April 1996)

Searches and Seizures § 82 (NCI4th)— lawfully detained vehicle—driver ordered to exit—no unreasonable search and seizure—reasonable grounds to believe driver armed and dangerous

The Fourth Amendment's proscription of unreasonable searches and seizures was not violated when the police ordered defendant, the driver of a lawfully detained vehicle, to exit the vehicle; furthermore, the evidence could support a conclusion that the officer had reasonable grounds to believe the defendant might be armed and dangerous so that a "pat-down" of defendant for weapons was lawful, even though he was cooperative and presented no obvious signs of carrying a weapon, since defendant was a convicted felon, a fact known to the arresting officer; defendant was under investigation by the arresting officer for drug trafficking; and it was the officer's experience that cocaine traffickers "normally carry weapons."

Am Jur 2d, Searches and Seizures §§ 51, 78.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

Judge SMITH dissenting.

Appeal by defendant from judgment entered 20 April 1995 in Scotland County Superior Court by Judge B. Craig Ellis. Heard in the Court of Appeals 21 February 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth Rouse Mosley, for the State.

Doran J. Berry and Ronnie M. Mitchell for defendant-appellant.

GREENE, Judge.

Tony Ray McGirt (defendant) appeals from the trial court's order, denying his motion to suppress a gun found during a search of his person. After the trial court denied defendant's motion, defendant pled guilty to possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14-415.1, and carrying a concealed weapon, in violation of N.C. Gen. Stat. § 14-269.

It is undisputed that on 27 October 1994 at about 9:30 a.m., Deputy Tommy Butler (Butler) of the Scotland County Sheriff's Department stopped defendant, who was driving a vehicle on a public street, for failure to wear his seat belt. Butler testified at the suppression hearing that he "had been looking for [defendant's] vehicle the previous night" and was "conducting an investigation on [defendant] for cocaine trafficking." Butler knew, at the time, that defendant had prior felony drug convictions and in his experience knew that "cocaine traffickers normally carry weapons."

The trial court found that after stopping defendant for the seat belt violation, Butler asked defendant for his license, which defendant produced, and asked defendant to exit the vehicle. Defendant complied with Butler's request and exited the vehicle, at which point Butler asked defendant if he had anything on him. Defendant answered, "No," and raised his hands. Butler then frisked defendant and felt a hard object, which Butler believed to be a gun. Butler asked defendant to identify the object, to which defendant replied that it was a pistol and handed the .22 caliber pistol to Butler. At that point, Butler arrested defendant for carrying a concealed weapon and possession of a weapon by a felon.

The trial court then concluded as a matter of law that Butler had probable cause to stop defendant's vehicle, because of defendant's seat belt violation. The trial court further concluded that Butler possessed "reasonable grounds to ask the defendant to exit his car and had [a] reasonable articulable suspicion which gave him the right to pat down the defendant for weapons." Finally, the trial court concluded that the search did not violate defendant's statutory or federal or state constitutional rights. Accordingly, defendant's motion to suppress was denied.

The issues are (I) whether Butler had the authority to ask defendant to exit his car; and if so, (II) whether Butler had a right to "pat-down" defendant for weapons.

We first note that the stop of defendant's vehicle for a seat belt violation may have been pretextual and thus unconstitutional. *State v. Morocco*, 99 N.C. App. 421, 427, 393 S.E.2d 545, 548 (1990) (police may not make stops "merely on the pretext of a minor traffic violation"). The nature of the stop, however, has not been raised by the defendant as a basis to support his motion to suppress.

I

Assuming that the stop itself was lawful, did the officer have the authority to ask the defendant to exit the automobile? This requires a weighing of the interest of the State in the personal safety of the officer and the interest of the defendant against an intrusion into his personal liberty. *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11, 54 L. Ed. 2d 331, 336-37 (1977). Because face-to-face confrontations outside the automobile "reduce[] the likelihood that the officer will be the victim of an assault" and because exiting the automobile is not a "serious intrusion upon the sanctity of the person," the Fourth Amendment's proscription of unreasonable searches and seizures is not violated when the police order the driver of a lawfully detained vehicle to exit the vehicle. *Id.*

II

A routine traffic stop, as we have in this case, is similar to a street encounter for investigation and does not justify in every instance a protective search for weapons. "To allow the police to routinely search for weapons in all such instances would . . . constitute an 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile." 3 Wayne R. LaFave, *Search and Seizure* § 5.2(h), at 96 (3d ed. 1996) (quoting *United States v. Robinson*, 471 F.2d 1082 (D.C. Cir. 1972)). The police are, however, permitted to conduct a "pat-down" for weapons once the defendant is outside the automobile, and if the circumstances give the police reasonable grounds to believe that the defendant may "be armed and presently dangerous." *Mimms*, 434 U.S. at 112, 54 L. Ed. 2d at 337; *United States v. Robinson*, 471 F.2d 1082, 1097 (D.C. Cir. 1972), *rev'd on other grounds*, 414 U.S. 218, 38 L. Ed. 2d 427 (1973) (note 6, Court only addresses full custodial arrest situation); *see Terry v. Ohio*, 392 U.S. 1, 20-22, 20 L. Ed. 2d 889, 905-06 (1968).

In this case, the evidence can support a conclusion that the officer had reasonable grounds to believe the defendant might be armed and dangerous. The evidence reveals: (1) defendant was a convicted felon and this was known to the arresting officer; (2) defendant was under investigation, by the arresting officer, for cocaine trafficking; and (3) it was the officer's experience that cocaine traffickers "normally carry weapons." The totality of these circumstances, even in the face of a cooperative defendant who presents no obvious signs of carrying a weapon, supports the conclusion of the trial court and thus its order denying the motion to suppress.

Although argued by the State as an alternative basis to support the order of the trial court, we do not reach the question of whether the defendant consented to the search, because the State asserts no cross-assignment of error to support that argument in this Court. N.C. R. App. P. 10(d).

Affirmed.

Judge LEWIS concurs.

Judge SMITH dissents.

Judge SMITH dissenting.

I respectfully dissent, as I do not think the police officer in this case had reasonable grounds to believe that defendant was "armed and presently dangerous," *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 54 L. Ed. 2d 331, 337 (1977), nor do I think the State has met its burden of showing that defendant consented to the frisk or search of his person or that the search was otherwise lawful. *See State v. Hunt*, 37 N.C. App. 315, 246 S.E.2d 159, *disc. review denied*, 295 N.C. 736, 248 S.E.2d 865 (1978).

Defendant first argues the trial court erred in concluding that the deputy had reasonable grounds to ask defendant to exit the car and to subsequently search defendant's person. While an officer may ask a vehicle occupant to exit the car as a precautionary measure for his own protection, he may not search the person unless there exists objective facts justifying a conclusion that the subject could be armed and presently dangerous. *Mimms*, 434 U.S. at 112, 54 L. Ed. 2d at 337. The burden is upon the State to show that "a reasonably prudent man in the circumstances would be warranted in the belief that his safety

or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909 (1968); *see State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992).

Here, the officer stopped defendant for failure to wear his seat belt. The majority holds that, because the officer knew defendant was a convicted felon under investigation for cocaine trafficking and that it was the officer's experience that cocaine traffickers "normally carry weapons," the officer was justified in doing a pat-down search of defendant. However, in this case defendant was not stopped for suspicious drug activity. Rather, he was stopped for failure to wear his seat belt. He cooperated fully with Officer Butler and offered no threat or resistance. In addition, Officer Butler's testimony that he pats down everyone he stops, "no matter what it's for," supports the conclusion that he did not believe defendant was presently dangerous in this case. In my opinion, the State has not shown that a reasonably prudent man in the same circumstances would have been warranted in the belief that defendant was armed and *presently* dangerous. For this reason, I disagree with the majority's holding that the evidence supports a conclusion that there were reasonable grounds to justify the officer's pat-down search of defendant.

In its brief, the State argues that, even if there were no objective facts to support the officer's conclusion that defendant was presently dangerous, defendant's Fourth Amendment rights were not violated, because by his conduct defendant consented to the search of his person. With this contention, I disagree.

It is well settled that a consensual search is constitutionally permissible as long as the consent is given freely and voluntarily, without coercion, duress or fraud. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973); *State v. Powell*, 297 N.C. 419, 255 S.E.2d 154 (1979). To be voluntary, it must be shown that waiver was "not given merely to avoid resistance." *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227, 36 L. Ed. 2d at 862-63; *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

In this case, the only facts regarding defendant's consent as found by the trial court were that, when the deputy asked defendant whether he had anything on him, defendant replied, "No" and raised

his hands. The trial court made no conclusion as to what defendant intended by raising his hands. The State argues that, by raising his hands, defendant implied "to an objectively reasonable person that he was *voluntarily* consenting to a pat-down search." I disagree.

The State's evidence that defendant raised his arms is insufficient to demonstrate the voluntariness of defendant's consent to be searched for weapons. At best, it shows an equivocal action which does not clearly evince consent to search. In order to meet its burden in this case, the State was required to show that defendant's consent was " 'unequivocal and specific,' " *Little*, 270 N.C. at 239, 154 S.E.2d at 65 (quoting *Judd v. United States*, 89 U.S. App. D.C. 64, 66, 190 F.2d 649, 651). To meet this burden, the State must establish by "clear and positive testimony that consent was so given." *Id.*

In this case, defendant could have been raising his arms as an act of submission to Officer Butler. Defendant's gesture could have been nothing more than a shrug, in which case, he was certainly not giving consent to search. Lastly, the gesture may have been an indication to the officer that defendant posed no physical threat. From the record before us, defendant's motivation for the gesture is simply unknown. Examining the totality of the circumstances in this case, I am of the opinion that the State has not met its burden of proving defendant consented to be searched. In such case, there is a presumption against waiver of fundamental constitutional rights. *State v. Vestal*, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971). For the foregoing reasons, I dissent from the majority's opinion.

WILLIAM CHARLES RYALS, PLAINTIFF-APPELLANT v. HALL-LANE MOVING AND STORAGE COMPANY, INC., RAYMOND JENSEN, HOLLY LEE WILLIAMS AND FRANK MAHONEY, DEFENDANTS-APPELLEES

No. COA95-546

(Filed 16 April 1996)

1. Process and Service § 195 (NCI4th)— motion to dismiss for insufficiency of process—three affidavits—presence of affiants not required—timeliness of affidavits

The trial court did not err in admitting three affidavits offered by defendants to support their Rule 12(b) defenses made in their

answer as to insufficiency of process and service of process, since there was no requirement that the three affiants be present in court to offer testimony; the affidavits submitted eleven days before the hearing on their Rule 12(b) defenses were timely presented; and there was abundant, competent evidence to support the trial court's findings that defendants had not been properly served with the complaint.

Am Jur 2d, Process §§ 330 et seq.

2. Appearance § 1 (NCI4th)— filing answer—engaging in discovery—no general appearance

Defendants were not estopped from contesting jurisdiction and service of process because they filed and served an answer containing the defense of lack of personal jurisdiction and engaged in discovery since such actions alone are not considered a general appearance within the meaning of N.C.G.S. § 1-75.7(1) which would give the court jurisdiction over defendants without serving a summons upon them.

Am Jur 2d, Appearance §§ 1 et seq.

Appeal by plaintiff from Order entered 6 February 1995 by Judge William A. Creech in Wake County Superior Court. Heard in the Court of Appeals 22 February 1996.

E. Gregory Stott for plaintiff-appellant.

Smith & Holmes, P.C., by Robert P. Holmes, for defendants-appellees Williams and Mahoney.

JOHNSON, Judge.

On 20 April 1991, at approximately 2:45 p.m., plaintiff William Charles Ryals was a passenger in a 1990 Dodge vehicle, which was being operated by his daughter, Jo Ann Ryals Moore. Ms. Moore was traveling in an easterly direction on Interstate 40 near Mebane, North Carolina, when her vehicle was struck by a vehicle driven by defendant Holly Lee Williams. The vehicle was owned by defendant Frank Mahoney.

As a result of this collision, plaintiff suffered severe and painful injuries. Plaintiff was transported to the University of North Carolina-Chapel Hill (UNC) Hospitals, where he received extensive treatment. Plaintiff has also received other medical attention as a result of these injuries.

On 14 March 1994, plaintiff instituted this civil action, requesting monetary damages from defendants Hall-Lane Moving and Storage Company, Inc., Raymond Jensen, Holly Lee Williams, and Frank Mahoney. Summons was returned by the Sheriff of Union County, indicating that both defendants Williams and Mahoney had been properly served. However, on 20 April 1994, defendants Williams and Mahoney filed a document denominated "Motions and Answer of Defendants, Williams and Mahoney," which denied any negligence on their behalf and asserted several defenses, including insufficiency of process, insufficiency of service of process, and lack of personal jurisdiction. No affidavits were filed in support of defendants Williams and Mahoney's Motions and Answer until 9 January 1995.

Subsequently, defendants Williams and Mahoney undertook extensive discovery in regards to plaintiff, and defendants Hall-Lane Moving and Storage Company, Inc. and Raymond Jensen. Thereafter, this matter came on for hearing before Judge William A. Creech during the 20 January 1995 civil session of Wake County District Court. On 6 February 1995, an Order was entered, dismissing plaintiff's action against defendants Williams and Mahoney for lack of personal jurisdiction and insufficient service of process.

Plaintiff gave Notice of Appeal to this Court on 14 February 1995 and, thereafter, properly perfected said appeal. Plaintiff raised seven Assignments of Error on appeal. However, plaintiff abandoned Assignments of Error 3 and 4 and their corresponding arguments in his brief. Thereafter, plaintiff's Motion to Withdraw Assignment of Error 6, and abandon Question Presented VI and the corresponding Argument VI was allowed by this Court. Thus, those Assignments of Error and their corresponding arguments will not be addressed herein.

[1] Plaintiff assigns as error the trial court's admission of the affidavits of Millicent Francis Lane, Kara Lane and Holly Lee Williams over his objections. First, plaintiff takes issue with the fact that these affiants were not in court and, therefore, not subject to cross-examination. We find plaintiff's argument, in this regard, to be unpersuasive.

A party may assert the defenses of insufficiency of process and insufficiency of service of process in its responsive pleading or by motion. N.C. Gen. Stat. § 1A-1, Rule 12(b) (1990). These defenses, "whether made in a pleading or by motion, . . . [are to] be heard and determined before trial on application of any party, unless the judge

orders that the hearing and determination thereof be deferred until the trial." N.C. Gen. Stat. § 1A-1, Rule 12(d). And if it is determined that there was no valid service of process, the court acquires no jurisdiction over defendant. *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138, *reh'g denied*, 285 N.C. 597 (1974).

Affidavits, and not oral testimony, are the preferred mode of testimony in pretrial motion and defense hearings. *See Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 300 S.E.2d 241, *disc. review denied*, 308 N.C. 387, 302 S.E.2d 250 (1983). Moreover, our Supreme Court has continued to allow the use of affidavits to prove non-service. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977).

In the instant case, the trial court scheduled a preliminary hearing to address defendants Williams and Mahoney's Rule 12(b) defenses which were contained in their Answer. Defendants Williams and Mahoney submitted three affidavits in support of their defenses— each of which showed that defendant Williams had never lived at 1701 Lake Lee Drive in Monroe; and that defendant Mahoney had lived at that address for approximately two years, until vacating the residence on or before 17 December 1993 and moving to 305 Bay Street in Monroe.

Plaintiff's reference to authority which supports his argument against the use of the three affidavits is readily distinguishable from the instant case— notably, they all refer to the propriety of the use of affidavits at trial. In line with North Carolina case law, we find that there was no requirement that the three affiants be present in court to offer testimony. *See Lowder*, 60 N.C. App. 699, 300 S.E.2d 241.

As to plaintiff's contention that the three affidavits submitted by defendants Williams and Mahoney were untimely, and therefore, inadmissible, again, we cannot agree. Plaintiff is correct in noting that Rule 6 of the North Carolina Rules of Civil Procedure provides that, "[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion." N.C. Gen. Stat. § 1A-1, Rule 6(d). However, plaintiff's efforts to liken the Rule 12(b) defenses contained in defendants Williams and Mahoney's Answer to a motion are unpersuasive.

Sections (a) and (b) of Rule 7 of our Rules of Civil Procedure clearly delineate the difference between pleadings—an answer in this case, and motions. *See* N.C. Gen. Stat. § 1A-1, Rule 7(a), (b) (1990). It follows, therefore, that a 12(b) defense contained in an answer is not

the same as a 12(b) defense raised in a motion. As such, affidavits filed in support of a 12(b) defense contained in an answer is not governed by the time constraints found in Rule 6(d). Affidavits submitted by defendants Williams and Mahoney eleven days before the hearing on their Rule 12(b) defenses were, therefore, timely presented.

Plaintiff also argues that the trial court erred in the findings of facts contained in its 6 February 1995 Order. Incorporating his previous arguments, plaintiff specifically contends that there was not adequate evidence to support the trial court's finding of fact that defendants Williams and Mahoney had not been properly served with his Complaint. As with plaintiff's above-mentioned arguments, we also find that this argument is without merit.

When a party challenges the trial court's findings of fact, this Court's sole task upon review is to determine whether those findings are supported by competent evidence. *Nationsbank of North Carolina v. Baines*, 116 N.C. App. 263, 269, 447 S.E.2d 812, 815 (1994) (quoting *Harris v. Walden*, 314 N.C. 284, 289, 333 S.E.2d 254, 257 (1985)). Further, "our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). Our Court stated in *General Specialties Company, Inc. v. Nello L. Teer Company* that the trial court "has the duty to pass upon the credibility of the witnesses who testify. [The trial judge] decides what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom. The appellate court cannot substitute itself for the trial court in this task." 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979), *quoted in Nationsbank*, 116 N.C. App. at 269, 447 S.E.2d at 815.

In the instant case, the trial court made numerous findings of fact in support of its conclusions of law: (1) that 1701 Lake Lee Drive, Monroe, North Carolina was neither defendant Williams' nor defendant Mahoney's dwelling house or usual place of abode; (2) that the only purported service of process on defendants Williams and Mahoney was when Corporal Francel left a copy of the Summons and Complaint with a minor at the 1701 Lake Lee Drive address on 22 March 1994; and (3) that, on 22 March 1994, defendants Mahoney and Williams resided at 305 Bay Street, Monroe, North Carolina.

Although there may have been contrary evidence presented at the hearing on defendants' 12(b) defenses which tended to show that the serving officer had reason to believe that valid service had been affected upon defendants Williams and Mahoney, we find abundant, competent evidence to support the trial court's findings of fact to the contrary. Consequently, these findings of fact will not be disturbed by this Court on appeal. Plaintiff's urgings to the converse must, therefore, fail.

[2] Plaintiff's final argument on appeal is that the trial court erred in the signing and entry of the 6 February 1995 Order, dismissing his Complaint against defendant Williams and Mahoney. Plaintiff's argument is based on a number of divergent lines of reasoning, but seems to be based on a theory of equitable estoppel. Essentially, plaintiff contends that defendants Williams and Mahoney should be estopped from contesting jurisdiction and service of process, because they filed and served an Answer and engaged in discovery. We cannot agree.

It is well-settled that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid, even though a defendant had actual notice of the lawsuit. *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E.2d 355 (1982); *Park v. Sleepy Creek Turkeys*, 60 N.C. App. 545, 299 S.E.2d 670 (1983). Generally, without valid service, the court cannot exercise jurisdiction over a person. *Sink*, 284 N.C. 555, 202 S.E.2d 138; *see* N.C. Gen. Stat. § 1-75.6 (1983). However, a person may submit himself to the jurisdiction of the court, if he makes a general appearance, even if the court has not already obtained jurisdiction over defendant by serving him with process. N.C. Gen. Stat. § 1-75.7(1) (1983); *M. G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 370 S.E.2d 431 (1988). A defendant, however, cannot submit himself to the jurisdiction of the court or waive the defense of lack of personal jurisdiction by filing an answer which contains the defense of lack of personal jurisdiction, *see* N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (requiring jurisdictional defenses to be raised in pre-answer motions or answers), and/or engaging in discovery, *see Wiles v. Construction Co.*, 34 N.C. App. 157, 159, 237 S.E.2d 297, 298 (1977) (holding that defendant had not waived the defense of insufficiency of service of process by taking plaintiff's deposition, after answer raised the jurisdictional defect) (citing *Neifeld v. Steinberg*, 438 F.2d 423 (3rd Cir. 1971); *Kerr v. Compagnie de Ultramar*, 250 F.2d 860 (2nd Cir. 1958)), *rev'd on other grounds*, 295 N.C. 81, 243 S.E.2d 756 (1978). When a defendant

promptly alleges a jurisdictional defense as his initial step in an action, he fulfills his obligation to inform the court and his opponent of possible jurisdictional defects. In this instance, there is no deception upon the court or defendant's opponent, and therefore, there can be no prejudice to his opponent, for defendant has alerted the opponent and given him the opportunity to cure any jurisdictional defect from the outset.

Defendants Williams and Mahoney, in the case *sub judice*, filed a timely Answer in which they promptly alerted plaintiff to the jurisdictional problems therein. In addition, defendants engaged in discovery. Plaintiff had ample opportunity to cure any jurisdictional defects and was not unfairly prejudiced by defendants' actions. Law nor equity permits such actions alone to be considered a general appearance within the provisos of section 1-75.7(1) of the General Statutes, thereby giving the court jurisdiction over defendants Williams and Mahoney without serving a summons upon them in the instant action. Thus, plaintiff's argument of waiver or equitable estoppel must fail.

In light of the foregoing, the trial court's decision is affirmed.

Affirmed.

Judges MARTIN, JOHN C. and McGEE concur.

CITY OF CONCORD, A MUNICIPAL CORPORATION, PLAINTIFF-APPELLANT v. DUKE POWER COMPANY, A DOMESTIC CORPORATION, DEFENDANT-APPELLEE

No. 9419SC264

(Filed 16 April 1996)

Energy § 5 (NCI4th)— electric service from two suppliers—date property annexed as determination date—plaintiff as sole supplier

In deciding which electric supplier had the right to serve a commercial customer under the Electric Act of 1965, the "determination date" was when the customer's premises were annexed by plaintiff city in 1986 rather than when the area that included defendant power company's line within 300 feet of the customer's premises was annexed in 1992. Where plaintiff city was the only

supplier entitled to provide electric service to the customer on the determination date, plaintiff had the exclusive right to provide such service, and the customer did not have a choice between the city and defendant power company. N.C.G.S. § 160A-331(1)(b); N.C.G.S. §§ 160A-332(a)(5) and (7).

Am Jur 2d, Electricity, Gas and Steam §§ 27 et seq.; Energy §§ 57-76.

Appeal by plaintiff from order entered 3 January 1994 by Judge A. Leon Stanback in Cabarrus County Superior Court. Heard in the Court of Appeals 9 January 1996.

Poyner & Spruill, L.L.P., by Ernie K. Murray and Deborah L. Edwards, for plaintiff-appellant.

Jeff D. Griffith, III and Hartsell, Hartsell & Mills, P.A., by Fletcher L. Hartsell, Jr., for defendant-appellee Duke Power Company.

JOHNSON, Judge.

Plaintiff City of Concord (City) is a municipal corporation in Cabarrus County chartered under the laws of North Carolina. Plaintiff owns and operates an electrical distribution system through which it transmits, sells and generally provides electric service to electric power customers. Defendant Duke Power Company (Duke) is a public utility corporation engaged in furnishing electric service to customers in the Piedmont area of North Carolina, including Cabarrus County.

The parties stipulated to the following facts: At the time of the institution of the present civil action, a building was being constructed at 1025 North Central Drive in Concord, North Carolina on a lot owned by David Catchpole (the Catchpole Premises). At the time of the institution of this civil action, the Catchpole Premises initially required, but had not yet received, permanent electric service.

The Catchpole Premises are located wholly within 300 feet of an area annexed into the City of Concord on 30 June 1986 (1986 annexation area). Plaintiff has a conductor for the distribution of electricity located inside the 1986 annexation area that was there on that area's effective date of annexation. The Catchpole Premises is located wholly within 300 feet of the aforementioned Concord conductor.

Duke has a conductor for distribution of electricity located inside an area annexed into the City of Concord on 30 June 1992 (1992 annexation area). This Duke conductor was in existence a number of years prior to the annexation of the 1986 annexation area. The 1992 annexation area is contiguous to the 1986 annexation area.

The Catchpole Premises is located wholly or partially within 300 feet of the Duke conductor in the 1992 annexation area, but the Catchpole Premises is not located wholly or partially within 300 feet of any other Duke conductor.

David Catchpole has requested that Duke provide permanent electric service to the Catchpole Premises. Duke was providing temporary electric service to the Catchpole Premises at the request of Mr. Catchpole. Both Duke and plaintiff City contend that they have the right to provide the Catchpole Premises with electric service.

Plaintiff brought an action seeking a declaratory judgment adjudging the City of Concord to have the exclusive right to provide electric service to certain commercial premises belonging to Mr. Catchpole. A temporary restraining order and preliminary injunction were entered in favor of plaintiff restraining Duke from serving the premises. Later, at trial before Judge A. Leon Stanback, Jr., an order was entered adjudging Duke to have the right to serve the Catchpole Premises and ordering the City to dismantle its service to the premises. Plaintiff City appeals.

Plaintiff argues that the trial court erred in determining that North Carolina General Statutes § 160A-332(a)(5) (1994) gave Duke Power Company service rights to the Catchpole Premises. The trial judge summarized the issue in this case as whether the first annexation date, which excluded a pre-existing electrical supplier's conductor, prevented that conductor from acquiring any service rights set forth in the Electric Act, or does a conductor, upon annexation, acquire such rights as are given them under section 160A-332. The trial judge's order adopted the latter version, i.e., that the conductor, upon annexation, acquired rights pursuant to section 160A-332.

The service rights of electric suppliers in a municipality is provided for in North Carolina General Statutes §§ 160A-331 through 160A-338 (1994). Sections 160A-331 and 160A-332 are the pertinent portions of the Electric Act in this appeal.

N.C. Gen. Stat. § 160A-331 entitled "Definitions" provides:

Unless the context otherwise requires, the following words and phrases shall have the meanings indicated when used in this Part:

(1) The "determination date" is

a. April 20, 1965, with respect to areas within the corporate limits of any city as of April 20, 1965;

b. The effective date of annexation with respect to areas annexed to any city after April 20, 1965;

c. The date a primary supplier comes into being with respect to any city first incorporated after April 20, 1965.

. . .

(2) "Line" means any conductor located inside the city for distributing or transmitting electricity . . . .

. . .

(3) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished. . . .

N.C. Gen. Stat. § 160A-332 entitled "Electric service within city limits" provides:

(a) The suppliers of electric service inside the corporate limits of any city in which a secondary supplier was furnishing electric service on the determination date (as defined in G.S. 160A-331(1)) shall have rights and be subject to restrictions as follows:

. . .

(5) Any premises initially requiring electric service after the determination date which are located wholly or partially within 300 feet of the primary supplier's lines and are located wholly or partially within 300 feet of the secondary supplier's lines, as such suppliers' lines existed on the determination date, may be served by either the secondary supplier or the primary supplier, whichever the consumer chooses, and no other supplier shall thereafter furnish service to such premises, except with the written consent of the supplier then servicing the premises.

. . .

> (7) Except as provided in subdivisions (1), (2), (3), (5), and (6) of this section, a secondary supplier shall not furnish electric service within the corporate limits of any city unless it first obtains the written consent of the city and the primary supplier.

The Electric Act of 1965 was designed to prevent or reduce litigation regarding electric services rights between suppliers. *Duke Power Co. v. City of Morganton*, 90 N.C. App. 755, 756, 370 S.E.2d 54, 55, *disc. review denied*, 323 N.C. 364, 373 S.E.2d 544 (1988); *Electric Service v. City of Rocky Mount*, 285 N.C. 135, 141, 203 S.E.2d 838, 842 (1974). The language in the statute is clear and unambiguous. *Morganton*, 90 N.C. App. at 758, 370 S.E.2d at 56.

In determining whether the trial court erred in the order, we must first determine whether the determination date in this case is 30 June 1986 or 30 June 1992, and whether the Duke conductor was a "line" as statutorily defined on the determination date. The statute defines the "determination date" as "[t]he effective date of annexation with respect to areas annexed to any city after April 20, 1965[.]" N.C. Gen. Stat. § 160A-331(1)b.

Plaintiff's argument is that the determination date is 30 June 1986, the date upon which the area containing the Catchpole Premises was annexed to the City. Plaintiff contends that because the Catchpole Premises was annexed on 30 June 1986 that this date is the determination date, and that it has the right to provide electric service because Duke did not have a line until 1992 because the Duke conductor was not located inside the city. Plaintiff further contends that section 160A-332(a)(5) requires that the lines be wholly or partially within 300 feet of the premises; that the lines must have existed on the determination date; that the Duke lines did not exist when the premises were annexed in 1986—the determination date; therefore, defendant is prohibited from servicing the premises by section 160A-332(a)(7) which provides:

> Except as provided in subdivisions (1), (2), (3), (5) and (6) of this section, a secondary supplier shall not furnish electric service within the corporate limits of any city unless it first obtains the written consent of the city and the primary supplier.

Subsections (1), (2), (3) and (6) of section 160A-332(a) are not applicable in this appeal, and subsection (5) is not applicable under plaintiff's present argument because on the date that the premises

were annexed in 1986, the determination date, Duke did not have a qualifying line inside the City that was wholly or partially within 300 feet of the premises.

Defendant's argument, however, is that the only limitation is the 300 feet requirement, and that section 160A-331(1)b makes the determination date applicable only when the areas had competing electric suppliers. Defendant contends that because the City was the only supplier with a line in the 1986 annexed area encompassing the Catchpole Premises and located wholly within 300 feet of the premises, that there was no need to seek a "determination date" or apply a "determination date" because there were no competing lines in the annexed area until 1992.

Accordingly, Duke argues that when the City annexed Duke's adjoining lines within city limits in 1992, the determination date for potentially conflicting service lines existed as of 30 June 1992 and defendant acquired its 300 feet service rights within the City pursuant to section 160A-332(a)(5). The consumer was then given the choice, and Mr. Catchpole selected Duke; thus, the trial court did not err. Defendant argues that this Court's decision in *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 385, 317 S.E.2d 701, 705 (quoting N.C. G.S. § 160A-331), *disc. review denied*, 312 N.C. 82, 321 S.E.2d 895 (1984), supports this position—"Born upon the effective date of annexation, statutorily defined as 'the determination date,' are the rights of 'primary' and 'secondary suppliers.' "

Additionally, defendant argues that the legislature did not intend to limit service to the annexed area. Defendant argues that the City's interpretation would allow the City to defeat the statutory right given to secondary suppliers within the city limits by using its annexations to exclude lines of electric suppliers, and then later bring those lines into the City at a later date; thereby, effectively eliminating their statutory right as suppliers. Further, defendant argues that it eliminates the consumer's right to choose his own electric supplier, an interpretation that the legislature did not intend.

After a careful review of the cases on this topic, we find that none of the cases give definitive guidance on section 160A-331(1)b and "the effective date of annexation with respect to areas annexed to any city . . . ." Thus, we look to the language of section 160A-331(1) which states that the determination date occurs on the date that the area was annexed. Moreover, in *Morganton*, 90 N.C. App. 755, 370 S.E.2d 54, this Court stated that the determination date is when the property

or premises become annexed. Accordingly, as the Catchpole Premises was annexed on 30 June 1986 and the City was the only supplier entitled to provide services on the determination date, the trial court erred in holding that the determination date was the date that the Duke conductor was annexed in 1992.

Therefore, for the reasons listed herein, this action is reversed and remanded.

Reversed and remanded.

Judges JOHN and SMITH concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. DORIS JEAN STAMPER, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF MELVIN STAMPER, DECEASED, DEFENDANTS

No. COA95-1000

(Filed 16 April 1996)

1. **Insurance § 528 (NCI4th)— UIM coverage—interpolicy stacking—circumstances where permitted**

Interpolicy stacking is available only when the coverage is nonfleet and the vehicle covered is of the private passenger type; therefore, the trial court did not err in determining that no UIM benefits were provided through decedent's business auto policy because the covered vehicle was not a "private passenger motor vehicle" as required for interpolicy stacking under N.C.G.S. § 20-279.21(b)(4).

Am Jur 2d, Automobile Insurance § 322.

Combining or "stacking" uninsured motorist coverages provided in single policy applicable to different vehicles of individual insured. 23 ALR4th 12.

2. **Insurance § 532 (NCI4th)— family-owned vehicle exclusion—void as against public policy**

The trial court did not err in ruling that the family-owned vehicle exclusion in a policy insuring a vehicle not involved in the accident is void as against public policy pursuant to the Motor Vehicle Safety and Financial Responsibility Act.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

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

Appeal by defendants and cross-appeal by plaintiff from declaratory judgment entered 20 July 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 25 March 1996.

This action for declaratory judgment arose from an accident in which decedent Melvin Stamper was killed in an accident with an underinsured motor vehicle on 3 December 1992. The facts of the case are not in dispute. Plaintiff sought a determination of the underinsured motorist (UIM) coverage available through several auto policies it issued, including decedent's business auto policy (BAP), and a personal auto policy (PAP) issued to defendant Doris Stamper, decedent's sister and a member of his household.

The trial court filed a declaratory judgment on 20 July 1995, finding that (1) there should be underinsured motorist coverage in the amount of $50,000 available through the PAP, subject to a set off for liability coverage received by the Estate of Melvin Stamper, "there being coverage through this policy despite the existence of an 'owned auto' exclusion in the underinsured motorist coverage section, the Court finding that such an exclusion violates the mandates of the North Carolina Motor Vehicle Financial Responsibility Act, including N.C. Gen. Stat. § 20-279.21(b)(4) [1993]," and (2) there should be no underinsured motorist coverage through the BAP, because the covered vehicle "did not come within the statutory definition of a 'private passenger motor vehicle' as required by N.C. Gen. Stat. § 20-279.21(b)(4) [1993] for interpolicy stacking."

Defendants appeal the trial court's ruling that there was no underinsured motorist insurance coverage provided through the BAP. Plaintiff cross-appeals and argues that the trial court erred by ruling that the family-owned auto exclusion in a policy insuring a vehicle not involved in the accident is void as against public policy pursuant to the Motor Vehicle Financial Responsibility Act.

Battle, Winslow, Scott & Wiley, P.A., by Samuel S. Woodley and M. Greg Crumpler, and Chichester Law Office, by Gilbert W. Chichester, for defendant appellants and cross-appellees.

Thompson, Barefoot & Smyth, L.L.P., by Theodore B. Smyth, for plaintiff appellee and cross-appellant.

ARNOLD, Chief Judge.

[1] Defendants argue that the trial court erred in determining that no UIM benefits were provided through decedent's BAP because the covered vehicle was not a "private passenger motor vehicle" as required for interpolicy stacking under N.C. Gen. Stat. § 20-279.21(b)(4) (1993). We disagree.

The statute governing the stacking of UIM policies was amended and became effective in 1991, and decedent's BAP was issued in 1992. Therefore, the UIM statute as amended applies in this case. However, the Supreme Court's most recent pronouncements regarding UIM interpolicy stacking interpret the pre-1991 version of the statute. *See Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 461 S.E.2d 317, *reh'g denied*, 342 N.C. 197, 463 S.E.2d 237 (1995); *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996).

The pre-1991 UIM stacking statute provided, in part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-131.36(9) and (10).

G.S. § 20-279.21(b)(4) (emphasis added). Interpreting this pre-1991 version of the statute, the Supreme Court recently held that "no reason exists to distinguish between fleet and nonfleet policies under interpolicy stacking. . . . Under *Sutton*, the interpolicy stacking of fleet and nonfleet policies is permissible." *Isenhour*, 341 N.C. at 602-03, 461 S.E.2d at 320 (citing *Sutton v. Aetna Casualty & Surety Co.*,

325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989)).

Defendants concede that although the BAP covered a nonfleet vehicle, it did not cover a private passenger motor vehicle, but they contend that the holding in *Isenhour* allows interpolicy stacking of the BAP and PAP under the amended statute. We find this argument unpersuasive. The Court in *Isenhour* based its conclusion on *Sutton*, which interpreted the pre-1991 statute to allow both interpolicy and intrapolicy stacking and reasoned that

> [i]f the paragraph under consideration were intended to require both interpolicy and intrapolicy stacking, an exception for fleet policies would be anticipated. This exception would preclude any argument that UIM limits in a fleet policy were figured by multiplying the UIM coverage by the number of vehicles ordinarily insured in the fleet.

Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 266, 382 S.E.2d 759, 763-64, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The *Sutton* Court indicated that because both intrapolicy and interpolicy stacking were allowed, the purpose of the fleet policy exception was to limit *intrapolicy* stacking to nonfleet policies only. "If . . . the legislature intended to provide for no intrapolicy stacking at all, there would be less need for a fleet policy exception." *Id.*, 382 S.E.2d at 764.

However, the conclusion of the *Isenhour* Court, based on *Sutton*, is inapplicable to the statute as amended in 1991. The 1991 act amending G.S. § 20-279.21(b)(4) was entitled "AN ACT TO PROHIBIT THE STACKING OF UNINSURED AND UNDERINSURED MOTORIST COVERAGE," 1991 N.C. Sess. Laws ch. 646, and the Supreme Court has since noted that "[t]he 1991 amendment to N.C.G.S. § 20-279.21(b)(4) appears to prohibit intrapolicy stacking." *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 113 n.2, 418 S.E.2d 221, 223 n.2 (1992). This Court has also held that "[b]ased upon our reading of the statute, discussions of the amendments in previous cases, and the title of the Act, the main purpose of the 1991 amendments to G.S. 20-279.21(b)(4) appears to be the prohibition of intrapolicy stacking of UIM coverage." *Honeycutt v. Walker*, 119 N.C. App. 220, 224, 458 S.E.2d 23, 26, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 236 (1995). *See also Maryland Casualty Co. v. Smith*, 117 N.C. App. 593, 597, 452 S.E.2d 318, 320, *disc. review denied*, 340 N.C. 114, 456 S.E.2d 316 (1995) (determining that the 1991 amendments regarding UIM coverage allowed only interpolicy stacking).

Even so, the amended statute retained the fleet policy exception:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy; provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58- 40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

G.S. § 20-279.21(b)(4) (emphasis added).

If, as the *Sutton* Court reasoned, the purpose of the fleet policy exception in the pre-1991 statute was to prevent intrapolicy stacking of fleet policies, the prohibition of intrapolicy stacking *altogether* in the statute as amended in 1991 would eliminate the need for the fleet policy exception. Nonetheless, the exception remains. Thus, applying the reasoning of *Sutton* and reading the plain language of the statute as amended, we conclude that interpolicy stacking is available only when the coverage is nonfleet and the vehicle covered is of the private passenger type. *See Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 497-501, 467 S.E.2d 34, 43-45 (1996); *Aetna Casualty and Surety Co. v. Fields*, 105 N.C. App. 563, 567, 414 S.E.2d 69, 71, *disc. review denied*, 331 N.C. 383, 417 S.E.2d 788 (1992). Although there is no dispute that the BAP covered a nonfleet vehicle, defendants concede that the vehicle was not of the private passenger type, and therefore interpolicy stacking is unavailable.

Defendants argue alternatively that the proviso regarding stacking is limited to the one sentence in the statute addressing private passenger motor vehicles, and therefore that sentence is inapplicable in this case. Defendants ask us to excise that sentence and read the statute to "assume that when the sentence does *not* apply, the credit for liability insurance coverage paid may be applied against the UIM

limit in each policy to arrive at the total amount of the applicable UIM coverage." We are not persuaded that the legislature intended this conclusion, and we agree with the trial court that defendants' BAP cannot be stacked or otherwise applied to provide UIM coverage in this case.

[2] In its cross-appeal, plaintiff argues that the trial court erred by ruling that the family-owned vehicle exclusion in a policy insuring a vehicle not involved in the accident is void as against public policy pursuant to the Motor Vehicle Safety and Financial Responsibility Act. Plaintiff concedes that this Court has ruled against enforcement of the "family member" or "household-owned" exclusion, *see Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 115 N.C. App. 438, 444, 445 S.E.2d 79, 82 (1994), *aff'd in relevant part*, 341 N.C. 678, 462 S.E.2d 650 (1995); *Honeycutt v. Walker*, 119 N.C. App. 220, 458 S.E.2d 23, *disc. review denied*, 342 N.C. 192, 463 S.E.2d 236 (1995), and that if the Supreme Court affirms these decisions, the trial court did not err. Indeed, the Supreme Court recently affirmed this Court's decision in *Bray* with regard to the family-owned vehicle exclusion issue, holding that the "family member/household-owned vehicle exclusion for UM coverage is repugnant to the purpose of UM and UIM coverage and is therefore invalid." *Bray*, 341 N.C. at 684, 462 S.E.2d at 653.

Although *Bray* involved the pre-1991 version of the Financial Responsibility Act, the underlying public policy upon which the *Bray* Court based its decision was not affected by the 1991 amendments. Moreover, the Supreme Court denied discretionary review in *Honeycutt*, a case addressing the post-1991 version of the statute, in which this Court rejected the family-owned vehicle exclusion with regard to UIM coverage. *Honeycutt*, 119 N.C. App. at 223, 458 S.E.2d at 25.

Finally, although the *Bray* Court addressed only UM coverage, the Supreme Court recently applied the same reasoning to UIM coverage and found that the owned vehicle exclusion in UIM coverage is likewise against the public policy of the Financial Responsibility Act. *See Mabe*, 342 N.C. at 493, 467 S.E.2d at 41. Accordingly, the law on family-owned vehicle exclusions is clear, and plaintiff's argument is unpersuasive.

Affirmed.

Judges JOHNSON and EAGLES concur.

BILLY LAVERN CHANEY, JR. AND TAMMY M. CHANEY, CO-ADMINISTRATORS OF THE ESTATE OF BILLY LAVERN CHANEY, III; AND BILLY LAVERN CHANEY, JR. AND TAMMY M. CHANEY, INDIVIDUALLY, PLAINTIFFS-APPELLEES v. LORIA ANN SIMMONS YOUNG, INDIVIDUALLY; AND LORIA ANN SIMMONS YOUNG AND CHARLES LESTER LOCKWOOD, D/B/A C & B AUTO SALES AND SERVICE, DEFENDANTS-APPELLANTS

No. COA95-659

(Filed 16 April 1996)

1. Appeal and Error § 118 (NCI4th)— case decided on merits—denial of summary judgment motion not reviewable

When a case has been decided on the merits, a denial of a motion for summary judgment is not reviewable on appeal.

Am Jur 2d, Appellate Review §§ 169, 170.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. Evidence and Witnesses § 210 (NCI4th)— plaintiffs' misuse of seat belts—failure to secure child in car seat—evidence properly excluded

The trial court did not err in granting plaintiffs' motion *in limine* prohibiting any evidence regarding the misuse of seat belts by plaintiffs or any evidence relative to the failure of plaintiffs to secure the minor decedent in a child restraint system as required by then existing N.C.G.S. § 20-137.1, since the plaintiff mother's placing of the ten-month-old child in her lap and buckling the seat belt around both of them was tantamount to nonuse, and the statutory provisions prohibiting evidence of failure to use a seatbelt in a civil action were therefore applicable. N.C.G.S. §§ 20-137.1(d), 20-135.2A(d).

Am Jur 2d, Evidence § 463.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action. 46 ALR2d 103.

3. Damages § 178 (NCI4th)— death of ten-month-old child—$118,000 damage award—no excessive award

The trial court did not err in failing to grant defendant's motion for a new trial pursuant to N.C.G.S. § 1A-1, Rule 59(a)(6) on the basis that excessive damages were awarded under passion and prejudice, since there was no evidence that the trial court

abused its discretion by failing to grant a new trial on the ground that $118,000 for the death of a ten-month-old child in an automobile accident was an excessive award.

Am Jur 2d, Damages §§ 1017 et seq.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child. 61 ALR4th 413.

Appeal by defendant from judgment entered 3 February 1995 by Judge Joe Freeman Britt in Sampson County Superior Court. Heard in the Court of Appeals 29 February 1996.

Johnson & Parsons, P.A., by Dale P. Johnson and David H. Hobson, for plaintiffs-appellees.

Henson Henson Bayliss & Sue, L.L.P., by Gary K. Sue and Miriam S. Forbis, for defendants-appellants.

JOHNSON, Judge.

Plaintiffs instituted this action seeking damages for personal injury and the wrongful death of their minor son, Billy Chaney, III. Prior to trial, plaintiffs dismissed their claims against defendants Loria Ann Simmons Young and Charles Lester Lockwood d/b/a C & B Auto Sales and Service. The remaining defendant is Loria Ann Simmons Young, individually.

Evidence presented at trial tends to show the following. On or about 1 July 1993, plaintiff Billy L. Chaney, Jr. was operating a 1993 Saturn vehicle in an easterly direction on Rural Paved Road 1226 in Sampson County near Clinton, North Carolina. His wife, plaintiff Tammy M. Chaney, and their ten month old son, decedent Billy L. Chaney, III, were riding as passengers in the vehicle. At the time in question, Billy Chaney was driving approximately 30-35 miles per hour and was going around a slight curve, when the vehicle driven by defendant Loria Young entered the curve traveling in a westerly direction. Defendant drove her vehicle across the center line into the eastbound lane of travel and collided with the vehicle driven by Billy Chaney. Plaintiffs were injured and decedent Billy Chaney, III was killed as a result of the accident. The vehicle driven by Loria Young was owned by Loria Ann Simmons Young and Charles Lester Lockwood, d/b/a C & B Auto Sales and Service.

Plaintiffs presented evidence of a certified copy of a warrant and judgment in which defendant Loria Young pled guilty to unintentionally causing the death of the minor child while violating North Carolina General Statutes § 20-146 (1993), by failing to drive her vehicle upon the right half of the highway. Defendant also stipulated that the minor died as a proximate result of the automobile accident on 1 July 1993.

The jury returned verdicts of $118,000.00 for the estate of the minor decedent; $7,000.00 for Billy Chaney, Jr.; and $20,000.00 for Tammy Chaney. From the judgment entered upon the jury verdicts, defendant appeals.

Defendant brings forward three assignments of error. Defendant's first assignment of error is two-pronged: that the trial court erred in denying defendant's motion for summary judgment and that the trial court erred in granting plaintiffs' motion *in limine*.

[1] As to the trial court's denial of defendant's motion for summary judgment, this Court has held that when a case has been decided on the merits, a denial of a motion for summary judgment is not reviewable, and is therefore properly dismissed. *Duke University v. Stainback*, 84 N.C. App. 75, 77, 351 S.E.2d 806, 807, *aff'd*, 320 N.C. 337, 357 S.E.2d 690 (1987). Thus, we address the second prong of defendant's first assignment of error.

[2] The trial court granted plaintiffs' motion *in limine* prohibiting any evidence regarding the misuse of the seat belts by plaintiffs; or any evidence relative to the failure of plaintiffs to secure the minor decedent in a child restraint system as required by then existing North Carolina General Statutes § 20-137.1 (1993).

The relevant statute requires that children be placed in child restraints. *See* N.C. Gen. Stat. § 20-137.1, entitled "Child restraint systems required." The statute reads as follows:

> (a) Every driver who is transporting a child of less than six years of age shall have the child properly secured in a child passenger restraint system (car safety seat) which met applicable federal standards at the time of its manufacture. The requirements of this section may be met when the child is three years of age or older by securing the child in a seat safety belt.
>
> (b) The provisions of this section shall not apply: (i) to vehicles registered in another state or jurisdiction; (ii) to ambulances

> or other emergency vehicles; (iii) when the child's personal needs are being attended to; (iv) if all seating positions equipped with a child passenger restraint system or seat belts are occupied; or (v) to vehicles which are not required by federal law or regulation to be equipped with seat belts.
>
> . . .
>
> (d) No driver license points or insurance points shall be assessed for a violation of this section; nor shall a violation constitute negligence per se or contributory negligence per se nor shall it be evidence of negligence or contributory negligence.

Additionally, North Carolina General Statutes § 20-135.2A(d)(1993), "Seat belt use mandatory," provides in pertinent part:

> Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section.

Defendant argues that these sections are inapplicable because the issue is not the admissibility of the evidence regarding plaintiffs' failure to use a seat belt, but whether plaintiffs' improper use of the seat belt and knowledge of warnings renders the section inapplicable. Defendant contends that she should have been able to introduce evidence to show that plaintiffs were knowledgeable as to the operating procedures of their 1993 Saturn automobile; that they had actual knowledge of the instructions contained in said operator's manual as the same relates to seat belt operation; that plaintiffs had actual knowledge that the operator's manual contained express warnings against placing two persons within a one passenger restraint system (the seat belts), and despite actual knowledge of the express warnings of the extreme danger of placing two persons within one seat belt, plaintiff Tammy M. Chaney strapped her infant son in her lap in the front passenger seat with the shoulder strap encompassing both herself and her child; and that the positioning of plaintiff and her infant son was known to plaintiff Billy LaVern Chaney, Jr.

Defendant's argument, however, is unpersuasive. In our review of the relevant case law, we have not found any North Carolina cases involving the *improper use* of seat belts. However, there are cases involving nonuse. *See State Farm Mut. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989); *Miller v. Miller*, 273 N.C. 228, 160 S.E.2d 65 (1968); *Hagwood v. Odom*, 88 N.C. App. 513, 364 S.E.2d 190 (1988).

In *Miller*, a case decided prior to the enactment of these pertinent statutes, our Supreme Court rejected the seat belt defense as a bar to a claim of actionable negligence and to mitigate damages in an automobile accident. The Court stated that:

> It would be a harsh and unsound rule which would deny all recovery to the plaintiff, whose mere failure to buckle his belt in no way contributed to the accident, and exonerate the active tortfeasor but for whose negligence the plaintiff's omission would have been harmless.

Miller, 273 N.C. at 237, 160 S.E.2d at 73. Subsequently, this Court in *Hagwood*, 88 N.C. App. 513, 364 S.E.2d 190, interpreted the statute and granted plaintiff's motion *in limine* to exclude evidence of seat belt nonuse. Moreover, in *Holland*, 324 N.C. 466, 475-76, 380 S.E.2d 100, 106, a wrongful death action for the death of an minor child in an automobile accident, our Supreme Court stated: "the failure of Holland to restrain the child in a child restraint system in violation of the statute did not constitute actionable negligence and was therefore not the proximate cause of the wrongful death of the child."

We hold that improper use of a seat belt under the circumstances of this case is tantamount to nonuse. Therefore, contrary to defendant's contentions, the statutory provisions are applicable. Defendant's argument is disingenuous and seeks to circumvent the intent of the legislature and the clear language of the statute. The intent of the legislature is to prevent tortfeasors from using evidence of a failure to use or the improper use of a seat belt in any civil action or proceeding. The statutory provisions explicitly state that the "failure to wear a seat belt shall not be admissible in any . . . civil trial, action, or proceeding[,]" N.C. Gen. Stat. § 20-135.2A(d), "nor shall a violation constitute negligence per se or contributory negligence per se[,] nor shall it be evidence of negligence or contributory negligence." N.C. Gen. Stat. § 20-137.1(d). Hence, the trial court properly granted the motion *in limine*.

[3] Defendant next argues that the awarded damages were excessive, and the trial court erred as a matter of law in failing to grant her motion for a new trial pursuant to Rule 59(a)(6) of the North Carolina Rules of Civil Procedure on the basis that excessive damages were awarded under passion and prejudice. Rule 59(a)(6) provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues for . . . excessive or inadequate damages appearing to have been given under the influence of passion or prejudice[.]"

Whether to grant or deny a new trial is within the sound discretion of the trial court and may not be reviewed absent a manifest abuse of discretion. *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 427 S.E.2d 149 (1993). As there is no evidence to show that the trial court abused its discretion by failing to grant a new trial on the ground that $118,000.00 was an excessive award, defendant's argument is without merit.

Defendant's final argument is that the trial court erred in failing to grant her motion for a new trial pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure regarding the mistake and inadvertence in the instruction to the jury regarding the issue of plaintiffs' contributory negligence and the omission in the jury instructions regarding mitigation of damages based on plaintiffs' improper use of the seat belt and their knowledge of specific warnings against said improper use. For the reasons stated under our analysis of defendant's first argument, this argument is also without merit.

For the reasons stated herein, we find no error in the decision of the trial court in this case.

No error.

Judges MARTIN, JOHN C. and McGEE concur.

THEODORE HORTON AND VENERVIA EARLS, ADMINISTRATRIX OF THE ESTATE OF CLINTON B. EARLS, PLAINTIFFS, V. NEW SOUTH INSURANCE COMPANY, DEFENDANT

No. COA95-141

(Filed 16 April 1996)

1. Appeal and Error § 367 (NCI4th)— check attached to brief—no inclusion in record—no motion to amend record

The Court of Appeals did not take judicial notice of a check which was not properly part of the record but was physically attached to plaintiff's brief, since plaintiff should have initially proposed to the trial court that the check be included in the record or should have made a motion in the appellate court to amend the record to include the check.

Am Jur 2d, Appellate Review § 507.

2. Assignments § 2 (NCI4th)— unfair and deceptive trade practices—bad faith refusal to settle—breach of fiduciary duty—tortious breach of contract—personal claims not assignable

The trial court did not err in dismissing plaintiff estate's claims on the ground that they were not assignable, since it is well settled that claims for unfair and deceptive trade practices are not assignable, and plaintiff's claims for bad faith refusal to settle, breach of fiduciary duty, and tortious breach of contract were personal to plaintiff insured and therefore could not be assigned.

Am Jur 2d, Assignments §§ 7 et seq.

Assignability of claim in tort for damage to personal property. 57 ALR2d 603.

Assignability and survivability of cause of action created by civil rights statute. 88 ALR2d 1153.

3. Notice § 4 (NCI4th)— motions hearing—adequacy of notice

There was no merit to plaintiff estate's assertion that the trial court erred in proceeding with a motions hearing because notice of the hearing had not been served on its attorney, since defendant served plaintiffs with a notice of hearing on its motions to dismiss on 24 August 1994; the notice stated that the motion was scheduled as a standby motion during the 6 September 1994 session of court and that further instructions as to date and time of the hearing would be forthcoming from the trial court administrator's office; the motions calendar for 4 October 1994 listing the hearing date and time for defendant's motion was delivered to the estate's attorney by placement in his box at the courthouse; such notice was adequate; and any possible error committed in notifying the estate's attorney of this hearing was cured by the rehearing held by the court on its own initiative on 5 October 1994, at which hearing the estate's attorney was given the opportunity to be heard.

Am Jur 2d, Notice §§ 5-12, 32-40.

Record of instrument without sufficient acknowledgment as notice. 59 ALR2d 1299.

Appeal by plaintiff from order entered 7 October 1994 by Judge Henry V. Barnette, Jr. in Durham County Superior Court. Heard in the Court of Appeals 27 October 1995.

Michaux and Michaux, P.A., by Eric C. Michaux, for plaintiff-appellant.

Law Office of Robert E. Ruegger, for defendant-appellee.

LEWIS, Judge.

On 19 December 1990, the Estate of Clinton B. Earls (hereinafter "the Estate") filed suit against Theodore Horton, the driver of a car which struck and killed Clinton B. Earls on 26 May 1990. After Horton stipulated to liability and a jury awarded damages of $200,000, judgment was entered on 18 October 1993.

On 3 August 1994, the Estate and Horton filed this suit against defendant. Plaintiffs allege that Horton has assigned all of his rights and privileges arising out of this accident to the Estate, including rights he has pursuant to an automobile liability insurance policy (policy number 2811784) issued by defendant that was allegedly in effect at the time of the accident. By order entered 7 October 1994, the trial court dismissed all of the Estate's claims pursuant to N.C.R. Civ. P. 12(b)(1) and 12(b)(6) on the grounds that plaintiff Horton is the real party in interest and that the claims are not assignable. In this order, the trial court also dismissed plaintiff Horton's claim against defendant New South Insurance Company for breach of fiduciary relationship pursuant to Rule 12(b)(6). Only the Estate appeals.

[1] We first address an issue raised in the Estate's brief. The Estate asks us to take judicial notice of a check that is not properly part of the record but is physically attached to its brief. The record does not show that the Estate initially proposed to the trial court that this check be included in the record, nor is there evidence that the Estate moved, under N.C.R. App. P. 9(b)(5), to amend the record on appeal to have it included. The matter is not addressed in the order settling the record on appeal. If it had been and the trial court had refused to include the check, the Estate could have challenged the ruling in its petition for writ of certiorari filed on 2 February 1995. *See Craver v. Craver*, 298 N.C. 231, 237 n.6, 258 S.E.2d 357, 361 (1979). After the case has been docketed in the appellate court, the proper method to request amendment of the record, when the inclusion of the document has not been addressed by a trial court order settling the record

on appeal, is to make a motion in the appellate court to amend the record under N.C.R. App. P. 9(b)(5). The Estate has made no such motion.

The Estate's request in its brief that this Court take judicial notice of the check does not suffice. Motions to an appellate court may not be made in a brief but must be made in accordance with N.C.R. App. P. 37. *Morris v. Morris*, 92 N.C. App. 359, 361, 374 S.E.2d 441, 442 (1988). Even if the motion were properly made, we will not take judicial notice of a document outside the record when no effort has been made to include it. Furthermore, it was improper for the Estate to attach a document not in the record and not permitted under N.C.R. App. P. 28(d) in an appendix to its brief. *See* N.C.R. App. P. 9(a) (stating that review is solely upon the record and transcripts) and N.C.R. App. P. 28(b) (describing proper contents of appellant's brief). We will consider no argument relating to this check in this appeal.

[2] In support of its first assignment of error, the Estate asserts that the trial court erred in dismissing its claims on the ground that they were not assignable. We disagree. The claims alleged are for unfair and deceptive trade practices, bad faith refusal to settle, breach of fiduciary relationship, and tortious breach of contract. We address each.

It is well settled that claims for unfair and deceptive trade practices under N.C. Gen. Stat. section 75-1.1 are not assignable. *See Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992).

We hold that Horton's claims for bad faith refusal to settle, breach of fiduciary duty, and tortious breach of contract are not assignable. An action "arising out of contract" generally can be assigned. *See* N.C. Gen. Stat. § 1-57 (1983). However, assignments of personal tort claims are void as against public policy because they promote champerty. *See Charlotte-Mecklenburg Hosp. Auth. v. Georgia Ins. Co.*, 340 N.C. 88, 91, 455 S.E.2d 655, 657 (1995); *Investors Title Ins. Co.*, 330 N.C. at 688, 413 S.E.2d at 271. Personal tort claims that may not be assigned include claims for defamation, abuse of process, malicious prosecution or conspiracy to injure another's business, unfair and deceptive trade practices and conspiracy to commit fraud. *Investors Title Ins. Co., id.*

Plaintiffs have alleged that defendant acted willfully, wantonly, and in bad faith in refusing to settle the claims against Horton. By

these allegations they seek damages based on tort, not merely on simple breach of contract. *See Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 394-95, 331 S.E.2d 148, 154, *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985). A claim for tortious, bad faith refusal to settle is more akin to an unassignable claim for unfair and deceptive trade practices than to an assignable claim of breach of contract. The allegations of bad faith make this claim personal to Horton, the insured. It may not be assigned. *See Dillingham v. Tri-State Ins. Co.*, 381 S.W.2d 914, 918-19 (Tenn. 1964).

The claim for breach of fiduciary duty is also personal to the insured because it concerns a special relationship of trust and confidence. This claim cannot be assigned. *See Claire Murray, Inc. v. Reed*, 656 A.2d 822, 824 (N.H. 1995).

Horton's claims for tortious breach of contract are based on allegations that defendant violated its statutory duties under N.C. Gen. Stat. section 58-63-1 *et seq.* and that these violations converted the defendant's actions from simple breach of contract to tortious breach of contract. G.S. section 58-63-1 *et seq.*, which proscribes unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, is closely akin to G.S. section 75-1.1 *et seq.* G.S. section 58-63-1 *et seq.* does not confer a private right of action; however, breach of N.C. Gen. Stat. section 58-63-15 constitutes a Chapter 75-1.1 violation as a matter of law. *See Belmont Land and Investment Co. v. Standard Fire Ins. Co.*, 102 N.C. App. 745, 748, 403 S.E.2d 924, 926 (1991). We conclude that claims based on tortious acts arising from G.S. section 58-63-1 *et seq.*, like those under G.S. section 75-1.1, are unassignable personal torts. *Cf. Investors Title Ins. Co.*, 330 N.C. at 688-89, 413 S.E.2d at 271-72. Accordingly, Horton's claims for tortious breach of contract, as alleged, are not assignable.

Any purported assignment of Horton's claims for unfair and deceptive practices, bad faith refusal to settle, breach of fiduciary duty, and tortious breach of contract to the Estate is void; the claims were properly dismissed.

The Estate also argues that it is entitled to bring these claims independent of Horton's purported assignment, but the amended and restated complaint fails to allege any such independent basis. This reason is not stated in an assignment of error, and the trial court's order of dismissal did not address this issue. The record fails to show that a theory of recovery based on independent claims was presented to the trial court; it cannot be raised for the first time here. *See Topper*

v. Topper, 105 N.C. App. 239, 241, 412 S.E.2d 173, 174 (1992). " '[T]he law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court,' " *In re Housing Authority*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952) (citing *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836 (1934)), nor is this Court a remount station. We hold that these issues are not properly before us.

[3] In its second assignment of error, the Estate asserts that the trial court erred in proceeding with the motions hearing on 4 October 1994 because notice of the hearing had not been served on its attorney. On 24 August 1994, defendant served plaintiffs with a notice of hearing on its motion to dismiss. This notice stated that the motion was scheduled as a standby motion during the 6 September 1994 session of Civil Superior Court and that further instructions as to the date and time of the hearing would be forthcoming from the trial court administrator's office. The trial court found that the motions calendar for 4 October 1994, listing the hearing date and time for defendant's motion, was delivered to the Estate's attorney by placement in his box at the courthouse. Since this attorney was aware that the motion was pending and was on standby, the notice he received of the hearing date and time by means of the motions calendar was adequate. Further, any possible error committed in notifying the Estate's attorney of this hearing was cured by the rehearing held by the court, on its own initiative, on 5 October 1994, at which hearing the Estate's attorney was given opportunity to be heard. This assignment of error is without merit.

Affirmed.

Judges JOHN and SMITH concur.

MARY MARGARET MOORE, INDIVIDUALLY, AND JOHN TURNER WALSTON, IN HIS REPRESENTATIVE CAPACITY AS ADMINISTRATOR CTA OF THE ESTATE OF EVAN CHARLES FOWLER, DECEASED, PLAINTIFFS, V. DEBORAH LODGE STERN, GLEN ALLEN LODGE, WILLIAM FOWLER AND JON R. FOWLER, DEFENDANTS.

No. COA95-82

(Filed 16 April 1996)

1. Wills § 137 (NCI4th)— item in will as residuary clause

Item III of testator's will was a residuary clause where it stated that "I will, devise, and bequeath all of my property of

every sort, kind, and description, both real and personal, . . ."; regardless of the lack of prior devises or bequests, Item III disposed of all property not expressly disposed of by other provisions of the will and therefore operated as a residuary clause; and the item made a gift of all property without designating any particular parcel or article and so was not a specific devise and/or legacy rather than a residuary clause.

Am Jur 2d, Wills §§ 1539, 1547.

2. Wills § 164 (NCI4th)— anti-lapse statute—qualified issue—lapsed residuary gift

A lapsed one-half share of a residuary gift to testator's deceased brother-in-law passed to the qualified issue of testator's brother, the other residuary beneficiary who would have taken the lapsed share had he survived the testator. N.C.G.S. § 31-42(c)(2).

Am Jur 2d, Wills §§ 1671 et seq.

Appeal by defendants William Fowler and Jon R. Fowler from order entered 3 October 1994 by Judge Paul M. Wright in Wayne County Superior Court. Heard in the Court of Appeals 24 October 1995.

Plaintiffs filed this action on 22 June 1994 for a declaratory judgment seeking an interpretation of Evan Charles Fowler's will. Defendants William Fowler and Jon R. Fowler filed an answer joining in plaintiffs' petition for interpretation of the will. Defendants Deborah Lodge Stern and Glen Andrew Lodge were served but never answered or appeared, and they have taken no part in this appeal. (Although the official caption lists Glen Allen Lodge as a defendant, a review of the complaint filed and the facts of the case reveal Glen Andrew Lodge is the correct defendant.) Plaintiffs moved for summary judgment, and after a hearing, the trial court entered an order on 3 October 1994 granting summary judgment for the plaintiffs, declaring Mary Margaret Moore to be the sole heir to the estate of Evan Charles Fowler. From this order, defendants appeal.

Warren, Kerr, Walston, Hollowell & Taylor, L.L.P., by John Turner Walston and David E. Hollowell, for plaintiff-appellees.

Donald P. Eggleston for defendant-appellants.

McGEE, Judge.

The facts in this case are undisputed. Evan Charles Fowler (testator) died testate on 28 November 1992. He was predeceased by his wife, Norma Lodge Fowler, and he left no issue. By his will, dated 18 August 1966, testator left his entire estate to his wife. In the event his wife predeceased him, the will provided as follows:

Item III

> In case my wife, Norma Lodge Fowler, shall not survive me, or in the event it will be impossible to determine which of us died first, I make the following disposition of my Estate: I will, devise, and bequeath all of my property of every sort, kind, and description, both real and personal, unto my brother, Franklin Lee Fowler, and to the brother of my wife, Glen Allen Lodge, share and share alike, absolutely and in fee simple. I hereby recognize that there is another brother of mine named Carl Evans Fowler; however, I know his needs are already adequately provided for.

Both of testator's brothers predeceased him. Franklin Lee Fowler left a daughter, plaintiff Mary Margaret Moore, as his sole issue. Carl Evans Fowler left two sons, defendants William Fowler and Jon R. Fowler, as his sole issue. Testator's brother-in-law, Glen Allen Lodge, also predeceased him, leaving defendants Deborah Lodge Stern and Glen Andrew Lodge as his only issue.

The parties agree that pursuant to N.C. Gen. Stat. § 31-42(a) (1995 Cum. Supp.), Mary Margaret Moore receives one-half of the estate of the testator by substitution for her father, Franklin Fowler. The parties also agree that because Deborah Lodge Stern and Glen Andrew Lodge are not qualified issue as defined by N.C. Gen. Stat. § 31-42(b) (1995 Cum. Supp.), Evan Charles Fowler's testamentary gift to his brother-in-law, Glen Allen Lodge, lapses. Therefore, the sole issue on appeal is the disposition of the lapsed Lodge share.

Plaintiffs argue this case is controlled by the decision in *In re Will of Hubner*, 106 N.C App. 204, 416 S.E.2d 401, *disc. review denied* 332 N.C. 148, 419 S.E.2d 572 (1992). In *Hubner*, this Court held: "If the predecessor would have taken a share of a lapsed residuary gift, then the qualified issue may also participate in this lapsed gift." *Hubner*, 106 N.C. App. at 209, 416 S.E.2d at 403. Here, plaintiffs contend that Franklin Fowler, had he survived the testator, would have taken the lapsed share of Glen Allen Lodge pursuant to N.C Gen. Stat.

§ 31-42(c)(2) (1995 Cum. Supp.). Therefore, they argue that his daughter and qualified issue, Mary Margaret Moore, takes the lapsed share.

Defendants argue *Hubner* does not control because: 1) Item III of the will is not a residuary clause, and therefore *Hubner* is inapplicable to this case; and 2) even if Item III is a residuary clause, the *Hubner* decision should not be followed because the *Hubner* court incorrectly interpreted the legislative intent behind the 1987 amendment to N.C. Gen. Stat. § 31-42(a) and therefore incorrectly applied N.C. Gen. Stat. § 31-42 in that case. Under either argument, defendants claim the lapsed share passes by intestacy under N.C. Gen. Stat. § 31-42(c) (1995 Cum. Supp.), and that William Fowler and Jon Fowler, along with Mary Margaret Moore, each take one-third of the lapsed one-half share.

[1] As to defendants' argument that Item III is not a residuary clause, we disagree. A residuary clause is defined as "[a]ny part of the will which disposes of property not expressly disposed of by other provisions of the will." Black's Law Dictionary 1309 (6th ed. 1990). "It is well settled that no particular mode of expression is needed to constitute a residuary clause. All that is required is an adequate indication that a particular clause was intended to dispose of property which was not otherwise disposed of by the Will." *Betts v. Parrish*, 312 N.C. 47, 52-53, 320 S.E.2d 662, 665 (1984). Item III of the will states: "I will, devise, and bequeath *all of my property of every sort, kind, and description*, both real and personal, ..." (emphasis added). Although under the will no property will be distributed before the distribution made under Item III, this does not prevent Item III from being a residuary clause. Regardless of the lack of prior devises or bequests, Item III disposes of all property "not expressly disposed of by other provisions of the will" and therefore operates as a residuary clause. *See* Unif. Probate Code § 2-604, 8 U.L.A. 144 (cmt., Supp. 1995) ("A devise of 'all my estate,' or a devise using words of similar import, constitutes a residuary clause").

Defendants further contend that Item III is a specific devise and/or legacy rather than a residuary clause. "A specific legacy is a bequest of a specific article, distinguished from all others of the same kind, pointed out and labeled by the testator . . . ." *Edmundson v. Morton*, 103 N.C. App. 253, 256, 404 S.E.2d 890, 892 (1991), *affirmed*, 332 N.C. 276, 420 S.E.2d 106 (1992), *quoting Heyer v. Bullock*, 210 N.C. 321, 186 S.E. 356 (1936). Here, the will made a gift of all property

without designating any particular parcel or article. Item III is not a specific devise.

[2] As to defendants' second argument, they claim *Hubner* incorrectly interpreted the 1987 amendments to G.S. § 31-42. Defendants argue the legislative history shows the amendments were meant only to clarify the shares of a class gift available by substitution to qualified issue of deceased class members under G.S. § 31-41(a), and were not intended to give qualified issue a right to share by substitution in a lapsed residuary gift under G.S. § 31-42(c). However, even if we were to accept this argument, we are bound by the holding of *Hubner*. "[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

We hold that Item III is a residuary clause and that this case is controlled by the decision in *Hubner*. Since Mary Margaret Moore is the qualified issue of Franklin Fowler, who would have taken the lapsed one-half share had he survived the testator, she is entitled to the lapsed share. Because Ms. Moore also takes the one-half share willed to her father, she is the sole heir of the estate of Evan Charles Fowler. The decision of the trial court is affirmed.

Affirmed.

Judges GREENE and MARTIN, Mark D. concur.

STATE OF NORTH CAROLINA v. JEVON ANDREWS

No. COA95-572

(Filed 16 April 1996)

1. Assault and Battery § 115 (NCI4th)— instruction on lesser included offense of simple assault required

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was entitled to an instruction on the lesser included offense of simple assault where there is evidence that the victim was attacked by multiple assailants not acting in concert; defendant admitted that

he struck the victim with his fists but denied that he cut the victim; defendant presented other evidence that the victim was cut by another perpetrator; and the victim testified that he was unsure who actually cut him.

Am Jur 2d, Trial §§ 1427 et seq.

2. Assault and Battery § 115 (NCI4th)— multiple perpetrators—showing of lesser offense allowed

Where there are multiple alleged perpetrators, a defendant is entitled to offer a defense to the more serious charge by showing that his or her involvement was limited to that of a lesser offense.

Am Jur 2d, Trial §§ 1427 et seq.

Appeal by defendant from judgment and commitment entered 26 October 1994 by Judge Quentin T. Sumner in Jones County Superior Court. Heard in the Court of Appeals 30 January 1996.

Defendant, Jevon Andrews, appeals from his conviction of assault with a deadly weapon inflicting serious injury pursuant to G.S. 14-32(b).

At trial, the State's evidence tended to show that on the evening of 3 December 1993, Craig Sutton and two friends drove to the Handy Mart store in Maysville. Sutton got out of the car to purchase some beverages and saw defendant, whom he knew from a previous encounter, standing in front of the store with approximately eight other people. Sutton walked toward the store and defendant attacked Sutton, repeatedly striking Sutton with his fists. At this point, Sutton attempted to return to the car, but defendant allegedly came from behind and pushed Sutton down. Defendant and two others then allegedly kicked Sutton as he fell and lay on the ground.

Sutton then attempted to get up from the ground and get into the car. As he got up on his hands and knees, however, defendant allegedly pulled a "shiny thing" from his pants and severely wounded Sutton by making a "slashing" or "swiping" motion with the "shiny" object. The object was described by other witnesses as a "box cutter," a "straight razor" or a "razor blade." From this assault, Sutton was cut on his right side, having sustained a wound about three-quarters of an inch deep and eight inches long. Sutton's hand was "matted with blood" from clutching his side, and he suffered dizziness and burning pain in his side. The wound required nineteen staples to close and left a scar.

Sutton testified that he did not know who had actually cut him. To link defendant to the actual cutting, the State presented the testimony of Sutton's two friends who were in the car throughout the encounter. One friend, William Riley, testified that he was "positive" that defendant was the one who cut Sutton. Gene Taylor was also in the car and his testimony essentially corroborated William Riley's.

Defendant's evidence tended to show that defendant did not have a weapon and that he did not cut Sutton. Defendant testified that he hit Sutton multiple times with his fists, but that he did not have a knife and did not kick, push, or cut the victim. Defendant further testified that, after he hit Sutton, he saw Joseph Burton "cut" Sutton as he tried to crawl away. Defendant testified that he saw Sutton "holding his side" when he finally got up from the ground.

Emmett Jones, a defense witness, testified that he saw defendant hitting Sutton with his fists. Jones testified that he grabbed defendant, essentially stopped defendant from hitting Sutton, and thereafter saw Joseph Burton cut Sutton. Jones also testified that he did not see defendant use any kind of instrument on Sutton nor did he see any blood on Sutton.

Ms. Willie Ward, another defense witness, stated that she drove to the store that evening and observed a group of "boys fighting." Ward testified that she did not see the entire fight and that she did not "see all of that commotion down on the ground." Ward also testified that she did not see defendant with a weapon and that defendant walked away while the "boys" were still fighting.

Defendant was originally indicted 24 January 1994 on the charge of assault with a deadly weapon with intent to kill inflicting serious injury under G.S. 14-32(a). At trial, defendant requested an instruction on simple assault and the trial court denied defendant's request. The trial court charged the jury on three possible verdicts: (1) guilty of assault with a deadly weapon with intent to kill inflicting serious injury; (2) guilty of assault with a deadly weapon inflicting serious injury; or (3) not guilty. The jury found defendant guilty of the lesser charge of assault with a deadly weapon inflicting serious injury and the trial court sentenced defendant to an active term of ten years.

Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

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

EAGLES, Judge.

[1] Defendant argues that the trial court erred by refusing to grant his request for an instruction on the lesser included charge of simple assault. We agree.

The trial court's obligation to instruct on a lesser degree of the offense charged is solely determined by "the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). Where there is evidence that would permit a " 'jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater . . . ,' " due process requires that the lesser included offense instruction be given. *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 153 (1995). Failure to give a necessary lesser included offense instruction is reversible error. *State v. Fisher*, 318 N.C. 512, 524, 350 S.E.2d 334, 341 (1986).

Here, we conclude that a lesser included offense instruction on simple assault was required by the evidence before the jury. Defendant presented more evidence than his own mere denial to support a conclusion that he was not the person who cut Sutton. *Conaway*, 339 N.C. at 514, 453 S.E.2d at 841. On the evidence presented, a rational jury could certainly decide to convict defendant of simple assault only. Defendant, after all, essentially admitted to being guilty of the elements of simple assault. The only evidentiary dispute of substance was whether or not defendant was the person who actually cut Sutton causing serious injury.

On this issue, the evidence presented was widely divergent. The State presented evidence from William Riley, who testified that he was "positive" it was defendant who cut Sutton. Defendant, on the other hand, presented Emmett Jones, who testified essentially that he was certain that defendant did not cut Sutton and that Sutton was instead cut by another perpetrator, Joseph Burton. Defendant testi-

fied on his own behalf that he never cut Sutton and that Sutton was cut by Joseph Burton. Moreover, Sutton testified that he was unsure who actually cut him. Based on this evidence, we conclude that a jury could rationally conclude that defendant did not cut Sutton and that defendant was therefore only guilty of simple assault. Accordingly, we conclude that the trial court erred in failing to instruct the jury on the lesser included charge of simple assault.

[2] The State argues that a simple assault instruction is improper because Sutton suffered a serious injury. The State's argument is essentially that any time a victim suffers a serious injury, the assault in question, by definition, is no longer "simple." Were there only one perpetrator, we would agree with this argument; however, there is evidence here that the victim was attacked by multiple assailants not acting in concert. Where there are multiple alleged perpetrators, as there are here, a defendant is entitled to offer a defense to the more serious charge by showing that his or her involvement was limited to that of a lesser offense. The cases cited by the State are each distinguishable by the absence of evidence that anyone other than defendant was responsible for inflicting the serious injury. *See State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984); *State v. Joyner*, 295 N.C. 55, 64, 243 S.E.2d 367, 373 (1978); *State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988).

We note that the charge ultimately given should well include an instruction that simple assault is not an option if the jury determines that defendant was the person who cut Sutton. Here, because of the conflict in the evidence about who actually cut the victim, the trial court should have instructed the jury on simple assault. The trial court's failure to do so is reversible error.

Reversed.

Judges MARTIN, JOHN C., and MARTIN, MARK D., concur.

TRACIE L. PARKER, PLAINTIFF-APPELLEE, v. STATE OF NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant-Appellant

No. COA95-646

(Filed 16 April 1996)

1. Judgments § 154 (NCI4th)— default against State—full evidentiary hearing not required

The Industrial Commission is not required by N.C.G.S. § 1A-1, Rule 55(f) to conduct a full evidentiary hearing prior to entering default against the State in a claim under the Tort Claims Act.

Am Jur 2d, Judgments §§ 277, 282.

2. Judgments § 154 (NCI4th)— default judgment against State—requirement of findings of fact to support claim

Prior to entering default judgment against the State in an action under the Tort Claims Act, the Industrial Commission must make findings of fact to support the conclusion under N.C.G.S. § 1A-1, Rule 55(f) that a claim or right to relief has been established by the evidence.

Am Jur 2d, Judgments §§ 277, 282.

Appeal by defendant from Decision and Order entered 26 January 1995 by the North Carolina Industrial Commission, Thomas J. Bolch, Commissioner. Heard in the Court of Appeals 28 February 1996.

Michael E. Mauney and Charles Darsie for plaintiff-appellee.

Michael F. Easley, Attorney General, by Don Wright, Assistant Attorney General, for the State.

WYNN, Judge.

Defendant, the State of North Carolina Department of Transportation ("DOT"), appeals from a default judgment entered by the North Carolina Industrial Commission ("Commission") on a claim made under the State Tort Claims Act. We vacate and remand for additional findings.

On 25 January 1990, plaintiff Tracie Parker rode in an automobile driven by Mark Marochek on a portion of North Roxboro Road which had been undergoing a state-ordered road widening project. An accident occurred when the vehicle collided into a telephone pole at a point in which the right lane ended abruptly.

Ms. Parker filed a tort claim affidavit dated 16 September 1992 against DOT alleging negligence in failing to provide signs, markers, or devices to advise motorists 1) that the right lane would end, or 2) that a utility pole was directly in the path of the incomplete right lane. The affidavit was served on the Attorney General on 5 October 1992.

On 6 November 1992, thirty-two days after service on the defendant, Ms. Parker moved for entry of default. The Commission received her motion on 13 November 1992 and entered default by order filed 13 August 1993. In denying DOT's subsequent motion to set aside the default entry, Commissioner J. Randolph Ward revealed the procedural morass of this matter in an order filed 15 September 1993:

> Plaintiff filed her affidavit with the Commission on September 18, made her motion for default on November 13, and defendant's answer was filed on November 24. Since, under G.S. §143-297, a State Torts Claims act is initiated by filing the complainant's affidavit with the Commission, which then forwards a copy of the affidavit to the Attorney General, who then has "30 days after receipt of copy of same" to answer, the undersigned sent an inquiry to [the Attorney General] requesting "whether or not the State filed an answer in this matter within 30 days of receipt of the complaint . . . [and] perhaps a copy of the document showing your office's receipt stamp" to determine whether there was an extraordinary delay before actual receipt following the Commission's transmission of the affidavit on September 29. When no such excuse was forthcoming, the Order of Entry of Default was filed.

Thereafter, Ms. Parker moved for a final default judgment. On 21 July 1994, in a Decision and Order that determined only the amount of damages due to plaintiff, Deputy Commissioner Jan N. Pittman awarded Ms. Parker $81,000. DOT appealed to the Full Commission which increased Ms. Parker's damages to $96,000 but set-off from that amount a $50,000 settlement between Ms. Parker and Mr. Marochek. DOT appealed to this Court.

The issues before this Court are (I) whether the Commission is required to conduct a full evidentiary hearing before default judgment may be entered against the State under Rule 55(f) and (II) whether the Commission must make findings of fact to support the conclusion under Rule 55(f) that a claimant established her claim or right to relief by the evidence.

I.

[1] DOT first contends that the Commission erred by failing to conduct a full evidentiary hearing prior to entering default judgment against the State. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 55(f) (1990), provides:

> No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof *unless* the claimant establishes his claim or right to relief by evidence.

(emphasis supplied).

DOT argues that once plaintiff establishes her right to relief by evidence, the State then has a right to present contrary evidence. It argues that "the evidentiary hearing, in essence, would be the equivalent of a trial on the merits . . . ."

The plain language of N.C.R. Civ. P. 55 establishes that prior to obtaining default against the State, a claimant must present evidence to establish her claim or right to relief. We find no provision in Rule 55(f) giving the State the right to then counter the plaintiff's evidence. *See Alliance Company v. State Hospital*, 241 N.C. 329, 332, 85 S.E.2d 386, 389 (1955) (holding that if the words in the statute are clear, certain, and intelligible, then they must be given their natural or ordinary meaning). Indeed, if we were to accept DOT's rationale, we would undermine the purpose of an entry of default since "[t]he effect of an entry of default is that the defendant . . . is *prohibited from defending on the merits of the case.*" *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991) (citations omitted) (emphasis supplied).

Accordingly, we hold that the Commission is not required by Rule 55(f) to conduct a full evidentiary hearing prior to entering default against the State.

II.

[2] Next, DOT argues that prior to entering default judgment against the State, the Commission must make findings of fact to support the conclusion that a claim or right to relief under Rule 55(f) has been established by the evidence. We agree.

Even though Rule 55 contains no requirement giving the State the right to counter plaintiff's evidence, the claimant must still establish

her claim or right to relief by the evidence. In so doing, the claimant must show that a factual basis exists upon which negligence or liability can be established. In turn, the fact finder must make findings of fact as to the claimant's evidentiary showing.

N.C.R. Civ. P. 52(a)(1) requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Rule 52(a) requires "specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. *Farmers Bank v. Brown Distributors*, 307 N.C. 342, 346-47, 298 S.E.2d 357, 359-60 (1983).

The requirement to make specific findings of fact is not a mere formality. Instead, it allows the "reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

Upon careful review of the record, we find that the deputy commissioner's order which was modified and adopted by the Full Commission is devoid of any findings of fact on the claims of liability and negligence. Indeed, the order only addresses the issue of damages. Moreover, we note in passing that nothing in the record indicates that the Commission entered a final default judgment against DOT. Because our review must be based upon findings of fact and conclusions of law, we vacate and remand for proper findings consistent with this opinion.

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

MILLS v. CITY OF NEW BERN

[122 N.C. App. 283 (1996)]

THOMAS EDWARD MILLS, SR. v. CITY OF NEW BERN, SELF-INSURED EMPLOYER, (GAB BUSINESS SERVICES, SERVICING AGENT)

No. COA95-695

(Filed 16 April 1996)

Workers' Compensation § 171 (NCI4th)— police officer's fall while pursuing suspect—injury arising out of employment

Because there was no dispute that plaintiff police officer's knee injury while chasing a suspect occurred in the course of his employment and because the Industrial Commission determined that the injury arose out of the employment, the Court of Appeals is bound to affirm the award to plaintiff; furthermore, even if plaintiff's preexisting knee condition contributed to the injury, plaintiff's fall while pursuing a fleeing suspect at night was a risk attributable to his employment and thus would be compensable.

Am Jur 2d, Workers' Compensation §§ 275, 276.

Appeal by defendant from Opinion and Award for the Full Commission filed 4 April 1995. Heard in the Court of Appeals 19 March 1996.

Voerman & Carroll, P.A., by David P. Voerman, for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Jack S. Holmes and Brian D. Lake, for defendant-appellant.

GREENE, Judge.

The City of New Bern (defendant) appeals from a 4 April 1995 opinion and award of the Industrial Commission (Commission) which reversed the deputy commissioner's decision, and awarded Thomas Edward Mills, Sr. (plaintiff) worker's compensation benefits for a knee injury.

It is undisputed that plaintiff, a police officer for defendant, received an injury to his left knee while chasing a suspect on 15 May 1993. It is further undisputed that plaintiff had two earlier left knee injuries, one in 1985, which required surgery, and one in 1989. As a result of plaintiff's earlier knee injuries, he suffered "knee plica, or, a fold in the lining of the knee, . . . medial scarring, . . . and patellar tendonitis [sic]" in his left knee. Defendant denied plaintiff's worker's

compensation claim for the 15 May 1993 left knee injury, stating that plaintiff's injury was "caused by an idiopathic condition, did not arise out of and in the course of his employment, and did not occur by accident."

Pursuant to N.C. Gen. Stat. § 97-85, plaintiff appealed from the deputy commissioner's decision denying plaintiff's claim for compensation. The evidence before the Commission consisted of plaintiff's testimony that he did not remember twisting his foot or anything which would have made him fall. He also testified that the ground and the sidewalk were uneven at the point where plaintiff fell and that he surmised that he fell when stepping onto this uneven area. Dr. Robert G. Blair, Jr., plaintiff's treating physician, testified that plaintiff's fall could have been caused by his knee going out or by stepping on the uneven area, which may then have caused his knee to give out.

The Commission determined that "[b]ecause risks attributable to plaintiff's employment, including running in the dark of night on uneven surfaces in pursuit of fleeing suspects, contributed to plaintiff's accident which resulted in the injury to plaintiff's knee, plaintiff's injury by accident also arose out of plaintiff's employment." "This is so even if an idiopathic condition - in this case, the alleged weakness in plaintiff's left knee - contributed to plaintiff's accident." The Commission finally awarded plaintiff "temporary total disability compensation for the periods of time during which plaintiff was unable to work."

The dispositive issue is whether the evidence in this record supports the determination of the Commission that the plaintiff's injury to his knee arose out of his employment.

The question of whether an injury "arises out of employment" is a mixed question of law and fact and our review is limited to whether "the findings and conclusions are supported by competent evidence." *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198, *reh'g denied*, 306 N.C. 565, — S.E.2d — (1982). If not supported by competent evidence, the award cannot be upheld. *Horn v. Sandhill Furniture Co.*, 245 N.C. 173, 176, 95 S.E.2d 521, 523 (1956).

An injury arises out of the employment "when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment."

Taylor v. Twin City Club, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963); N.C.G.S. § 97-2(6) (Supp. 1995).

When the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment. *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 92-93, 63 S.E.2d 173, 176 (1951). The injury does arise out of the employment if the idiopathic condition of the employee combines with "risk[s] attributable to the employment" to cause the injury. *Hollar v. Montclair Furniture Co.*, 48 N.C. App. 489, 496, 269 S.E.2d 667, 672 (1980). It is not necessary that the "risk attributable to the employment" be a risk greater than that experienced by the general public. *See Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 556, 117 S.E.2d 476, 478 (1960); 1 Arthur Larson, *The Law of Workmen's Compensation* § 6.40 (1995). In other words, if the employment "aggravated, accelerated, or combined with the [employee's preexisting] disease or infirmity to produce" the injury, that injury arises out of the employment. *Larson* § 12.21. When the cause of the injury is in doubt or unknown, the injury is sustained in the course of the employment and the Commission determines that the injury arose out of the employment, the award must be sustained. *Robbins v. Bossong Hosiery Mills, Inc.*, 220 N.C. 246, 248, 17 S.E.2d 20, 21 (1941); *Murray v. Associated Insurers, Inc.*, 114 N.C. App. 506, 518, 442 S.E.2d 370, 378 (1994), *rev'd on other grounds*, 341 N.C 712, 462 S.E.2d 490 (1995); *Larson* § 10.31(a) ("all injuries from neutral risks are compensable").

In this case, the cause of the injury is unknown. The plaintiff was unsure as to what caused him to fall, and Dr. Blair, the treating physician, was unable to identify the cause of the injury. Therefore, because there is no dispute that the injury occurred in the course of plaintiff's employment and because the Commission determined that the injury arose out of the employment, we are bound to affirm the award to the plaintiff. Even if the plaintiff's preexisting knee condition contributed to the injury, the plaintiff's fall while pursuing a fleeing suspect at night was a "risk attributable" to his employment and thus would be compensable.

We reviewed the other assignments of error asserted by the defendant and overrule them.

Affirmed.

Judge SMITH concurs.

Judge LEWIS concurs in the result only.

FAIRCHILD PROPERTIES, PLAINTIFF, v. PAMELA HALL, DEFENDANT

No. COA95-230

(Filed 16 April 1996)

1. Ejectment § 14 (NCI4th)— appeal dismissed for failure to comply with statutory requirements—error

Defendant tenant was not required, in order to stay execution of the magistrate's judgment of ejectment for nonpayment of rent pending appeal, to make the additional undertaking under N.C.G.S. § 42-34(c) or, in the alternative, to file an *in forma pauperis* affidavit because the judgment was not entered more than five working days before the day when the next rent was due under the lease. Furthermore, N.C.G.S. § 42-34 does not set out requirements for perfection of an appeal to the district court, and the trial court erred in dismissing defendant's appeal for failure to comply with the "jurisdictional appellate requirements" under § 42-34(c).

Am Jur 2d, Appellate Review § 862; Landlord and Tenant § 929.

2. Courts § 129 (NCI4th)— dismissal for failure to prosecute—error

Dismissal of defendant's appeal from a magistrate to district court under N.C.G.S. § 7A-228(c) for failure to prosecute was not proper since neither the record nor the district court's order indicated that this case had been regularly set for trial or that defendant-appellant was called.

Am Jur 2d, Appellate Review § 871.

Appeal by defendant from order entered 21 November 1994 by Judge James A. Harrill, Jr. in Forsyth County District Court. Heard in the Court of Appeals 17 November 1995.

Smith Murphrey & Helms, by Steven D. Smith, for plaintiff-appellee.

Legal Aid Society of Northwest North Carolina, Inc., by Louise E. Harris and Susan Gottsegen, for defendant-appellant.

LEWIS, Judge.

This is an appeal from an order dismissing defendant's appeal from a magistrate's judgment to the district court. On 19 August 1994, plaintiff filed a complaint in summary ejectment against defendant. The case was heard before Magistrate William B. Campbell who entered judgment for plaintiff on 30 August 1994, two days before rent was due on 1 September 1994. On 30 August 1994, defendant appealed to the Forsyth County District Court asking for a trial de novo by jury. On motion by plaintiff and by order entered 21 November 1994, Chief District Court Judge James A. Harrill, Jr. dismissed defendant's appeal to district court. Defendant appeals.

[1] Defendant assigns error to the district court's dismissal of her appeal for failure to comply with the "jurisdictional appellate requirements" under N.C. Gen. Stat. section 42-34(c) on the ground that she was not required to comply with this section in order to perfect her appeal. We agree.

In its order dismissing her appeal, the district court concluded that she was required by G.S. section 42-34(c) to file an affidavit in forma pauperis under N.C. Gen. Stat. section 1-288. In so concluding, the district court misread G.S. section 42-34(c). G.S. section 42-34(b)and (c) provide a means for a defendant to stay execution of a judgment for ejectment pending an appeal. These subsections provide, in pertinent part:

> (b) It shall be sufficient to stay execution of a judgment for ejectment that the defendant appellant sign an undertaking that he will pay into the office of the clerk of superior court the amount of the contract rent as it becomes due periodically after the judgment was entered and, *where applicable*, comply with subdivision (c) below. Any magistrate, clerk, or district court judge shall order stay of execution upon such undertaking . . . .
>
> (c) In an ejectment action based upon alleged nonpayment of rent *where the judgment is entered more than five working days before the day when the next rent will be due under the lease, the appellant shall make an additional undertaking to stay execution pending appeal.* Such additional undertaking shall be the payment of the prorated rent for the days between the day that the judgment was entered and the next day when the rent will be due under the lease. *Notwithstanding, such additional undertaking shall not be required of an indigent appellant who pros-*

ecutes his appeal with an in forma pauperis affidavit that meets the requirements of G.S. 1-288.

G.S. § 42-34(b) and (c) (1994) (emphasis added).

Defendant obtained a stay of execution under G.S. section 42-34(b) by signing an undertaking that she would pay to the clerk of superior court the amount of the contract rent as it became due periodically after judgment was entered. However, she did not make an additional undertaking under G.S. section 42-34(c) and she did not, in the alternative, prosecute her appeal with a G.S. section 1-288 in forma pauperis affidavit.

We first note that defendant was not required, in order to stay execution of the magistrate's judgment, to make the additional undertaking under G.S. section 42-34(c) or, in the alternative, to file an in forma pauperis affidavit because the judgment was not entered more than five working days before the day when the next rent was due under the lease. The magistrate's judgment was entered on 30 August 1994. Under the lease, rent was next due two days later, on 1 September 1994. By its terms, G.S. section 42-34(c) did not require defendant to pay an additional undertaking or to file an in forma pauperis undertaking because judgment was not entered *more than five working days* before 1 September 1994.

Furthermore, it appears from the record that defendant did perfect her appeal to the district court pursuant to N.C. Gen. Stat. 7A-228. She also complied with the G.S. section 7A-228(b1) requirements for appealing as an indigent. G.S. section 42-34 does not set out requirements for perfection of an appeal to district court. Rather, this section simply provides the mechanism for an appellant to stay execution of the magistrate's judgment pending the appeal. An affidavit in forma pauperis is only necessary when an indigent who is required to make an additional undertaking under G.S. section 42-34(c) seeks to be exempted from making the additional undertaking. The trial court erred in concluding that compliance with this section was necessary to perfect defendant's appeal.

[2] Plaintiff asserts that, even if the court erred in dismissing defendant's appeal for failure to comply with G.S. section 42-34, the order of dismissal should be upheld because the district court also dismissed the appeal for failure to prosecute.

After concluding that defendant failed to comply with G.S. section 42-34(c), the district court found that defendant, "after being

given proper notice, has failed to prosecute this action in that she and/or her representative did not appear at the Hearing of this Motion." This finding is not mentioned in the decretal portion of the order. Rather, in the decretal portion of the order, the court dismisses the appeal "for Failure to Comply with Jurisdictional Appellate Requirements." This phrase appears to refer to the court's previous conclusion that defendant failed to comply with G.S. section 42-34(c), not its finding regarding failure to prosecute. Thus, although it made a finding on failure to prosecute, the order does not show that this finding was the basis for the dismissal.

We note that defendant has not assigned error to the court's finding that she failed to prosecute her action. However, because plaintiff asserts this as an alternative ground to uphold the order and because the order is not clear as to whether the court relied on this ground in dismissing the appeal, we exercise our discretion under N.C.R. App. P. 2 and consider this issue.

After review, we conclude that dismissal pursuant G.S. section 7A-228(c) for failure to prosecute was not proper here. G.S. section 7A-228(c) provides:

> Whenever such appeal is docketed and is regularly set for trial, and the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed.

G.S. § 7A-228(c) (1995). This section refers to the failure of the appellant to appear and prosecute his appeal once the appeal is docketed and regularly set for trial. Neither the record nor the district court's order indicate that this case had been regularly set for trial or that the defendant-appellant was called. This is not a case in which the defendant-appellant failed to appear at a regularly set trial. Under these circumstances, dismissal for failure to appear was error.

Reversed and remanded.

Judges WYNN and JOHN concur.

IN RE WHITLEY

[122 N.C. App. 290 (1996)]

IN THE MATTER OF KEITH WHITLEY

No. COA94-1302

(Filed 16 April 1996)

1. **Searches and Seizures § 82 (NCI4th)— search of respondent—reasonable suspicion to justify search**

There was reasonable suspicion to justify an officer's pat-down search of respondent juvenile where officers had received a phone call indicating two black males were selling drugs on a certain street; upon arriving at the scene to investigate, the officers found two black males standing in the location where the drugs were purportedly being sold; when an officer approached respondent, he noticed respondent's legs were very tight; and these facts gave rise to a reasonable suspicion that respondent might be armed, dangerous, and involved in criminal activity and justified the officer's search of respondent.

Am Jur 2d, Searches and Seizures §§ 51, 78.

2. **Searches and Seizures § 80 (NCI4th)— item seized from respondent's person—incriminating character immediately apparent**

There was no merit to respondent's contention that the incriminating character of the item seized from his person was not immediately apparent to the officer and the trial court erred in allowing it into evidence, since the officer asked respondent to spread his legs; when he complied an item fell onto the officer's hand through respondent's pants; and based upon his personal experience as a law enforcement officer, the officer immediately believed that it was some type of illegal substance.

Am Jur 2d, Searches and Seizures §§ 51, 78.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

Appeal by respondent from juvenile order signed 24 August 1994 by Judge Richard G. Chaney in Durham County Juvenile Court. Heard in the Court of Appeals 12 September 1995.

Gregory L. Hughes for respondent-appellant.

Attorney General Michael F. Easley, by Associate Attorney General Sondra C. Panico, for the State.

McGEE, Judge.

A juvenile petition was filed pursuant to N.C. Gen. Stat. § 7A-517(12) alleging respondent to be delinquent "in that in Durham County on or about July 5, 1994, the juvenile unlawfully, willfully and feloniously did possess with intent to sell and deliver a controlled substance, namely 3.2 grams of cocaine . . . ." A hearing was held during the 23 August 1994 Juvenile Session of the District Court of Durham County with Judge Richard G. Chaney presiding.

The evidence at trial established that on the afternoon of 5 July 1994 Durham law enforcement officers Hector Borges and Reese Carson responded to a call that drug sales were occurring between two black males on Merrick Street. Upon arriving at the scene, the officers observed respondent and another individual under a tree. The officers approached these two individuals, stated that they were responding to a drug complaint, and "asked [the individuals] to spread their legs because we were going to do a Terry stop in reference to any weapons that they might have on them . . . ."

Officer Carson patted down one individual while Officer Borges conducted a pat down on respondent. During respondent's search, Officer Borges stated that respondent's "lower body, his legs were really tight" so he asked respondent to spread his legs. When respondent complied with this request, Officer Borges testified that "an item fell on my hand through his pants, which with my personal experience as a law enforcement officer, gave me the probable cause to believe that it was some type of illegal substance." Officer Borges explained that his hands were outside of respondent's trousers, in the bottom, crotch area of respondent's pants when the item fell from respondent's buttocks into his pants. When Officer Borges felt the item fall on his hand, he held it in one hand and put his other hand into respondent's pants and retrieved the item. After observing that the item he retrieved was "a plastic bag with a white powdered substance," Officer Borges placed respondent under arrest.

At the 23 August 1994 hearing, respondent was found guilty of simple possession of a Schedule II controlled substance, in violation of N.C. Gen. Stat. § 90-95(a) (3), and he was placed on juvenile probation for one year. From this order, respondent appeals.

Respondent brings forward two issues in his appeal. He first contends the police conducted an improper pat down search in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 20 of the North Carolina Constitution. Additionally, he argues the trial court committed reversible error in allowing the introduction of evidence obtained as a result of this improper search because the incriminating character of the item seized was not immediately apparent to the officer and therefore, it exceeded the scope of the search. We disagree and affirm the trial court.

I.

[1] A governmental search of private property without a warrant "is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). One of the exceptions to the warrant requirement is a pat-down search conducted pursuant to *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). In *Terry*, the Court held that when a police officer observes unusual behavior which leads him to conclude, in light of his experience, that criminal activity may be occurring and that the person may be armed and dangerous, the officer is permitted to conduct a pat-down search to determine whether the person is carrying a weapon. *Terry v. Ohio*, 392 U.S. 1, 30-31, 20 L. Ed. 2d 889, 911 (1968). However, "[a] brief investigative stop of an individual must be based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Allen*, 90 N.C. App. 15, 25, 367 S.E.2d 684, 689 (1988).

In the case before us, we find there was reasonable suspicion to justify the officer's search of respondent. The officers had received a telephone call indicating two black males were selling drugs on Merrick Street. Upon arriving at the scene to investigate, the officers found two black males standing in the location where the drugs were purportedly being sold. Further, Officer Borges testified that when he approached respondent, he noticed respondent's legs were very tight. When viewed through "the eyes of a reasonable and cautious police officer," the telephone call, later corroborated once the officers arrived at the scene, coupled with the nervous body reflexes of respondent are articulable facts which gave rise to a reasonable suspicion that respondent might be armed, dangerous and involved in criminal activity and justified the officer's search of respondent.

II.

[2] The scope of a search conducted pursuant to *Terry v. Ohio* is limited. The purpose "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *State v. Beveridge*, 112 N.C. App. 688, 693, 436 S.E.2d 912, 915 (1993) (quoting *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 617 (1972)), *temp. stay denied*, 335 N.C. 560, 441 S.E.2d 105, *affirmed*, 336 N.C. 601, 444 S.E.2d 223 (1994). If the search exceeds the limits reasonable in ascertaining whether the suspect is armed, then the evidence discovered as a result of the search is inadmissible. *Id.* However, in cases where the police officer is conducting a lawful pat down search for weapons and he discovers contraband, it is proper for the officer to seize the item discovered. In *State v. Wilson*, 112 N.C. App. 777, 437 S.E.2d 387 (1993), we quoted the United States Supreme Court as saying:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.

Wilson, 112 N.C. App. at 780, 437 S.E.2d at 388 (quoting *Minnesota v. Dickerson*, 113 S.Ct. 2130, 2137, 124 L. Ed. 2d 334, 346 (1993)).

In this case, the incriminating character of the evidence seized was immediately apparent to the officer. Officer Borges testified he asked respondent to spread his legs and when he complied, "an item fell on [Borges'] hand through [respondent's] pants, which with my personal experience as a law enforcement officer, gave me the probable cause to believe that it was some type of illegal substance." There is no additional testimony that Borges manipulated the material to determine if the object was contraband or that he performed a search that was not permitted under *Terry*.

We find the *Terry* search was lawfully conducted and the evidence seized during the stop was properly admitted into evidence.

Affirmed.

Judges MARTIN, JOHN C. and WALKER concur.

STATE OF NORTH CAROLINA v. LOU ELMER GUNNINGS

No. COA95-1125

(Filed 16 April 1996)

Narcotics, Controlled Substances, and Paraphernalia § 33 (NCI4th)— attempt to possess cocaine—sufficiency of evidence

The evidence was sufficient to be submitted to the jury on a charge of attempt to possess cocaine where there was a significant amount of evidence offered, including that of defendant's own testimony, which would allow a jury to conclude that defendant intended to possess cocaine; she took several steps calculated to accomplish that intent, including driving to an area known for drug sales, approaching undercover officers who she believed were cocaine dealers, and exchanging money for what she thought was cocaine; and her efforts fell short of completing the offense of possession of cocaine.

Am Jur 2d, Drugs and Controlled Substances §§ 130 et seq.

Appeal by defendant from judgment entered 7 July 1995 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals

Defendant was convicted of attempted possession of cocaine. She was sentenced to two years, sentence suspended, and placed on supervised probation for one year. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Jane L. Oliver, for the State.

Assistant Public Defender Cynthia D. West for defendant appellant.

McGEE, Judge.

Evidence presented by the State tends to show the following: On 2 March 1994 officers of the Gastonia Police Department were conducting an undercover drug operation on Vance Street in Gastonia. Several officers stood on the side of the street and posed as drug dealers, while undercover police cars were stationed at either end of the

block. The officers did not have any cocaine to sell, but instead carried pieces of Brazil nuts cut up to resemble crack cocaine.

At approximately 8:18 p.m., defendant drove up to the officers posing as dealers. Another female riding in the passenger seat spoke to them through the car window, and asked if she and defendant could purchase two "rocks" for thirty dollars. One of the officers agreed to sell them the two rocks, and defendant turned her car around so she could speak to the officer through her window. She stated "I want to see this." The officer handed her two white rock-like substances in exchange for thirty dollars from defendant. Defendant said "I'm going to taste it to see if it's real." When she did so, she realized the "rocks" she had purchased were not cocaine. She became irate and started to get out of the car. One of the officers radioed for back-up, and one of the squad cars pulled up with its blue lights flashing. Defendant dropped the pieces of Brazil nut, and told the officer who had driven up that the men on the street were selling cocaine. The dealers were identified as police and defendant was placed into custody.

At trial, defendant testified that she pulled over in her car at her passenger's request, and was aware that the purpose of the stop was to buy cocaine. She further stated that when she gave the undercover officer the thirty dollars, she did so in order to buy cocaine.

Defendant's sole argument on appeal is that the trial court erred in denying her motion to dismiss for insufficient evidence. She contends that because the officers were not selling real cocaine, she could not be convicted of an attempt to possess cocaine. We disagree.

In ruling on a motion to dismiss, the issue before the trial court is whether there has been presented substantial evidence of each element of the offense charged, and that the defendant was the perpetrator of the offense. *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992). If the trial court so finds, the motion is properly denied. *State v. Tuggle*, 109 N.C. App. 235, 426 S.E.2d 724, *appeal dismissed and disc. review denied*, 333 N.C. 794, 431 S.E.2d 29 (1993). Substantial evidence is that 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). All the evidence, whether direct or circumstantial, must be considered by the trial court in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence being drawn in favor of the State. *State v. Figured*,

116 N.C. App. 1, 446 S.E.2d 838 (1994), *disc. review denied*, 339 N.C. 617, 454 S.E.2d 261 (1995).

The elements of the crime of "attempt" consist of the following: (1) an intent by an individual to commit a crime; (2) an overt act committed by the individual calculated to bring about the crime; and (3) which falls short of the completed offense. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). In the case before us there was a significant amount of evidence offered, including that of defendant's own testimony, which would allow a reasonable jury to conclude (1) that defendant intended to possess cocaine; (2) that she took several steps calculated to accomplish that intent, including driving to an area known for drug sales, approaching people she believed were cocaine dealers, and exchanging money for what she thought was cocaine; and (3) that her efforts fell short of completing the offense of possession of cocaine. This evidence was sufficient to defeat defendant's motion to dismiss, and the trial court did not err in so doing.

Finally, we note that where the evidence tends to show defendant intended to commit the underlying substantive offense, in this case possession of cocaine, defendant's "intent" is the controlling factor. As stated by our Supreme Court in *State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982):

> [W]hen a defendant has the specific intent to commit a crime and under the circumstances as he reasonably saw them did the acts necessary to consummate the substantive offense, but, because of facts unknown to him essential elements of the substantive offense were lacking, he may be convicted of an attempt to commit the crime.

Hageman, 307 N.C. at 13, 296 S.E.2d 441 (1982).

For these reasons, we find defendant received a fair trial, free from prejudicial error.

No error.

Judges GREENE and MARTIN, MARK D. concur.

ALICE R. HARPER, Administratrix of the ESTATE OF WILLIAM P. HARPER, JR., v. ALLSTATE INSURANCE COMPANY

No. 9410SC66

(Filed 16 April 1996)

Insurance § 527 (NCI4th)— vehicle owned by insured but not listed in policy—UIM coverage not excluded by family member exclusion

The Court of Appeals again rejects defendant's argument that the family member exclusion in an automobile policy excluded UIM coverage for injuries sustained by the insured while occupying a vehicle owned by insured which is not listed in the policy.

Am Jur 2d, Automobile Insurance § 322.

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

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.

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

Appeal by defendant from judgment entered 13 December 1993 in Wake County Superior Court by Judge Coy E. Brewer, Jr. Heard in the Court of Appeals 29 September 1994. Reconsidered for the purpose of modifying earlier opinion.

Smith & Holmes, P.C., by Robert E. Smith and Mary M. McHugh, for defendant-appellant.

Edwards and Kirby, by David F. Kirby, for plaintiff-appellee.

WYNN, Judge.

On 6 December 1994, this Court issued an opinion affirming summary judgment for the plaintiff in a declaratory judgment action. *Harper v. Allstate Ins. Co.*, 117 N.C. App. 302, 450 S.E.2d 759 (1994). On 9 February 1996, our Supreme Court vacated our opinion and directed that we reconsider it in the light of *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996). *Harper v. Allstate Ins.*

Co., 342 N.C. 643, 466 S.E.2d 77 (1996). Having so reconsidered, we again reject defendant's argument that the family member exclusion in its policy excludes underinsured motorists (UIM) coverage for injuries sustained by the insured while occupying a vehicle owned by the insured which is not listed in the policy. In *Mabe*, our Supreme Court affirmed this Court's rejection of the "owned vehicle" or "family member" exclusion with regard to UIM coverage. *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996). Accordingly, the trial court's entry of summary judgment for the plaintiff is,

Affirmed.

Chief Judge ARNOLD and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. MICHAEL GRANT DIAL, APPELLANT

No. COA94-1368

(Filed 7 May 1996)

1. Criminal Law § 59 (NCI4th); Judgments § 205 (NCI4th)—jurisdiction in North Carolina—special verdict at first trial—relitigation of issue precluded

The trial court's acceptance of the jury's special verdict finding that North Carolina had jurisdiction at defendant's first murder trial, prior to declaring a mistrial by reason of the jury's inability to agree upon the issue of guilt or innocence, precluded defendant from relitigating jurisdiction at his second trial, since the parties were the same; the issue as to jurisdiction was the same; the issue was raised and actually litigated in the prior action; jurisdiction was material and relevant to the disposition of the prior action; and the determination as to jurisdiction was necessary and essential to the resulting judgment.

Am Jur 2d, Criminal Law § 336; Judgments §§ 539-552.

Modern status of res judicata in criminal cases. 9 ALR3d 203.

2. Criminal Law § 266 (NCI4th)— medical examiner's testimony—difference between first and second trials—continuance properly denied

The trial court did not err in denying defendant's motion for continuance made on the ground that he prepared for trial based on the assumption that the State's medical examiner would testify as he had at the first trial with regard to time of death, and that his alibi evidence was affected because he was forced to account for his whereabouts for an additional twelve hours when the medical examiner testified differently at the second trial, since the medical examiner's testimony at the second trial was consistent with his opinions expressed in the autopsy report and death certificate, both of which were available to defendant in advance of his first trial.

Am Jur 2d, Continuance §§ 100, 101, 103.

3. Evidence and Witnesses § 1693 (NCI4th)— photographs of murder victim—admissibility

The trial court did not err in admitting into evidence photographs of the victim's body taken during the autopsy, since they were illustrative of the degree, nature, and circumstances of the amputation of the victim's head and hands and the skin slippage of her body, a fact relevant to a determination of how long the victim had been dead.

Am Jur 2d, Evidence § 974; Homicide §§ 417-419.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

4. Criminal Law § 530 (NCI4th)— news articles about trial—mistrial properly denied

The trial court did not err in denying defendant's motion for a mistrial due to a news article which appeared during the trial which reported that defendant had rejected a plea bargain and in denying his alternative requests that the jury be polled to determine whether any juror had been exposed to this or other articles which were published during the course of the trial, since the trial court properly admonished the jury throughout the trial to avoid exposure to media accounts of the trial, and there was no hint either in the record or in defendant's argument that the court's instructions were not followed.

Am Jur 2d, Trial §§ 1641-1644, 1728, 1729.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal. 46 ALR4th 11.

Juror's reading of newspaper account of trial in federal criminal case during its progress as ground for mistrial, new trial, or reversal. 85 ALR Fed. 13.

5. Criminal Law § 557 (NCI4th)— reference to defendant's criminal record—defendant not prejudiced

The trial court did not err in denying defendant's motion for a mistrial made after his supervisor testified that defendant had told him he had a record, since the trial court acted promptly and properly in instructing the jurors to disregard the supervisor's statement if they had heard it, and the court's refusal to grant a mistrial or to individually poll jurors was not an abuse of discretion.

Am Jur 2d, Trial § 1746.

6. Evidence and Witnesses § 154 (NCI4th)— telephone conversation with defendant—identity of voice proved by circumstantial evidence

Circumstantial evidence with regard to the identity of defendant's voice was sufficient to permit a police sergeant to testify concerning statements allegedly made by defendant during a telephone conversation with the sergeant.

Am Jur 2d, Evidence § 580.

Sufficiency of identity of participants as prerequisite to admissibility of telephone conversation in evidence. 79 ALR3d 79.

7. Evidence and Witnesses § 2135 (NCI4th)— testimony as to ocean currents—admissibility to prove connection with crime

A Coast Guard officer's testimony as to ocean currents was relevant to show a connection between defendant and the crime in that an inference could be drawn therefrom that the victim's body had drifted from an area with which defendant was familiar, where he and the victim had previously camped and fished, and

where he had stated an intention to take the victim over the July 4th holiday; furthermore, by offering the testimony, the State did not open the door to his relitigating the issue of jurisdiction.

Am Jur 2d, Evidence §§ 307-312.

Admissibility of nonexpert opinion testimony as to weather conditions. 56 ALR3d 575.

8. Evidence and Witnesses § 2047 (NCI4th)— defendant's co-worker's extrajudicial statements—rational basis—admissibility

The trial court in a murder prosecution did not err in allowing testimony of defendant's co-worker that, after seeing a news report that an unidentified body bearing a rose tatoo had washed onto the beach at Nags Head, he said to his girlfriend, "Mike, he killed his girlfriend," and that he told his employer that he did not want to work with defendant because he thought defendant had killed his girlfriend, since evidence of defendant's earlier threats against his girlfriend which were communicated to the co-worker, evidence that the witness knew of fights between defendant and the victim, and evidence that the witness knew of the victim's tatoo showed that there was a rational basis for the witness's testimony and that by his conduct the witness took defendant's statements seriously. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Expert and Opinion Evidence §§ 26-31.

9. Evidence and Witnesses § 165 (NCI4th)— evidence of threats—no offer to prove defendant's character—admissibility to prove motive

The trial court in a homicide prosecution did not err in denying defendant's motion *in limine* to preclude a witness's testimony that defendant had told him that "if he were pulled over, that he would take out whoever pulled him over—with him" and that "something had gone south and that he had to off two people," since the statements were not offered to prove that defendant was a person of bad character but were instead admissible as tending to establish a motive for killing the victim and his intent to elude capture, and went to the issue of premeditation and deliberation.

Am Jur 2d, Evidence § 425.

Appeal by defendant from judgment entered 1 March 1994 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 26 September 1995.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the State.

The Law Firm of Gladden & Rose, by John B. Gladden and Randy L. Jones, for defendant-appellant.

MARTIN, John C., Judge.

Defendant appeals from a judgment imposing a sentence of life imprisonment upon his conviction of second degree murder. The procedural and evidentiary history of the case is as follows:

On 12 August 1991, defendant, a Virginia resident, was indicted for first degree murder in connection with the death of Brenda Dozier whose body washed onto the beach of Nags Head, North Carolina on 4 July 1991. Defendant entered a plea of not guilty and moved to dismiss for lack of jurisdiction. At defendant's first trial in Dare County Superior Court, an issue was submitted to the jury of whether North Carolina had jurisdiction, as well as the issue of defendant's guilt or innocence of the offense. On 28 April 1993, the jury returned a special verdict finding that North Carolina had jurisdiction; however, the jury was unable to agree upon the issue of defendant's guilt or innocence. The trial court accepted the jury's special verdict finding jurisdiction and declared a mistrial as to the issue of defendant's guilt or innocence.

Defendant subsequently filed a new motion to dismiss the indictment for lack of jurisdiction and a motion to set aside the special verdict finding jurisdiction. The trial court ruled that the special verdict had determined the issue of jurisdiction and denied the motions. The case was tried a second time in the Dare County Superior Court at the 14 February 1994 criminal session.

At the second trial, the State's evidence tended to show that the victim's head and hands had been amputated from her body. Dr. Lawrence Stanley Harris, a forensic pathologist, determined that the amputation had occurred after death and had been performed with one heavy blade and one smaller, sharper blade. Because of the amputation, the cause of death could not be determined. Dr. Harris testified that the body could have been placed in the ocean as early as 1 July or possibly as late as 3 July.

Defendant and the victim had lived together in an apartment prior to her disappearance. They had a stormy relationship, often engaging in arguments and physical fights. Witnesses testified that defendant had become particularly upset with the victim after she had an abortion.

Around 11:00 p.m. on 1 July 1991, defendant, the victim and her brother, Chris Jackson, left a bar near Norfolk, Va. in defendant's truck. After taking Jackson to his house, defendant and the victim headed to their apartment. Defendant told police that he and the victim had an argument on the way, and he stopped the truck. Defendant claimed that he last saw the victim when she got out and walked away from the truck.

Defendant told police that he went on to the apartment and waited. When the victim did not come home, he called Jackson but was told she did not go to his home. Defendant said that when he left for work at 6:00 a.m. the victim still had not arrived at the apartment, but when he returned around 3:30 p.m. he saw clothes she had worn the night before so he knew she had returned. However, defendant said he did not see or talk to the victim again.

Defendant worked the next few days and resided at his parents' home during this time. Lorraine Rudacil, a friend of defendant, and Charles Dabney, a co-worker of defendant, both testified that defendant had told them he planned to take the victim on a fishing trip to the North Carolina coast during the 4 July holiday.

Defendant was known to keep his truck in immaculate condition, but on 5 July 1991, the day after the victim's body was discovered, defendant drove his truck to an area south of Richmond, Virginia, set fire to the truck, and then hitchhiked back to Virginia Beach. Witnesses including Rudacil, Dabney, John McNeese, another friend of defendant, William Horton, defendant's supervisor, and Douglas Campbell, another co-worker of defendant, testified that defendant told them the victim had bled in the truck from an accidental head wound suffered after an argument between the couple. Rudacil and Horton testified that defendant told them the accident happened the night that the victim disappeared. Campbell testified that defendant said the accident happened a couple of weeks earlier.

Defendant appeared nervous and agitated at work on the days after Ms. Dozier's disappearance but before her body was found. Dabney testified about statements defendant had made earlier that he

wished the victim were dead. Campbell testified that on 1 July defendant had stated that if he and Ms. Dozier did not get away from each other he was going to "put chains on her and carry her out in one of the tributaries and chain her to the bottom of the ocean." Defendant later asked Campbell not to say anything about his threats to kill Ms. Dozier. Robert Hart, another of defendant's friends, testified that on 4 July, the night the victim's identity became public knowledge, he was outside a club talking with defendant next to defendant's truck. Hart stated that he noticed a gasoline odor coming from the cab of the truck, and when he mentioned it defendant indicated he was in some trouble and that "if he were pulled over he would take out whoever pulled him over—with him." He testified that defendant told him that "something had gone south and that he had to off two people." Hart also stated that a couple of days later defendant told him "basically that he didn't want to see anything happen to me so I should not say anything about what I was told."

Defendant's motion to dismiss the charge of first degree murder at the close of the State's evidence was denied. Defendant offered evidence tending to show he spent the night of 1 July 1991 at the home of his parents, and that he and Ms. Dozier were not seen together thereafter. The clothes Ms. Dozier wore on the night of her disappearance were later found in the laundry at her apartment. Defendant offered alibi evidence for most of the time between the victim's disappearance and the discovery of her body. No evidence of foul play was discovered in the burned truck; there was no direct evidence that defendant entered North Carolina during the time in question; and defendant made no mention of Ms. Dozier in his statements that "something had gone south" and that he had "had to off two people," nor did he indicate when or where the events he was referring to had occurred.

At the close of all the evidence, defendant renewed his motion to dismiss the charge of first degree murder. The motion was denied. The jury convicted defendant of second degree murder.

In his appellant's brief, defendant has presented arguments in support of the questions raised by twenty-three of the twenty-seven assignments of error contained in the record on appeal. The remaining four assignments of error are deemed abandoned. N.C. App. R. 28(a), 28(b)(5). We have carefully reviewed his arguments and find no prejudicial error in his trial.

[1] By his first two assignments of error, defendant contends the trial court erred by denying his motions made prior to his second trial, (1) to dismiss the indictment for lack of jurisdiction and (2) to set aside the special verdict returned by the jury at the first trial finding that North Carolina had jurisdiction. Defendant does not argue in this Court that the evidence at his first trial was insufficient to support the jury's special verdict as to jurisdiction. Rather, he argues that the special verdict was not binding at his second trial so that the State should have been required to prove, beyond a reasonable doubt, the existence of jurisdiction to the same jury deciding his guilt or innocence at his second trial. We reject his argument.

Where a criminal defendant challenges the theory upon which the State claims jurisdiction to try him, the question is a legal question for the court; however, where the defendant challenges the facts upon which jurisdiction is claimed, the question is one for the jury. *State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856, *cert. denied*, 457 U.S. 1138, 73 L. Ed. 2d 1356 (1982). Where the *locus* of the offense is challenged, the State must prove beyond a reasonable doubt that the crime occurred in North Carolina. *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995); *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977). Here, by his motion to dismiss, defendant alleged the State had insufficient evidence to show the murder of Brenda Dozier was committed in North Carolina, a factual challenge to jurisdiction.

The question before us, then, is whether the trial court's acceptance of the jury's special verdict finding that North Carolina has jurisdiction at defendant's first trial, prior to declaring a mistrial by reason of the jury's inability to agree upon the issue of guilt or innocence, precludes defendant from relitigating jurisdiction at his second trial. The question is apparently one of first impression. We believe, however, that it is resolved by application of the settled principles of *res judicata* and collateral estoppel.

"*Res judicata* deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the same cause of action." *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 804 (1973). "[W]hen a fact has been agreed on, 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." *Humphrey v. Faison*, 247 N.C. 127, 133, 100 S.E.2d 524, 529 (1957) (quoting *Armfield v. Moore*, 44 N.C. 157, 160). Similarly, collateral estoppel precludes par-

ties and those in privity with them "from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King*, 284 N.C. at 356, 200 S.E.2d at 805 (citations omitted). The doctrines of *res judicata* and collateral estoppel apply to criminal, as well as, civil proceedings, *Sealfon v. United States*, 332 U.S. 575, 92 L. Ed. 180 (1948), and their application against a criminal defendant does not violate the defendant's rights to confront the State's witnesses or to a jury determination of all facts. *United States v. Colacurcio*, 514 F. 2d 1 (9th Cir. 1975).

In the present case, all the requirements for precluding relitigation of the jurisdiction issue have been met: (1) the parties are the same; (2) the issue as to jurisdiction is the same; (3) the issue was raised and actually litigated in the prior action; (4) jurisdiction was material and relevant to the disposition of the prior action; and (5) the determination as to jurisdiction was necessary and essential to the resulting judgment. *See King*, 284 N.C. at 358, 200 S.E.2d at 806. Moreover, our Supreme Court has similarly applied the doctrine of collateral estoppel to preclude the defendant in a civil paternity action from relitigating the issue of paternity which had been determined against him in a prior criminal action. *State ex rel Lewis v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984). *See State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964) (error as to nonsupport issue did not entitle defendant to new trial on paternity issue); *State v. O'Neal*, 67 N.C. App. 65, 312 S.E.2d 493 (1984) (where special verdict form containing seven issues submitted to jury, new trial not required upon six issues unaffected by error as to seventh issue). Defendant has offered no other argument in support of his motion to set aside the special verdict. Thus, we hold that the court's acceptance of that special verdict of the jury at his first trial finding that North Carolina has jurisdiction precludes defendant from relitigating the issue of jurisdiction at his second trial. Defendant's first and second assignments of error are overruled.

[2] By his next argument, defendant contends the trial court erred in denying his motion to continue the trial. Defendant contends that he prepared for trial based on the assumption that Dr. Harris, the State's medical examiner, would testify as he had at the first trial, that in his opinion Ms. Dozier's death had occurred within thirty-six hours of the time when her body was found on the morning of 4 July 1991, though he could not be conclusive about the time of death. Defendant contends that he first became aware that Dr. Harris would testify Ms. Dozier's death could have occurred in the early morning hours of 2

July less than three days before the second trial. Accordingly, defendant contends his alibi evidence was affected because he was forced to account for his whereabouts for an additional twelve hours. Moreover, he argues that he needed additional time to retain his own expert forensic pathologist.

"A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion." *State v. Baldwin*, 276 N.C. 690, 697, 174 S.E.2d 526, 531 (1970). We find no abuse of discretion in the denial of defendant's motion. The autopsy report and death certificate, which were available to defendant in advance of the first trial, both contained the medical examiner's opinion that the victim's death occurred at an unknown time on or about 2 July or 3 July 1991. Dr. Harris' testimony at defendant's second trial is consistent with his opinions expressed in those documents, and is not necessarily inconsistent with his testimony at the first trial that he could not be conclusive about the time of death. This assignment of error is overruled.

In a related assignment of error, defendant contends the trial court erred in denying his motion *in limine* to preclude Dr. Harris from giving testimony with respect to the time, manner or cause of Ms. Dozier's death, or the time when her body was placed in the ocean. He contends these matters were outside the witness' area of expertise. "[E]xpert testimony is properly admissible when such testimony can assist the jury in drawing certain inferences from the facts because the expert is better qualified." *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990). A trial court has wide latitude and discretion in making this determination, *id.*, and its findings as to the witness' qualifications and field are binding on appeal when supported by competent evidence. *Edwards v. Hamill*, 266 N.C. 304, 145 S.E.2d 884 (1966). The evidentiary record in the present case supports the trial court's acceptance of Dr. Harris as an expert medical witness specializing in forensic pathology, and his testimony could assist the jury in determining the time, manner and cause of Ms. Dozier's death and when her body was placed in the ocean. Defendant's assignment of error is, therefore, overruled.

[3] Defendant also assigns error to the admission into evidence of photographs of the victim's body. Defendant argues that the photographs were not relevant and were highly prejudicial since the medical examiner was unable to determine the cause of death. "Photographs of a homicide victim may be introduced even if they are

gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). "[P]hotographs taken during an autopsy are generally deemed admissible." *State v. House*, 340 N.C. 187, 191, 456 S.E.2d 292, 294 (1995). Four black and white photographs taken during the autopsy were admitted into evidence and were used to illustrate the degree, nature and circumstances of the amputation of the victim's head and hands. In addition, the photographs were used to illustrate skin slippage on the victim's body, relevant to a determination of how long the victim had been dead. This assignment of error is overruled.

[4] In three separate assignments of error defendant argues the trial court erred by denying his motion for a mistrial due to a news article that appeared during the trial which reported that defendant had rejected a plea bargain, and by denying his alternative requests that the jury be polled to determine whether any juror had been exposed to this article or two other articles that were published during the course of the trial. We disagree.

The presiding judge is vested with broad discretion in matters relating to the conduct of the trial. *State v. Rhodes*, 290 N.C. 16, 224 S.E.2d 631 (1976). This broad discretion includes rulings with respect to making inquiry of jurors to determine whether they may have been influenced or prejudiced by any matters outside the evidence. *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). Likewise, the decision of whether to grant a mistrial rests within the discretion of the trial judge. *State v. Hogan*, 321 N.C. 719, 365 S.E.2d 289 (1988). The scope of our review, then, is whether the trial judge abused his discretion in denying defendant's motions. An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision. *Id.*

No abuse of discretion attended the trial court's rulings with respect to defendant's motions here. The trial court properly admonished the jury throughout the trial to avoid exposure to media accounts of the trial, and there is no hint either in the record or in defendant's argument that the court's instructions were not followed. Thus, neither prejudice nor abuse of discretion has been shown. *See State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988); *Byrd*, 50 N.C. App. 736, 275 S.E.2d 522. These assignments of error are overruled.

[5] Defendant assigns error to the denial of an additional motion for a mistrial which he made after William Horton, defendant's supervisor, testified that defendant had told him he had a record. Defendant further claims that the court erred in not individually polling the jury as to whether they heard Horton's statement. We disagree.

At trial, Horton made the following statement: "He [defendant] told me that because he had a record—." Horton's testimony was interrupted and the jury was instructed: "Members of the jury, with regard to the last statement made by this witness, I instruct you to disregard it if you did hear it."

"The law assumes that jurors will follow [a court's] instructions and act in a rational fashion." *State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987) (citations omitted). When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice will ordinarily be regarded as harmless. *Id.* The trial court acted promptly and properly in this instance, and its refusal to grant a mistrial or to individually poll jurors was not an abuse of discretion. *Id.*

[6] Defendant next contends the trial court erred in overruling his objection to testimony by Sergeant Tice of the Norfolk Police Department concerning statements allegedly made by defendant during a telephone conversation with Sergeant Tice. For a court to allow a witness in a criminal case to testify to the content of a telephone conversation, the identity of the person with whom the witness was speaking must be established. *See State v. Richards*, 294 N.C. 474, 242 S.E.2d 844 (1978). In such cases identity may be established by testimony that the witness recognized the other person's voice, or by circumstantial evidence. *Id.* In the present case, there was sufficient circumstantial evidence to support the trial court's ruling: Chris Jackson, the victim's brother, told Sergeant Tice that defendant could be reached at his parent's home; Sergeant Tice called the residence of defendant's parents and spoke with a male who identified himself as Michael Dial; this person told Sergeant Tice that he had been given Tice's name and number by Chris Jackson and had been meaning to contact him; the same person later called Sergeant Tice back and told him basically the same story concerning the victim's disappearance as Chris Jackson had told police; the person stated that he had been staying at his parent's home since the victim's disappearance; the person related that the victim had had an abortion a few months earlier; and when Sergeant Tice asked the caller about the location of his

truck, the person said he could not speak to police about that without his lawyer. Sergeant Tice's testimony concerning the conversation was properly admitted.

[7] Defendant next assigns error to the denial of his motion *in limine* to exclude testimony by Coast Guard Petty Officer Torquato as to prevailing ocean currents from 1 July 1991 to 4 July 1991. Defendant contends the evidence was relevant only to the question of jurisdiction, and that the trial court had, by its earlier rulings, precluded defendant from relitigating that issue. Thus, he argues, the evidence was not relevant to any issue before the jury and should have been excluded. We disagree.

Evidence is relevant and admissible if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401, 402. We hold Petty Officer Torquato's testimony as to ocean currents was relevant to show a connection between defendant and the crime in that an inference could be drawn therefrom that the body had drifted from an area with which defendant was familiar, where he and Brenda Dozier had previously camped and fished, and where he had stated an intention to take Ms. Dozier over the 4th of July holiday.

Alternatively, defendant claims the State, by offering Petty Officer Torquato's testimony, "opened the door" to his relitigating the issue of jurisdiction, and that the trial court erred by refusing to allow him "to present his own evidence concerning the location and movement of the body." As noted above, the evidence was admissible, not as to jurisdiction, but as evidence tending to show defendant's connection with the crime. Moreover, there is no indication in the record that defendant made any offer of evidence as to "the location and movement of the body" or that the trial court excluded such evidence. The exclusion of evidence will not be held for error in the absence of a showing of an offer thereof. N.C. Gen. Stat. § 8C-1, Rule 103(a). *State v. Barton*, 335 N.C. 741, 441 S.E.2d 306 (1994). We deem these assignments of error to be without merit.

[8] Defendant next assigns error to the denial of his motion to strike certain testimony by Douglas Campbell, a co-worker of defendant. Campbell testified that after seeing a news report that an unidentified body bearing a rose tattoo had washed onto the beach at Nags Head, Campbell had said to his girlfriend, "Mike, he killed his girlfriend." Campbell also testified that he told his employer that he did

not want to work with defendant because he thought defendant had killed Brenda Dozier. Defendant argues that the witness had no foundation for the first statement, and that neither of the statements are relevant.

A lay witness may testify as to opinions or inferences drawn if those opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.R. Evid. 701. Our Supreme Court has held that "out-of-court statements offered to explain the conduct of a witness are relevant and admissible." *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991) (citing *State v. Potter*, 295 N.C. 126, 132, 244 S.E.2d 397, 401-02 (1978) (witness' testimony as to a threat to her husband admissible to explain her subsequent conduct in calling the police)). Campbell testified that defendant had stated that he and Ms. Dozier had been fighting the whole weekend prior to the murder, and that defendant said he was going to kill the victim if they did not get away from each other. Defendant further stated he was going to chain the victim to the bottom of the ocean. Campbell testified that on 2 July defendant's eyes were bloodshot, he was agitated and edgy, and that he "appeared to have been up all night." Defendant also asked if Campbell could help get some new seats for defendant's truck because of blood on the seats from a fight defendant and the victim allegedly had a couple of weeks earlier. Campbell was aware of the distinctive rose tattoo on Ms. Dozier. Subsequent to the news report, Campbell called the "Crime Line" to report his previous conversation with defendant. Thus, there was a rational basis for Campbell's testimony, and the testimony shows that by his conduct the witness took defendant's statements seriously. For similar reasons, we overrule, without discussion, defendant's eighteenth assignment of error, which is directed to similar testimony by another witness.

[9] Defendant next contends the trial court erred in denying his motion *in limine* to preclude Robert Hart's testimony that defendant had told him that "if he were pulled over, that he would take out whoever pulled him over—with him" and that "something had gone south and that he had to off two people." Defendant argues the statements were not relevant and were offered solely to prove that defendant was a person of bad character.

"[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Prevette*, 317 N.C.

148, 162, 345 S.E.2d 159, 168 (1986). In light of other testimony tending to show that Ms. Dozier had expressed fear of defendant because she knew of things he had done, defendant's alleged statements tend to establish a motive for killing her, his intent to elude capture, and also go to the issue of premeditation and deliberation. At defendant's request, the trial court gave the jury a limiting instruction that the testimony was not offered to show defendant's character, but was admissible only for the purpose of "showing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, entrapment, or accident, if you find that it does so." We find no abuse of discretion in the trial court's denial of defendant's motion *in limine*. *See Prevette*, 317 N.C. 148, 345 S.E.2d 159 (testimony concerning a defendant's statement that he had "unfinished business" in the area to take care of upon his release from prison held relevant and properly admitted).

By his twenty-fourth and twenty-sixth assignments of error, defendant contends the trial court erred by refusing to dismiss the charge of first degree murder at the close of the State's evidence and at the close of all the evidence. Only the ruling made at the close of all the evidence is subject to review. *State v. Hough*, 299 N.C. 245, 262 S.E.2d 268 (1980). Defendant contends there was an absence of sufficient evidence of premeditation and deliberation to support a conviction of first degree murder. However, defendant was acquitted of first degree murder, having been convicted of the lesser offense of second degree murder. Thus, any error with respect to the submission of the issue of defendant's guilt of first degree murder was rendered harmless, absent some showing that the verdict of guilty of second degree murder was affected thereby. *State v. Berkley*, 56 N.C. App. 163, 287 S.E.2d 445 (1982). Defendant has made no such showing.

We have examined carefully the remaining assignments of error brought forward in defendant's brief and conclude that they are without merit and may be overruled without discussion.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges JOHN and McGEE concur.

EMPLOYMENT SECURITY COMM. v. PEACE

[122 N.C. App. 313 (1996)]

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT/RESPONDENT v. WILLIAM PEACE, APPELLEE/PETITIONER

No. COA94-1283

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLEE-RESPONDENT, v. WILLIAM H. PEACE, III, Appellant-Petitioner.

No. COA95-678

(Filed 7 May 1996)

1. Public Officers and Employees § 67 (NCI4th)— state employee's obtaining coffee without permission— employee's filing of criminal charge—dismissal without just cause—sufficiency of evidence to support findings

The evidence was sufficient to support the findings of the Personnel Commission, and its findings were sufficient to support its conclusions that petitioner, a permanent state employee, was not dismissed for just cause and should be reinstated where the evidence tended to show that petitioner, in good faith, believed his membership in the office petty fund allowed him to obtain coffee from the personnel file room, which he did; when a supervisor in the personnel office told petitioner he should pay for the coffee, petitioner refused; the supervisor called petitioner despicable, told him she hoped he was fired, and told petitioner that, if he got another cup of coffee without paying, she would get a cup of coffee and scald him with it; petitioner had the right to seek protection from potential bodily harm by taking his complaint to the proper judicial officials, even if the charge was dismissed as frivolous by the trial court; and petitioner was not contacted by his superiors regarding the incident until he received a predismissal conference memorandum the day before his dismissal conference, after which he was dismissed for unacceptable personal conduct.

Am Jur 2d, Civil Service § 63.

2. Public Officers and Employees § 66 (NCI4th)— termination for good cause—burden of proof on employer

The Personnel Commission properly required the employer, the Employment Security Commission, to carry the burden of proving petitioner was terminated for good cause.

Am Jur 2d, Civil Service § 61.

Appeal by respondent from order entered 12 August 1994 by Judge Narley L. Cashwell in Wake County Superior Court and appeal by petitioner from order entered 13 March 1995 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 19 March 1996.

Attorney General Michael F. Easley, by Chief Deputy Attorney General Andrew A. Vanore, Jr., and Assistant Attorney General Valerie Bateman, for North Carolina Department of Justice; and Chief Counsel T.S. Whitaker and Attorney Fred R. Gamin, for North Carolina Employment Commission, respondent appellant-appellee.

Hilliard & Jones, by Thomas Hilliard, III, for petitioner appellant-appellee.

SMITH, Judge.

Petitioner, William H. Peace, III, appeals a superior court order reversing a State Personnel Commission decision which reinstated petitioner as an employee of respondent, the Employment Security Commission of North Carolina ("ESC"). ESC appeals a superior court order affirming an Office of Administrative Hearing ("OAH") decision finding a Title VII violation and reinstating petitioner. After carefully reviewing the record, we agree with petitioner's contention that ESC has failed to show that it dismissed petitioner with just cause. Therefore, we affirm the decision of the State Personnel Commission reinstating petitioner. For reasons stated herein, we do not address the merits of ESC's appeal.

William H. Peace, III, began his employment with respondent on 15 October 1985 as its Equal Employment Opportunity ("EEO") officer. On 10 April 1991, an incident between Peace and a coworker occurred which ultimately led to Peace's dismissal for alleged unacceptable personal conduct. The State Personnel Commission adopted, *inter alia*, the following facts as recommended by the Administrative Law Judge ("ALJ"): During his 1985 orientation, petitioner was informed that by paying $2.00 per month to the Personnel Office petty fund, he would be entitled to obtain an occasional cup of coffee from a pot located in the personnel file room. He paid the dues; however, his usual practice was to go to the agency's cafeteria for morning coffee. Prior to 10 April 1991, no one informed petitioner that his payment into the petty fund did not entitle him to obtain coffee from the personnel file room. Over the years, on an irregular

basis, he obtained coffee from the petty fund coffee pot. At a staff meeting which petitioner did not attend, a coffee fund was established, for which membership dues were $3.40 per month. Petitioner was not made aware of a separate coffee fund, nor was he asked to join.

On 10 April 1991, petitioner got a cup of coffee from the personnel file room. As petitioner was leaving the office with the coffee an exchange between him and Ms. Catherine High, a supervisor in the personnel office, took place in which she told him that he should pay her for the coffee. Petitioner refused. Ms. High called petitioner "despicable" and told him she hoped he was fired. She ended the colloquy by telling petitioner that, if he got another cup of coffee and did not pay her, she would get a cup of coffee and scald him with it. Ms. High informed her supervisor and Mr. Gene Baker, who became petitioner's immediate supervisor as of 22 April 1991, of the incident.

On the afternoon of 10 April 1991, petitioner contacted the magistrate's office regarding the incident with Ms. High. He was informed that if he believed she was capable of carrying out her threat, he should take out a warrant against her. Petitioner spoke with Ms. High following his conversation with the magistrate's office, at which time he gave her an opportunity to apologize. Ms. High did not apologize. Thereafter, petitioner had the magistrate's office issue summons against Ms. High charging her with communicating a threat. The charge was dismissed by the trial court as frivolous and petitioner was ordered to pay court costs.

Petitioner was not contacted by his superiors regarding the incident until he received a predismissal conference memorandum on 5 June 1991, from Gene Baker, his immediate supervisor. Following a 6 June dismissal conference, petitioner was discharged for unacceptable personal conduct. In a 7 June letter, Ann Q. Duncan, Chairperson of the Employment Security Commission explained that petitioner was being dismissed for unacceptable conduct, including taking the coffee without paying Catherine High and filing criminal charges against High, which were found to be frivolous. Such conduct, said Duncan, caused petitioner's reputation as the EEO officer at ESC to be called into question and his respect among fellow employees diminished.

Petitioner filed two appeals to the ESC decision to discharge him. The basis of his appeals were that ESC lacked "just cause" to dismiss him pursuant to N.C. Gen. Stat. § 126-35 (1995), and that he had been

discharged in retaliation for having filed discrimination charges against ESC in 1989, in violation of Title VII, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3 (1964). Petitioner did not appeal upon a state claim of retaliatory discharge pursuant to N.C. Gen. Stat. § 126-36. Pursuant to N.C. Gen. Stat. § 7A-759, petitioner's charge of retaliatory discharge was investigated by the Civil Rights Division of the Office of Administrative Hearings.

Through its investigation, OAH found reasonable cause to believe that a violation of Title VII had occurred. OAH presented petitioner with three options. He could: (1) receive a right to sue letter; (2) commence a contested case hearing in OAH; or (3) do nothing. Petitioner chose to commence a contested case hearing with regard to the retaliatory discharge claim. He also filed a petition for contested case hearing with regard to the N.C. Gen. Stat. § 126-35 lack of "just cause" claim. Pursuant to an order of the Chief Administrative Law Judge of OAH, both cases were consolidated for hearing. A hearing was conducted by ALJ Sammie Chess on 12-14 July 1993.

Pursuant to N.C. Gen. Stat. § 7A-759(e), an ALJ decision on the merits of a retaliatory discharge claim is a final decision binding on the parties. However, with regard to the N.C. Gen. Stat. § 126-35 lack of "just cause" claim, an ALJ issues a recommended decision to the State Personnel Commission, which then issues a final decision. N.C. Gen. Stat. § 126-37 (1995). ALJ Chess issued two separate decisions following the hearing. In his recommended decision to the State Personnel Commission, ALJ Chess found that ESC had the burden of proving it had "just cause" to discharge petitioner. ALJ Chess concluded that ESC had failed to meet that burden and recommended petitioner be reinstated. In his final decision regarding the retaliatory discharge claim pursuant to Title VII, ALJ Chess concluded that petitioner's discharge violated Section 704(a) of Title VII of the Civil Rights Act of 1964, in that his dismissal was retaliatory. Pursuant to that holding, ALJ Chess ordered petitioner reinstated.

The ALJ's recommended decision reinstating petitioner for lack of "just cause" was adopted, with slight modification, by the State Personnel Commission. ESC appealed the State Personnel Commission order and the ALJ final decision separately, pursuant to N.C. Gen. Stat. § 150B-50 (1995). In a 13 August 1994 order, Judge Narley L. Cashwell upheld the final decision of the ALJ with regard to the retaliatory discharge claim in which petitioner was ordered reinstated. In a 13 March 1995 order, Judge Wiley F. Bowen reversed the

final decision of the State Personnel Commission and dismissed Peace's petition challenging his dismissal. From these superior court orders, ESC appeals Judge Cashwell's order affirming the retaliatory discharge claim. Petitioner appeals Judge Bowen's order reversing the State Personnel Commission decision to reinstate him.

Initially, we note that the two cases should have been consolidated for all purposes except the final agency decision by the ALJ pursuant to N.C. Gen. Stat. § 150B-26. Failing that, the appeals from the ALJ and State Personnel Commission orders should have been consolidated in ESC's petition for judicial review to the superior court. At the very least, the two appeals should have been consolidated for hearing in the superior court, as both appeals involved identical facts and similar questions of law. As a result of the failure to consolidate and the filing of two separate petitions for judicial review, two inconsistent orders were issued from Wake County Superior Court. In addition, we are now presented with two records on appeal and two sets of lengthy briefs, all arising out of the same set of facts.

After careful review of both records and both sets of briefs in this case, we agree with petitioner that the superior court erred in reversing the State Personnel Commission decision to reinstate petitioner. For this reason, it is unnecessary for us to reach the merits of ESC's appeal of the superior court order affirming the ALJ order to reinstate petitioner under the retaliatory discharge claim, as that issue is rendered moot by our decision reinstating the decision of the State Personnel Commission.

This Court's as well as the superior court's review of a final agency decision is governed by N.C. Gen. Stat. § 150B-51 (1995). *In Re: Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995); *Dockery v. Dept. of Human Resources*, 120 N.C. App. 827, 463 S.E.2d 580 (1995). The proper standard of review depends upon the particular issues presented on appeal. *Brooks v. Ansco & Associates*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 92 (1994). "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." *In re: Appeal of Ramseur*, 120 N.C. App. at 524, 463 S.E.2d at 256 (citations omitted).

To determine whether an agency's findings are supported by substantial evidence, the reviewing court applies the "whole record" test. *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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977) (citation omitted). The "whole record" test requires the reviewing court to take into account all evidence in the record, including evidence which supports the Commission's decision as well as that which in fairness detracts from it. *Id.* However, "[t]he 'whole record' test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it de novo . . . ." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

[1] As the reviewing court, we must take into account the specialized expertise of the staff of an administrative agency, in this case, the State Personnel Commission. *High Rock Lake Assoc. v. Environmental Management Comm.*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981). While there is evidence in the record contrary to the Commission's findings, neither this Court nor the superior court may substitute its judgment for that of the agency. After reviewing the record, we find substantial evidence to support the State Personnel Commission's findings of fact.

While the criminal charges brought by petitioner against Ms. High were found to be frivolous, the Commission found as fact that "[t]he petitioner believed that Ms. High was capable of scalding him with coffee." In passing upon issues of fact, the Commission, as trier of fact, is the sole judge of the credibility of the witnesses, and of the weight to be given to their testimony. This being true, it may accept or reject the testimony of a witness, in whole or in part, depending solely upon whether it believes or disbelieves the witness. *Anderson v. Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951). The Commission found it pertinent that the judicial officer (magistrate) "found facts sufficient to issue the warrant." The Commission also found that none of the reasons for petitioner's dismissal were ever discussed with him prior to 6 June 1991. Applying the "whole record" test, we find the Commission's findings are supported by substantial evidence.

Based upon its findings of fact, the State Personnel Commission made the following conclusions of law:

1. Petitioner was a Permanent State employee within the meaning of that term as defined in North Carolina General Statute Section 126-39, at the time of his dismissal on June 7, 1991. The Office of Administrative Hearings has jurisdiction to hear Petitioner's appeal where he has alleged that Respondent lacked just cause to terminate his employment without warning and where he has alleged that Respondent committed procedural violations while implementing the dismissal. [N.C. Gen. Stat. §]126-35.

2. [N.C. Gen. Stat. §]126-35(a) provides, in part, that "[N]o permanent employee subject to the State Personnel Act shall be discharged . . . for disciplinary reasons, except for just cause." Where just cause is an issue, the Respondent bears the ultimate burden of persuasion. A just cause issue involves both procedural and substantive questions. Causes for dismissal fall into two categories: (1) causes relating to performance of job duties and, (2) causes relating to personal conduct - no prior warnings are required under (2).

3. The Petitioner was not discharged for just cause.

. . . .

5. Respondent's actions, or lack thereof, following the April 10, 1991 coffee incident and May 21, 1991 court judgment were inconsistent with its claim that Petitioner's conduct was unacceptable. For the two month period, April 10, 1991 through June 6, 1991, Respondent never raised the issue of unacceptable personal conduct with Petitioner; in addition, during that period, Petitioner's work performance was neither reviewed nor appraised by Respondent to determine what impact, if any, the above incidents had on his reputation as the EEO Officer. No evidence showed that Petitioner was unfit to continue his employment due to the events occurring in April and May, 1991.

. . . .

8. Petitioner belonged to the petty fund and in good faith believed that, as in the past, such membership continued his entitlement to an occasional cup of coffee.

. . . .

13. Petitioner had the right to seek protection from potential bodily harm by taking his complaint to proper judicial officials.

Based upon the foregoing conclusions of law, the Commission reversed ESC's decision to dismiss petitioner because such decision was without "just cause."

Petitioner's argument that his discharge was not for "just cause" based upon his personal misconduct raises a question of law and is, therefore, reviewed *de novo* by this Court. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 678, 443 S.E.2d 114, 120 (1994). An alleged error of law "exists if a conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the agency." *Brooks*, 114 N.C. App. at 717, 443 S.E.2d at 92. In this case, we hold the agency's findings, support its conclusions, and its conclusions support its decision to reinstate petitioner.

[2] As a career state employee, defined in N.C. Gen. Stat. § 126-1A, petitioner could not be dismissed from employment with ESC except for "just cause." N.C. Gen. Stat. § 126-35. The "just cause" provision creates a "property interest of continued employment . . . protected by the Due Process Clause of the United States Constitution." *Leiphart*, 80 N.C. App. at 348, 342 S.E.2d at 921 (citations omitted). In its order, the State Personnel Commission held that the burden of proving "just cause" existed to justify dismissal is upon the State. In a recent decision involving almost identical "just cause for termination" provisions governing City of Raleigh employees, this Court held the City's rules placing the burden of showing lack of "just cause" upon the city employee constitutionally infirm. *Soles v. City of Raleigh Civil Service Comm.*, 119 N.C. App. 88, 457 S.E.2d 746, *disc. review allowed*, 341 N.C. 652, 462 S.E.2d 517 (1995). In reaching its decision, the *Soles* court applied a balancing test, weighing the respective interests of the individual and the governmental entity. *Id.* at 95, 457 S.E.2d at 751. Specifically, the Court looked at three factors:

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

Id. (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed. 2d 18, 33 (1976)).

Examining those factors, the *Soles* court held that Mr. Soles' interest in retaining his employment was a constitutionally protected property right. Regarding the second factor, the court held that "requiring the dismissed employee to prove that the 'action taken against him was unjustified' significantly increases the risk of an erroneous deprivation of the right to retain employment." *Id.* at 96, 457 S.E.2d at 752. With respect to the third factor, the court recognized the City's legitimate interest in maintaining good, efficient employees for the efficient operation of government, and in that case, insuring that employees are not using illegal drugs. Nevertheless, the court concluded that the "scales tip in favor of an individual employee's right to retain constitutionally protected employment until the [governmental entity] proves cause exists for termination." *Id.* Given the similarities between the case *sub judice* and *Soles*, we agree with the analysis, and are in fact bound by the holding, in the *Soles* decision. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989). Therefore, we find that the Commission was correct in requiring ESC to carry the burden of proving petitioner was terminated for good cause.

The remaining issue left for our consideration is whether the State Personnel Commission erred in concluding as a matter of law petitioner was dismissed without "just cause." N.C. Gen. Stat. § 126-35 does not define "just cause." Interpreting the statute, we are to give the words their ordinary meaning. *Reed v. Byrd*, 41 N.C. App. 625, 255 S.E.2d 606 (1979). In this case, the Commission found that petitioner, in good faith, believed his membership in the office petty fund allowed him to obtain coffee from the personnel file room. The Commission also found that petitioner had the right to seek protection from potential bodily harm by taking his complaint to the proper judicial officials. There is substantial competent evidence in the record to support these findings.

ESC specifically dismissed petitioner for obtaining coffee without permission and for filing a criminal charge, later found to be frivolous. Based upon the Personnel Commission's findings, neither basis for dismissal is well founded. Thus, we cannot say that the Commission erred, as a matter of law, in its conclusion that ESC failed to show "just cause" for its dismissal of petitioner.

In summary, we find the Commission's findings of fact supported by substantial evidence in the record. Furthermore, the Commission's conclusions of law are supported by the findings of fact and support the decision of the Commission. *See Brooks*, 114 N.C. App. 711, 443 S.E.2d 89. For the foregoing reasons, we affirm the order of the State Personnel Commission reinstating petitioner. ESC's appeal in case 93 CVS 10599 affirming the ALJ on the retaliatory discharge claim is dismissed as moot, as a result of our affirming the order of the State Personnel Commission. In case 94 CVS 11517 the order of the superior court is reversed.

Reversed in Case No. 94 CVS 11517.

Appeal dismissed in Case No. 93 CVS 10599.

Judges GREENE and LEWIS concur.

EMMETT H. WIGGINS, PLAINTIFF v. PATSY ANN L. SHORT, MARY L. LOWELL, CHARLOTTE AMANDA L. MUNGER, MARK BRICKHOUSE, AND EVELYN B. LOWELL, TRUSTEE FOR THE ALBANIA TRUST, DEFENDANTS

No. COA95-518

(Filed 7 May 1996)

1. Highways, Streets, and Roads § 11 (NCI4th)— path not public road—sufficiency of evidence

The trial court did not err in concluding that a path crossing defendants' property and leading to plaintiff's house was not a public road, since the path had not been established as a public road in a judicial proceeding; the public had not generally used the road; the fact that the town had a water drain easement across the path was competent evidence from which the trial judge could conclude that the town maintained the road for its own access, not that of the public generally; defendants never offered or intended to offer the path to the public; and simply including the path on the town map was insufficient evidence of the town's intent to accept the path for public use. N.C.G.S. § 160A-296(a)(2).

Am Jur 2d, Highways, Streets, and Bridges § 32.

2. Easements §§ 59, 60, 61 (NCI4th)— no express easement—no implied easement from prior use—no implied easement by necessity

The trial court did not err in finding that the facts of this case did not support : (1) an express easement, since plaintiff failed to produce sufficient evidence to fix the location of the easements granted in the conveyance to plaintiff's predecessor and to establish the intentions of the parties at the time of that conveyance; (2) an implied easement from prior use, since plaintiff failed to show that at the time of his conveyance, the path in question was an obvious and apparent path across the land of his predecessors, that it was necessary for the benefit of his property, that there existed a map showing the property or the paths running through it at the time of plaintiff's conveyance, or that before separation of the property, the use giving rise to the alleged easement was so long continued and obvious as to show that it was meant to be permanent; and (3) an implied easement by necessity, since plaintiff had adequate and proper access to his property without the use of the path in question.

Am Jur 2d, Easements and Licenses §§ 134, 135.

Appeal by plaintiff from judgment entered 2 February 1995 by Judge Zoro J. Guice, Jr., in Chowan County Superior Court. Heard in the Court of Appeals 21 February 1996.

Moseley, Elliott & Sholar, L.L.P., by Bradley A. Elliott and Terry M. Sholar, for plaintiff appellant.

Max S. Busby, P.A., by Max S. Busby, for defendant appellee.

SMITH, Judge.

Plaintiff appeals from judgment entered by the trial court denying a mandatory injunction for removal of a gate and fence from a section of roadway over which plaintiff claimed a right-of-way. After careful review of the record, we affirm.

The record reveals that in 1940, M.G. Brown Company, Inc., conveyed a certain portion of its property in Chowan County, North Carolina to Pattie C. Brown (the 1940 conveyance). The conveying instrument also conveyed to grantee, Pattie Brown, three rights-of-way across M.G. Brown Company property.

In 1946, Pattie C. Brown conveyed a part of the property conveyed to her through the 1940 conveyance, to E.H. Wiggins, appellant (the 1946 conveyance). The 1946 conveyance to E.H. Wiggins did not expressly provide any access easements or other rights-of-way, but did contain a typical habendum clause referencing all "privileges and appurtenances."

When appellant Wiggins initially bought the land, "it was in poor condition" and "high water [from the adjoining creek] would just cover it." After purchasing the land, Mr. Wiggins filled in much of the property and began using it to store heavy equipment, such as bulldozers. He eventually moved a lighthouse from the Roanoke River to his property and began living there off and on. He now lives in a mobile home on the property.

At the time he purchased the land from Pattie C. Brown, Wiggins had two means of access. He could get to his property by water or by Eden Street Road Extended, which crossed a wooden bridge. The bridge apparently crossed Pembroke Creek, although there is some evidence in the record that the bridge crossed Filbert Creek. We are simply unable to discern the location of the bridge from the record. At trial, Mr. Wiggins testified that, except for those two means of access, he "couldn't get [to his property] until later they changed the road up there and put Dickerson [*sic*] Street in . . . ." There is now a path Mr. Wiggins calls "Shore Drive," which runs from Dickinson Street across appellee's property (the Pattie C. Brown tract) to Mr. Wiggins' home. From the record we have been unable to discern exactly where this path crosses appellees' property.

At some time, although it is unclear when, the bridge crossing the creek became unusable and was eventually torn down. Thus, the Eden Street Extended entrance to appellant's property was no longer available. Apparently, it was then that appellant began accessing his property by the "Shore Drive" entrance.

In the summer of 1989, appellees began having security problems with the house located on their property. Patsy Lowell Short, Pattie C. Brown's granddaughter and part owner of the Pattie C. Brown tract, testified that someone broke into the house and removed selected items in a "kind of sampling run." As a result, appellees decided to erect a gate and fence around portions of the house. Appellees installed a gate across "Shore Drive," the path leading to Mr. Wiggins' home. Going towards Mr. Wiggins' property, the gate could be opened from a vehicle with the proper device (possibly electronic) or it could

be opened from his home. Coming from his property, the gate was controlled by an underground sensing device which opened and closed the gate automatically. Appellees never attempted to keep Wiggins from using "Shore Drive." In fact, they made repeated efforts to show him how the gate worked and to give him the necessary device which would have allowed him to open the gate from his vehicle.

On 27 February 1991, Mr. Wiggins filed a complaint against appellees, requesting compensatory and punitive damages, and an order requiring defendants to remove the gate across "Shore Drive" immediately and permanently. The parties waived jury trial. The trial court concluded that the evidence was insufficient to establish that the path appellant calls "Shore Drive" is a public road. The court also concluded that Mr. Wiggins had not presented sufficient evidence to show that he had an easement over and across the path. Thus, the trial court entered judgment in favor of defendants, denying plaintiff's request that the gate erected across the path be removed.

[1] Appellant brings forth several assignments of error. First, he argues the trial court erred in concluding that the path he calls "Shore Drive" is not a public road. At trial, Wiggins offered two pieces of evidence as proof that "Shore Drive" was a public road and could not, therefore, be obstructed by appellees pursuant to N.C. Gen. Stat. § 160A-296(a)(2) (1994). First, he introduced a map entitled "Town of Edenton, N.C., Corporate Limits," which shows a road adjoining Dickinson Street labeled "Shore Drive." The map is dated 1979 and is signed by Carlyle C. Webb, a registered land surveyor, who certifies that the mileage statements on the map are correct. Second, Wiggins testified that the town of Edenton has occasionally graded and spread gravel on the road. Ms. Patsy Short testified that the town has a water drainage easement down a portion of the road and this is why the town occasionally grades the road.

The North Carolina Supreme Court has held:

> " '[T]here can be in this State no public road or highway unless it be one either established by public authorities in a proceeding regularly instituted before the proper tribunal or one generally used by the public and over which the public authorities have assumed control for the period of twenty years or more; or dedicated to the public by the owner of the soil with the sanction of the authorities and *for the maintenance and operation of which they are responsible.*' "

Owens v. Elliott, 258 N.C. 314, 317, 126 S.E.2d 583, 586 (1962) (quoting *Chesson v. Jordan*, 224 N.C. 289, 291, 29 S.E.2d 906, 908 (1944)). In this case, "Shore Drive" has not been established as a public road in a judicial proceeding, nor has the public generally used the road. Town or city maintenance of a roadway may be some evidence of acceptance of the road for public use. *See Blowing Rock v. Gregorie*, 243 N.C. 364, 368, 90 S.E.2d 898, 901 (1956). However, in this case, the Town of Edenton has a water drain easement across the path. This is competent evidence from which the trial judge could conclude that the town maintained the road for its own access, not that of the public generally.

Alternatively, appellant argues that the map of the town evidences a public dedication of the road. However, appellant's argument fails for two reasons. First, from the record, we find no evidence that appellees ever offered or intended to offer the road to the public. Second, simply including the road on the town map is insufficient evidence of the town's intent to accept the road for public use. To accept a road for public use, the proper public authorities must accept the offer in some "recognized legal manner." *Owens*, 258 N.C. at 317, 126 S.E.2d at 586 (citing *Gault v. Lake Waccamaw*, 200 N.C. 593, 158 S.E. 104 (1931)). There is a dearth of evidence indicating proper acceptance of the path. Thus, the trial court did not err in its conclusion that "Shore Drive" is not a public road.

[2] Next, appellant argues the trial court erred in finding that the facts of this case do not support an express easement, an implied easement from prior use, or an implied easement by necessity. First, Mr. Wiggins argues that Pattie C. Brown was granted an easement to "Shore Drive" through the 1940 conveyance from M.G. Brown Company. He maintains that through that deed, he obtained an express appurtenant easement over "Shore Drive."

The 1946 conveyance from Pattie C. Brown to E.H. Wiggins makes no specific reference to an easement, but does refer to all "privileges and appurtenances" of the transferred land. "Appurtenance" has been defined as " '1: an incidental property right or privilege (as to a right of way, a barn, or an orchard) belonging to a principal right and passing in possession with it 2: a subordinate part, adjunct, or accessory.' " *Blackwelder v. Insurance Co.*, 10 N.C. App. 576, 580, 180 S.E.2d 37, 39 (1971) (quoting Webster's Third New International Dictionary). An easement granted to Pattie C. Brown in the 1940 conveyance may have been transferred with the portion of

land conveyed to Wiggins in the 1946 deed, as an "appurtenance," if certain conditions of an express easement had been met.

An express easement must be "sufficiently certain to permit the identification and location of the easement with reasonable certainty." *Adams v. Severt*, 40 N.C. App. 247, 249, 252 S.E.2d 276, 278 (1979). "The description must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers." *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942) (citing *Hodges v. Stewart*, 218 N.C. 290, 291, 10 S.E.2d 723, 724 (1940)). However, our Supreme Court has stressed that an alleged grant of an easement will be void only "when there is such an uncertainty appearing on the face of the instrument itself that the court—reading the language in the light of all the facts and circumstances *referred to in the instrument*—is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed." *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984). Where there is no express agreement with respect to the location of an easement, " 'the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor . . . sufficiently locates the way, which will be deemed to be that which was intended by the grant.' " *Id.* (quoting *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953)).

The plaintiffs in the *Allen* case produced surveys, photographs, maps and testimony from witnesses fixing the location of alleged easements which were not sufficiently described in the conveyance. In this case, however, appellant has failed to produce sufficient evidence to fix the location of the easements granted in the 1940 conveyance to Pattie C. Brown. The granting language in Pattie C. Brown's 1940 deed is insufficient to describe the exact location of the alleged easements because it is vague. Evidence presented by appellant at trial fails to establish the intentions of the parties with respect to the location of the easements granted to Pattie C. Brown in 1940. We obviously cannot use the same language to establish Wiggins' alleged easement rights across "Shore Drive." The language of the 1940 deed provides Pattie C. Brown

> [1] together with the right to use, jointly with M.G. Brown Company, the right of way granted to M.G. Brown Company by R.L. Boyce & Wife by deed dated February 17, 1927 recorded in Book Q#2 page 411 in the public registry of said County, said right of way extending from the M.G. Brown Company property to the

> State Highway a short distance West of Filbert's Creek, [2] together with a right of way across the M.G. Brown Company's property necessary to get to and from and use the right of way aforesaid. [3] Also a right of way across the M.G. Brown Company property over the road leading from the wooden bridge across Filbert's Creek to Eden Street with all necessary or proper means of transportation of persons and property.

We note that the words "right of way" usually connote an easement, and in this case, giving effect to these words, we find that three appurtenant easements were granted to Pattie C. Brown through the above conveyance. *See Crawford v. Wilson*, 43 N.C. App. 69, 257 S.E.2d 696 (1979).

According to appellant's testimony, at the time he purchased the land from Brown, he had two means of access to his property. He could access it from Pembroke Creek or by crossing the wooden bridge connected to Eden Street Extended. Wiggins' testimony suggests that an easement exists over the road leading from the Eden Street Extended bridge to his property. However, Pattie C. Brown's 1940 deed refers to a bridge over Filbert Creek. The evidence does not clearly establish the existence of an easement leading from Eden Street Extended to appellant's property. Furthermore, no evidence fixing the location of the other two easements ([1] and [2]) referenced in Brown's 1940 deed was presented at trial. We are unable to determine whether the road appellant calls "Shore Drive" constitutes part, or all, of one of the remaining two easements described in Brown's deed, because we cannot determine from the record where those paths were. The description in the 1940 conveyance does not furnish any means by which the location of the proposed easement may be ascertained. Appellant failed to produce evidence at trial showing that "Shore Drive" is a path the parties intended to include in the grant of easements in the 1940 conveyance. *Harris v. Greco*, 69 N.C. App. 739, 744, 318 S.E.2d 335, 339 (1984). Therefore, the trial court did not err in concluding appellant does not have an express easement over "Shore Drive."

However, even if not expressly granted in a conveyance, "the rule is said to be general that, where one conveys a part of his estate, he impliedly grants all those apparent or visible [appurtenant] easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part." *Carmon v. Dick*, 170 N.C. 305,

306-07, 87 S.E. 224, 225 (1915); *see also Barwick v. Rouse*, 245 N.C. 391, 95 S.E.2d 869 (1957); *Dorman v. Ranch*, 3 N.C. App. 559, 165 S.E.2d 561 (1969). Because it is not expressly granted, this type of easement has come to be known as an easement implied from prior use. A reason for the rule is that an appurtenant easement, which "is an incorporeal right attached to the land and incapable of existence separate and apart from the particular land to which it is annexed," passes with transfer of the dominant tenement, or part thereof, as an appurtenance. *Yount v. Lowe*, 288 N.C. 90, 97, 215 S.E.2d 563, 567, *aff'd*, 288 N.C. 90, 215 S.E.2d 563 (1975). Applying this reasoning to the instant case, it is tenable that an easement obtained by Pattie C. Brown from M.G. Brown Company in the 1940 deed, was impliedly transferred through the 1946 conveyance to E.H. Wiggins.

It is also possible that an easement from prior use may have arisen upon severance of the Pattie C. Brown property. This is so even if such path had been entirely contained within Brown's property before severance, rather than running through any portion of the M.G. Brown property. It is fundamental that a person may not possess an easement in his own land. However

> "it is a well settled rule that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary to the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant."

Barwick, 245 N.C. at 393, 95 S.E.2d at 871 (quoting 17 Am. Jur. 945 *Easements Implied* § 33).

An easement may be implied from prior use when three essential elements of creation are met: (1) A separation of title; (2) before the separation took place, the use which gives rise to the easement must have been so long continued and obvious as to show that it was meant to be permanent; and (3) the easement must be necessary to the beneficial enjoyment of the land granted or retained. *Carmon*, 170 N.C. 305, 87 S.E. 224; *Barwick*, 245 N.C. 391, 95 S.E.2d 869; *Jones v. Carroll*, 91 N.C. App. 438, 371 S.E.2d 725 (1988). The burden of estab-

lishing an easement is upon the party asserting a right to go upon lands to which he does not have title. *McCracken v. Clark*, 235 N.C. 186, 69 S.E.2d 184 (1952); *Ferrell v. Trust Co.*, 221 N.C. 432, 20 S.E.2d 329 (1942); *Carmon*, 170 N.C. 305, 87 S.E. 224. Wiggins has failed to show that the path he calls "Shore Drive" meets the essential elements of an easement implied from prior use, either across the M.G. Brown Company tract or the Pattie C. Brown tract. Therefore, for the reasons stated below, we affirm the trial court's conclusion that no such implied easement exists.

We first address the possibility of an easement extending across the M.G. Brown Company tract. Appellant has failed to show that at the time of his conveyance, "Shore Drive" was an obvious and apparent path across M.G. Brown Company property or that the path was necessary for the benefit of Wiggins' property. The record is devoid of any map or plat showing the M.G. Brown property or the paths that ran through it at the time of appellant's conveyance. Without such evidence, the trial court was correct in concluding that there was no easement implied from prior use across any land retained by the original grantor, M.G. Brown Company.

Second, with respect to a claim of easement across the Pattie C. Brown tract, appellant has again failed to prove two of the three requirements necessary to imply an easement by prior use. Wiggins has shown separation of title. However, he has not shown that before the separation of the property, the use giving rise to the alleged easement was so long continued and obvious as to show that it was meant to be permanent. *Carmon*, 170 N.C. at 308, 87 S.E. at 226. Mr. Wiggins testified at trial that until the bridge connected to Eden Street Extended across Pembroke Creek became unusable, he did not use the "Shore Drive" entrance to his property. He presented no other evidence that "Shore Drive" was otherwise used prior to severance of the Brown tract. Wiggins has also failed to show that the easement across the Brown property is necessary to the beneficial enjoyment of the land granted. Because appellant has failed to meet his burden on this issue, we affirm the trial court's conclusion that no easement implied from prior use exists under the facts of this case.

As an alternative to an express or implied easement, appellant argues he has an easement by necessity across "Shore Drive." The trial court found that Mr. Wiggins had adequate and proper access to his property without the use of "Shore Drive," and thus did not have an easement by necessity over the road. We agree and affirm. This

Court has held that an easement by necessity will be implied upon proof of two elements: (1) the claimed dominant parcel and the claimed servient parcel were held in a common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became "necessary" for the claimant to have the easement. *Harris*, 69 N.C. App. at 745, 318 S.E.2d at 339. To establish a right of way as "necessary," it is not required that the party thus claiming show absolute necessity. It is sufficient to show physical conditions and use which would "reasonably lead one to believe that the grantor intended the grantee should have the right of access." *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971) (citing *Smith v. Moore*, 254 N.C. 186, 118 S.E.2d 436 (1961)). The right must be necessary to the beneficial use of the land granted, "and to its convenient and comfortable enjoyment, as it existed at the time of the grant." *Meroney v. Cherokee Lodge*, 182 N.C. 739, 744, 110 S.E. 89, 91 (1921).

In this case, Wiggins initially used the land he bought from Brown to store boats and barges; it was covered at high water. After filling in the land, Wiggins used it to store heavy equipment and accessed it by Eden Street Extended. There was no evidence presented at trial to show the road Wiggins calls "Shore Drive" provided any access to his land in 1946, the time of the grant. Wiggins has also failed to show that his grantor intended that he use the path as a means of access to his property at the time of the conveyance. Furthermore, based upon competent evidence presented at trial, Pembroke Creek, which abuts Wiggins' property, is still navigable and is available as a means of access to his property in the same way it was at the time of the 1946 grant. Thus, the trial court did not err in its conclusion that Pembroke Creek provides adequate and proper access to Wiggins' property and he does not have an easement of necessity across appellees' property, *via* "Shore Drive."

Based upon our holding in this case, it is unnecessary to address appellant's remaining assignment of error. For the reasons stated herein, the judgment of the trial court is

Affirmed.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. ANTHONY GLENN CARTER

No. COA95-558

(Filed 7 May 1996)

1. Larceny § 68 (NCI4th)— ownership of stolen property—no variance between indictment and proof

In a prosecution of defendant for felonious larceny of computers and computer equipment from a university, there was no fatal variance between the indictment and proof as to ownership of the stolen goods, since a professor's use of the word "my" in reference to the laboratory and computers did not indicate that they were his own personal property as opposed to the university's.

Am Jur 2d, Larceny § 174.

Single or separate larceny predicated upon stealing property from different owners at the same time. 37 ALR3d 1407.

2. Larceny § 110 (NCI4th)— possession of recently stolen property—sufficiency of evidence

The evidence was sufficient to be submitted to the jury in a prosecution for felonious larceny of computers and other items under the theory of possession of recently stolen property where it tended to show that a cable and lock which were found in defendant's car were clearly and positively identified as coming from the computer lab from which the larceny occurred; they were discovered less than eighteen hours after the theft; defendant was in the area of the computer lab in the evening hours after classes had ended and grades had been turned in, the day before the theft; defendant was seen flinging items into a dumpster; the items that were on the top of the dumpster immediately after defendant deposited items into it were manuals that were of the same type used in the computer lab and were found to be missing; one of the manuals was the only such manual on campus; and defendant's witnesses gave contradictory testimony as to the time defendant left a cookout held on the date the theft probably occurred.

Am Jur 2d, Larceny §§ 166-169.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking. 51 ALR3d 727.

3. Criminal Law § 1177 (NCI4th)— larceny of computer equipment by student with access code—taking advantage of position of trust—sufficiency of evidence to support aggravating factor

In a prosecution of defendant for felonious larceny of computer equipment from the university in which he was enrolled, the trial court did not err in finding as an aggravating factor for purposes of sentencing that defendant took advantage of a position of trust where defendant, an upperclassman, was entrusted with a security access code by his professor on behalf of the university with the expectation that the student would behave in a responsible and trustworthy fashion, and the access code gave defendant access to computer equipment worth thousands of dollars. N.C.G.S. § 15A-1340.4(a)(1)n.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 1 November 1994 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 March 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant.

JOHNSON, Judge.

The State's evidence tends to show the following. On Friday, 7 May 1993, Derrick Clinton Tabor, Assistant Professor of Chemistry at Johnson C. Smith University went to his office in Perry Science Hall at approximately 8:00 p.m., after attending a dinner held in honor of the graduating seniors. Dr. Tabor was surprised to meet defendant in the building at that time of the evening, since classes for the semester were over and grades had been turned in. Defendant asked Dr. Tabor if he had seen Professor Nagem. Dr. Tabor testified that he then asked defendant what he was doing in the laboratory so late, and defendant stated that he had an appointment with Professor Nagem. Dr. Nagem, however, testified that he did not have an appointment with defendant. At the time of this encounter, defendant had a rolled-

up cloth carrying bag. Dr. Tabor checked the computer lab in Perry Hall and left the building. The computer lab was still secure with no missing items the next day, 8 May 1993, at approximately 4:15 p.m., according to Professor Peter Hall.

However, early on the morning of Sunday, 9 May 1993, Dr. Tabor returned to Perry Science Hall and immediately noticed that some computers were missing from the computer lab. The cables to these computers had been cut. Notably, it was later determined that other items were missing from the computer lab as well. There was no sign of forced entry, and the lab was only accessible upon using a security code. Defendant had been given the security code for his classes. Dr. Tabor immediately proceeded to the security booth and informed a security officer that a theft had occurred. Shortly after arriving at the security booth, Dr. Tabor observed defendant drive onto the campus in a small hatchback car and was able to see that there were some items in the back of the hatch that were covered by a cloth. After telling Officer Mark Eli Williams that he had seen defendant in the computer lab building on Friday night, Dr. Tabor and Officer Williams walked away from the security booth in the direction defendant had driven the car. Dr. Tabor and Officer Williams observed defendant take a box and fling it into a dumpster and drive away. Dr. Tabor and Officer Williams then looked into the dumpster and saw, on the very top, computer operations manuals for MacIntosh computers. The manuals were clean and were in plain view.

Officer Williams and Chief of Campus Security, Guy Martin, saw defendant driving toward the dumpster five minutes later, and they stopped the car. After asking defendant if they could search the car, defendant gave consent to a search of the vehicle. Officer Williams and Chief Martin found an eight-inch long cable attached to a lock in the car's back seat, as well as a mousepad and a blue and gold tablecloth in the back of the car, identical in appearance to university tablecloths. The lock had a number on it, and University officials testified that they put such numbers on the locks after buying them. Defendant was taken to the security office for questioning. At that time, defendant gave consent for campus security to search his dorm room, but no computers were found there. A search was conducted of the car belonging to the parents of defendant's fiance´, but nothing further was found.

Officer Williams went with Dr. Tabor and Dr. Hall to the computer lab. Dr. Tabor took keys from a desk in the lab and one of the keys fit

the lock attached to the eight-inch long cable found in defendant's car. The used value of the computers missing as of the date of the trial was $3,492.00.

Defendant, as well as a number of family members and friends, testified on his behalf. Defendant testified that on Friday, 7 May 1993, he went to Perry Science Hall to find his senior advisor, Dr. Nagem, because he found out at approximately 3:30 or 4:00 p.m. that he had failed a class and would not be able to graduate. A friend of defendant, Gary Hunter, testified that he told defendant that he had seen Dr. Nagem leaving campus a short time earlier. Defendant denied telling Dr. Tabor that he had an appointment with Dr. Nagem. According to defendant, when he could not locate Dr. Nagem, he left Perry Science Hall.

Various witnesses testified as to defendant's whereabouts on Saturday, 8 May 1993. Defendant testified that he arrived at a cookout held in his honor between 3:30 and 4:00 p.m., and that he left the cookout between 7:00 and 8:00 p.m. However, two of defendant's witnesses, including his mother, testified that defendant did not leave the cookout before 9:00 p.m. Defendant's fiancé, Audrey Burks, left the cookout around 6:00 p.m. with her parents. Defendant testified that, after leaving the cookout, he went to his friend Gary Hunter's room and stayed there until approximately 10:15 p.m., at which time he went to the Student Union to play cards with friends. Defendant testified that he later spent time with his fiance´ on campus and then the two drove to his grandmother's house to spend the night.

Defendant's fiance´, Ms. Burks, testified that she saw defendant later that night (early Sunday morning) between 12:00 and 12:30 a.m., when she went to the Student Union. She was upset that defendant was playing cards and walked out of the union. Defendant followed her a few minutes later. The two stayed outside until approximately 2:00 a.m., at which time Ms. Burks went to her dorm to pick up some clothes and the two left campus in defendant's car.

Mr. Herbert Gidney, Jr., Assistant Director of the Student Union, testified that the card game broke up around 11:45 p.m. and that he saw Ms. Burks come out of her dorm room at around 2:00 a.m.

According to Ms. Burks, she and defendant went to her parent's motel room knocked on the door, but did not get an answer, at which time they proceeded to defendant's grandmother's house. Defendant testified that they left campus and went to his grandmother's house where they spent the night together. Defendant and Ms. Burks denied

that defendant threw computer manuals into the dumpster. Ms. Burks testified that they threw away a comic book, papers, a Sprite can, and a few other things. Defendant testified that they threw away University manuals, old textbooks and old test scores.

On 1 November 1994, defendant was found guilty of felonious larceny and sentenced to a term of imprisonment of five years. This sentence was suspended and defendant was placed on supervised probation for a period of four years. Defendant appeals.

Defendant first argues that the trial court erred in denying his Motion to Dismiss at the close of all of the evidence where the evidence was insufficient for a rational trier of fact to find each and every element of the crime charged beyond a reasonable doubt.

In deciding whether a Motion to Dismiss should be granted, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). All of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983); *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993).

Regardless of whether the evidence is circumstantial or direct, the test for sufficiency of the evidence to withstand a Motion to Dismiss is the same. *State v. Quick*, 106 N.C. App. 548, 553, 418 S.E.2d 291, 295, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 415 (1992). "If the evidence presented is circumstantial, 'the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (emphasis omitted). Thus, the evidence presented at trial in its entirety must be considered in assessing whether the trial court properly denied defendant's Motion to Dismiss. *State v. McWilliams*, 277 N.C. 680, 687, 178 S.E.2d 476, 479 (1971).

Defendant was charged and subsequently convicted of felonious larceny of three MacIntosh personal computers, two Quantum computer hard drives, one Conner computer hard drive, one computer monitor, one modem, two boxes of floppy disks, four computer man-

uals, one cable and lock, one computer mouse pad, and one tablecloth from Johnson C. Smith University. The essential elements of felonious larceny are: (1) the wrongful taking and carrying away, (2) of the personal property of another, (3) without his consent, and (4) with the intent to deprive permanently the owner thereof. *Mitchell*, 109 N.C. App. at 224, 426 S.E.2d at 444; *see* N.C. Gen. Stat. § 14-72(a) (Cum. Supp. 1995).

Defendant contends that (1) there was a fatal variance between who was alleged to own the cable and lock in the indictment and the evidence produced at trial as to the ownership of the cable and lock; and (2) that the evidence concerning other items alleged to have been stolen, taken singly, are insufficient for the case to have been presented to the jury.

[1] Defendant's first contention that there was a fatal variance to the allegation of the property owner in the indictment and the evidence presented at trial is wholly without merit. The evidence presented at trial revealed that Dr. Peter M. Hall, Professor of Chemistry and Physics, testified that the cable and lock were of the type used in the school laboratory, and that the cable came from his computer in the laboratory. Defendant's allegation that Dr. Hall's reference to the laboratory and computers as his, using the word "my" indicated that it was his own personal property, and not the University's is without merit.

[2] Defendant next contends that the evidence was insufficient under the doctrine of recent possession to show that he stole the items. We disagree. The State's evidence considered in its entirety and in the light most favorable to the State shows that more than adequate evidence was presented to establish that the doctrine of recent possession was applicable.

The doctrine of recent possession of stolen property "allows the jury to presume that the possessor of stolen property is guilty of larceny." *State v. Callahan*, 83 N.C. App. 323, 325, 350 S.E.2d 128, 130 (1986), *disc. review denied*, 319 N.C. 225, 353 S.E.2d 409 (1987) (citing *State v. Williamson*, 74 N.C. App. 114, 327 S.E.2d 319 (1985)). The State is required to prove: "(1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others . . . and (3) the possession was discovered recently after the larceny . . . ." *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981).

Defendant argues that the mousepad and the tablecloth were not sufficiently identified as stolen property. It has been recognized that the fruits of the crime must be firmly established before the presumption of recent possession will apply. *State v. Jones*, 227 N.C. 47, 49, 40 S.E.2d 458, 460 (1946). Nevertheless, "[i]t is not necessary that stolen property be unique to be identifiable. Often stolen property consists of items which are almost devoid of identifying features, such as coins and goods which are mass produced and nationally distributed under a brand name." *State v. Crawford*, 27 N.C. App. 414, 415, 219 S.E.2d 248, 249, *disc. review denied*, 288 N.C. 732, 220 S.E.2d 621 (1975). Other evidence presented at trial may be used to establish the identity of the stolen items. *Id.* Further, this Court has held that all of the stolen goods were sufficiently identified when two of the items could be positively identified. *See State v. Owens*, 75 N.C. App. 513, 331 S.E.2d 311, *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985) (finding that evidence as to all of the items was sufficient to withstand a Motion to Dismiss where currency, change, checks countersigned with the cashier's name, food stamps, coupons for hot dogs and diapers stolen from supermarket; and later currency, food stamps, check with cashier's name were found, but cashier was unable to identify the currency). *See also State v. Hales*, 32 N.C. App. 729, 233 S.E.2d 601, *disc. review denied*, 292 N.C. 732, 235 S.E.2d 782 (1977).

In the case *sub judice*, the evidence presented by the State showed: that the cable and lock which were found in defendant's car were clearly and positively identified as coming from the computer lab from which the larceny occurred; the cable and lock were discovered less than eighteen hours after the theft; defendant was in the area of the computer lab in the evening hours after classes had ended and grades had been turned in, the day before the theft; that defendant was seen flinging items into a dumpster; that the items that were on the top of the dumpster immediately after defendant deposited items into it, were manuals that were of the same type used in the computer lab and were found to be missing; that one of the manuals was the only such manual on campus according to Dr. Hall; and that defendant's witnesses gave contradictory testimony as to the time that defendant left the cookout held on the date that the theft probably occurred. Thus, there was sufficient evidence to submit to the jury and sufficient evidence from which the jury could have found that defendant had committed the crime, as accused. Accordingly, the trial court did not err in denying the Motion to Dismiss.

Defendant next argues that the trial court erred in instructing the jury on the doctrine of recent possession and on actual and constructive possession. It is well-established that "the trial judge should not give instructions which present to the jury possible theories of conviction not supported by the evidence." *State v. Odom*, 99 N.C. App. 265, 272, 393 S.E.2d 146, 150, *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990) (citing *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983)). As discussed in the previous argument, substantial evidence existed to support the presumption created by the doctrine of recent possession; therefore, this argument is without merit.

[3] Defendant's final argument is that the trial court erred in finding as an aggravating factor for purposes of sentencing that defendant took advantage of a position of trust. Pursuant to North Carolina General Statutes § 15A-1340.4(a)(1)n (1988), a trial judge may increase a term of imprisonment beyond the presumptive term if the trial judge finds that "[t]he defendant took advantage of a position of trust or confidence to commit the offense." Defendant argues that this aggravating factor is predicated on a friendship or familial relationship, not where the victim was a legal entity or corporation. *See State v. Hammond*, 118 N.C. App. 257, 454 S.E.2d 709 (1995) (providing that aggravating factors are usually found as to familial relationships and when the relationship between the defendant and the victim was one of best friends, not when the relationship between the defendant and the victim was that of drug dealer and customer). Thus, defendant argues that the relationship between defendant student and the University was not one of trust or confidence which caused the University to rely upon defendant. Defendant's argument is unpersuasive.

The instant action does not involve a relationship where the victim and defendant are involved in a criminal conspiracy, such as a drug dealer and buyer as in *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991), nor does it involve a situation where a relationship had just begun or did not exist. In this case, an upperclassman was entrusted with a security access code by his professor on behalf of the University with the expectation that the student would behave in a responsible and trustworthy fashion. The access code gave defendant access to computer equipment worth thousands of dollars. Accordingly, defendant took advantage of the trust and confidence given to him by the University. Thus, this argument is without merit.

For the foregoing reasons, defendant received a fair trial, free of prejudicial error.

No error.

Judges MARTIN, JOHN C. and McGEE concur.

EVELENA MORRISON THOMPSON, ADMINISTRATRIX OF THE ESTATE OF FREDERICK THOMPSON, DECEASED, PLAINTIFF v. THE THREE GUYS FURNITURE COMPANY, CHARLES HILLIARD GREENE, D/B/A THE THREE GUYS FURNITURE COMPANY AND/OR FRANKLIN PLACE, CHARLES HILLIARD GREENE, INDIVIDUALLY AND TERRY PAUL RAY, DEFENDANTS

No. COA95-444

(Filed 7 May 1996)

1. Automobiles and Other Vehicles § 700 (NCI4th)— fatal collision—truck driven by one other than owner—agency of driver at time of collision—summary judgment improper

In an action to recover for the death of plaintiff's intestate who was killed when a truck, owned by one defendant and driven by the other defendant to whom the truck had been entrusted for painting, crossed the center line and struck intestate's vehicle head-on, summary judgment was improper as to plaintiff's allegations, based on N.C.G.S. § 20-71.1, that defendant owner was vicariously liable for defendant driver's negligence because he was acting as the owner's agent at the time of the accident, since plaintiff submitted affidavits in addition to the *prima facie* showing of agency provided by N.C.G.S. § 20-71.1, and defendant driver's affidavit gave rise to genuine issues of material fact about whether defendant owner gave him a specific time to return the truck and whether, at the time of the collision, he was in the course of his duties as the owner's agent.

Am Jur 2d, Automobiles and Highway Traffic §§ 1085-1087.

Presumption and prima facie case as to ownership of vehicle causing highway accident. 27 ALR2d 167.

2. Automobiles and Other Vehicles § 440 (NCI4th)— negligent entrustment of vehicle by owner to another—sufficiency of evidence

The evidence was sufficient to create a genuine issue of material fact as to whether defendant truck owner, through the exercise of due care, should have known that defendant driver was an incompetent or reckless driver and that his operation of the truck might likely cause injury to another where it tended to show that the owner entrusted his truck to a stranger who walked in from the street without asking to see his driver's license, asking about his driving record, or even inquiring from his references about his character, and as a result defendant driver, whose license had been permanently revoked for numerous driving violations including driving while impaired, drove defendant owner's truck while under the influence of alcohol, crossed the center line, and struck plaintiff's intestate's automobile, resulting in his death.

Am Jur 2d, Automobiles and Highway Traffic §§ 643, 645.

3. Automobiles and Other Vehicles § 441 (NCI4th)— authorizing driver with no license to use vehicle—no negligence per se—knowledge required

There was no merit to plaintiff's contention that violation of N.C.G.S. § 20-34 and negligence *per se* are established when it is shown only that defendants "authorized" defendant driver to drive the truck when he had no license, since the statute makes it unlawful for one to permit or authorize a motor vehicle owned by him or under his control to be driven by a person only when he *knows* the driver has no legal right to do so or is otherwise driving the vehicle in violation of any of the provisions of the Uniform Driver's License Act.

Am Jur 2d, Automobiles and Highway Traffic § 645.

Appeal by plaintiff from order entered 20 December 1994 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 1996.

Plaintiff administratrix brought this action seeking damages for the wrongful death of her son, alleging that his death had been caused by negligence on the part of defendant Ray and that Ray's negligence was imputed to defendant Three Guys Furniture Company (TGF) and

its sole proprietor, defendant Greene. By her complaint and amended complaint, plaintiff also alleged that defendant Greene had negligently entrusted the company's 1980 Chevrolet truck to Ray and had violated G.S. § 20-34, constituting negligence *per se*.

Defendants Greene and TGF answered, denying any negligence on their part and further denying liability for any negligent conduct of Ray. Following discovery, Greene and TGF moved for summary judgment.

The materials before the trial court tended to show that on 29 May 1992, Frederick Thompson was killed when defendant Ray drove a truck, owned by and registered to defendant TGF, across the center line and struck Thompson's automobile head-on. Ray's blood alcohol level was later tested to be .17. Ray's driver's license had been permanently revoked on 13 June 1991 for violations including: driving while impaired, driving on the wrong side of the road, reckless driving, unsafe movement, a moving violation involving personal injury or property damage over $300.00, and for multiple offenses of driving while his license was revoked.

Defendants' evidence tended to show that defendant Greene had first met Ray on 15 April 1992 when Ray came to the TGF store and offered to paint the company truck for $700.00. Ray left a telephone number with Greene, and Greene told Ray he would let him know if he was interested. Ray returned to the store a month later, on a Friday, and, after some negotiation, Greene and Ray agreed that Ray would paint the truck for $550.00 and that Ray would pick the truck up on the following Monday, 18 May 1992, and return it by Thursday, 21 May 1992, because Greene needed to use the truck on that day. According to Greene, Ray appeared clean cut and spoke clearly and intelligently each time they met. Upon Greene's inquiry, Rick Waycaster, another store owner for whom Ray had worked, told Greene that Ray had done a good job for him.

Martha Jean Stegall, an employee of TGF, stated that Greene told her that Ray would paint the truck for $550.00 and would pick up the truck on 18 May and return it by 21 May. When Ray came to pick up the truck on 18 May, he asked for a $250.00 advance to buy supplies and gave Stegall a receipt upon which he wrote that the job was to be finished "within three days." Stegall also stated that she made it clear to Ray that the truck had to be returned by 21 May, and that Ray gave her a phone number where he could be reached.

Ray did not return the truck on 21 May 1992. Greene testified that he tried unsuccessfully to contact Ray at the phone numbers Ray had given, and that he was unable to locate Ray by other means. Greene filed a formal stolen vehicle report on 25 May 1992, and a warrant was issued for Ray's arrest.

Plaintiff's evidence tended to show that Greene knew Ray would be driving the truck, but did not ask to see Ray's driver's license, did not talk to Ray about his driving record, and had never seen Ray driving a car or truck. Greene did not investigate Ray's references other than speaking briefly to Rick Waycaster. Greene described his inquiry to Waycaster as follows: "in passing I asked Mr. Waycaster—you know, looks like he's doing a good job, and he said—he said, yes, and that's about the extent of that. I was more concerned over what I was purchasing [at Waycaster's shop]."

Plaintiff also presented Ray's affidavit in which Ray stated that Greene had personally given him the keys to the truck and knew that he would be driving it, but had not requested to see a driver's license and had not asked any questions about his driving record or the status of his driving privilege. Ray stated that Greene did not give him a specific time to return the truck, and that at the time of the collision he was driving the truck with Greene's permission and for the purpose of getting material to complete the job. Ray also stated that he had given Greene telephone numbers where he could be reached, but from the date he received the truck until the collision, Greene never contacted him and never requested that he return the truck. The charges against Ray for stealing the truck were subsequently dismissed.

The trial court granted summary judgment in favor of defendants Greene and TGF, dismissing all claims against them. Plaintiff appeals.

Ferguson, Stein, Wallas, Adkins, Gresham and Sumter, by James E. Ferguson, Noell P. Tin, and Anita Hodgkiss, for plaintiff-appellant.

Petree Stockton, L.L.P., by David B. Hamilton and Anne E. Essaye, for defendant-appellees.

MARTIN, John C., Judge.

Plaintiff assigns error to the trial court's order granting summary judgment, contending there are genuine issues of material fact with respect to her claims that defendants Greene and TGF are liable (1)

vicariously for Ray's negligence, (2) for their own negligent entrustment of the truck to Ray, and (3) for their own negligence *per se* in violating G.S. § 20-34. We agree with plaintiff's argument as to her claims based on agency and negligent entrustment and reverse summary judgment as to those claims. However, we affirm summary judgment as to plaintiff's claim based on the alleged statutory violation.

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). The moving party has the burden of showing entitlement to summary judgment, *Varner v. Bryan*, 113 N.C. App. 697, 440 S.E.2d 295 (1994), and in ruling upon the motion, a court must consider the evidence in the light most favorable to the non-moving party, who is entitled to the benefit of all favorable inferences which may be drawn from the evidence. *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995).

I.

[1] Plaintiff first argues that summary judgment was improper as to her allegations that defendants Greene and TGF are vicariously liable for Ray's negligence because he was acting as their agent at the time of the accident. Plaintiff relies on G.S. § 20-71.1, which provides:

> (a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such accident or collision shall be prima facie evidence that said motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose.
>
> (b) Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

The purpose of this statute is "to establish a ready means of proving agency in any case where it is charged that the negligence of a

nonowner operator causes damage to the property or injury to the person of another." *Hartley v. Smith*, 239 N.C. 170, 177, 79 S.E.2d 767, 772 (1954). *See Taylor v. Parks*, 254 N.C. 266, 271, 118 S.E.2d 779, 782 (1961); *Scallon v. Hooper*, 49 N.C. App. 113, 117, 270 S.E.2d 496, 499 (1980), *disc. review denied*, 301 N.C. 722, 276 S.E.2d 284 (1981) ("the plain and obvious purpose of G.S. 20-71.1 . . . is to enable plaintiff to submit a *prima facie* case of agency to the jury which it can decide to accept or reject"). However, the *prima facie* showing of agency under the statute only permits, and does not compel, a finding for plaintiff on the issue of agency. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 325 S.E.2d 223 (1985); *Chappell v. Dean*, 258 N.C. 412, 128 S.E.2d 830 (1963).

Defendants Greene and TGF contend that plaintiff's *prima facie* showing of agency pursuant to the statute was overcome in this case, and that summary judgment was appropriate on this issue because of "clear and convincing evidence" that the agency relationship between Greene and Ray had been terminated. Citing *DeArmon*, 312 N.C. 749, 325 S.E.2d 223, and *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976), defendants assert the trial court could determine issues of credibility at the summary judgment stage and "concluded that Ray's affidavit could not be believed." We reject their argument.

In *DeArmon*, the Supreme Court essentially agreed with the decision reached in this Court, *DeArmon v. B. Mears Corp.*, 67 N.C. App. 640, 314 S.E.2d 124 (1984), that plaintiff's *prima facie* showing of agency under the statute and defendant's evidence to the contrary created a genuine issue of material fact for the jury on the agency issue. *DeArmon*, 312 N.C. at 759, 325 S.E.2d at 230. *Kidd* holds that courts are entitled to assign credibility as a matter of law to a moving party's affidavit when a party opposing a motion for summary judgment has failed to submit affidavits or other supporting material pursuant to Rule 56(e) or (f) to cast doubts as to the existence of a material fact or upon the credibility of a material witness. *Kidd*, 289 N.C. 343, 222 S.E.2d 392. In this case, however, plaintiff has submitted affidavits pursuant to Rule 56(e), and thus has presented evidence in addition to the *prima facie* showing of agency provided by G.S § 20-71.1. Moreover, as this Court noted in *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 363 S.E.2d 215, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988), "where matters of the credibility and weight of the evidence exist, summary judgment ordinarily should be denied." *Id.* at 351, 363 S.E.2d at 218 (citation omitted). Defendant Ray's affidavit gives rise to genuine issues of material fact

about whether Greene gave Ray a specific time to return the truck, and whether at the time of the collision Ray was in the course of his duties as Greene's agent. Summary judgment was thus not proper on this issue. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c).

II.

[2] Plaintiff also alleged that defendants Greene and TGF negligently entrusted the truck to Ray. Negligent entrustment occurs

> when the owner of an automobile "entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver" who is "likely to cause injury to others in its use." As a result of his own negligence, the owner is liable for any resulting injury or damage proximately caused by the borrower's negligence.

Swicegood v. Cooper, 341 N.C. 178, 180, 459 S.E.2d 206, 207 (1995) (citations omitted). A plaintiff is not required to show actual knowledge of unfitness, incompetence, or recklessness; the cases require that the owner exercise due care in determining whether the person entrusted with the vehicle is fit. *Id.*; *Heath v. Kirkman*, 240 N.C. 303, 82 S.E.2d 104 (1954). In *McIlroy v. Motor Lines*, 229 N.C. 509, 50 S.E.2d 530 (1948), cited by defendants, the Supreme Court found that evidence of negligent entrustment was insufficient to go to the jury when an employer performed only a "perfunctory" investigation to determine a person's fitness as a truck driver before hiring him, and failed to discover that the person had previously been convicted of drunkenness and drunken driving. *Id.* However, in that case the Court found as dispositive evidence that, before the accident giving rise to the suit, the employee "drove [the] truck regularly in defendant's service for *eight months*, during which time his conduct was under observation, without evidence of accident or of drinking or addiction to intoxication." *Id.* at 514, 50 S.E.2d at 533 (emphasis added).

The circumstances present here are different, and in this case a jury could find that Greene failed to exercise due care in entrusting the truck to Ray. Clearly one is not required to examine the credentials of every person to whom he entrusts his vehicle; the duty to conduct such an inquiry is dictated by the circumstances and application of the standard of reasonable care. "Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury." *Taylor v. Walker*, 320 N.C. 729, 734, 360

S.E.2d 796, 799 (1987). Viewed in the light most favorable to plaintiff, the evidence in this case shows that Greene entrusted his truck to Ray, a stranger who walked in from the street, without asking to see Ray's driver's license, asking about his driving record, or even inquiring from Ray's references about his character. As a result, Ray, whose license had been permanently revoked for numerous driving violations including driving while impaired, drove defendant TGF's truck while under the influence of alcohol, crossed the center line, and struck Frederick Thompson's automobile, resulting in Thompson's death. We hold this evidence sufficient to create a genuine issue of material fact as to whether defendant Greene, through the exercise of due care, should have known that Ray was an incompetent or reckless driver and that his operation of the truck might likely cause injury to another.

III.

[3] Plaintiff also alleged that defendants violated G.S. § 20-34, which provides:

> No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so or in violation of any of the provisions of this Article.

She contends a violation of the statute is negligence *per se* and is established when it is shown only that defendants "authorized" Ray to drive the truck when he had no license. Defendants, on the other hand, argue that the statute requires that the person charged with its violation must have had knowledge that the driver had no legal right to do so.

As a general rule, " '[w]here a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. "or"), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.' " *Davis v. Granite Corporation*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963) (citations omitted). However, statutes should also be interpreted so as to "avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results." *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978). In interpreting G.S. § 20-34, we can decipher no distinction in meaning, nor a reason for one, between the

words "authorize" and "permit." Indeed, the words as used here are synonymous. *See* American Heritage Dictionary 977 (New College Edition 1981) (defining "permit" as "to authorize"); Black's Law Dictionary 133 (6th ed. 1990); 7A C.J.S. *Authorize* 914 (defining "authorize" in part as "to permit"). To construe the statute as contended by plaintiff would result in the absurd consequence of a court attempting to distinguish whether a person "authorized" or "permitted" a person to use a vehicle. As we read it, G.S. § 20-34 makes it unlawful for one to permit or authorize a motor vehicle owned by him or under his control to be driven by a person when he *knows* the driver (1) has no legal right to do so or (2) is otherwise driving the vehicle in violation of any of the provisions of the Uniform Driver's License Act. Accordingly, we affirm the trial court's grant of summary judgment as to this issue.

The judgment of the trial court is affirmed in part, reversed in part and remanded for trial in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and MARTIN, Mark D., concur.

HAROLD D. GLYNN, EMPLOYEE-PLAINTIFF v. PEPCOM INDUSTRIES, INC., EMPLOYER AND CRAWFORD AND COMPANY, CARRIER-DEFENDANTS

No. COA95-347

(Filed 7 May 1996)

Workers' Compensation § 165 (NCI4th)— back injury during judicially cognizable time period—sufficiency of evidence—credibility of medical evidence—good cause to receive additional evidence—error by Commission

The Industrial Commission erred in finding as a fact and concluding as a matter of law that plaintiff did not sustain a specific traumatic incident on 23 June 1993, erred in concluding that there was insufficient medical evidence to support a finding that plaintiff's massive herniated disc was caused by a specific incident on 23 June 1993, and erred in failing to allow plaintiff's motion to reopen the evidence and depose a medical witness since plaintiff presented credible and competent evidence that he sustained a

compensable injury during a judicially cognizable time period; plaintiff's medical evidence with regard to his injury was compelling, especially since defendant did not provide any medical evidence to contradict the medical evidence offered by three of plaintiff's doctors; and in light of the Commission's finding that the medical evidence was insufficient, allowing additional medical evidence to be taken would constitute good cause sufficient to allow plaintiff's motion to reopen the evidence in order to depose another doctor.

Am Jur 2d, Workers' Compensation § 593.

Appeal by plaintiff from opinion and award entered 27 December 1994 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 19 March 1996.

Twiford, Morrison, O'Neal & Vincent, by Branch W. Vincent, III, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by C. Ernest Simons, Jr., for defendant-appellee.

JOHNSON, Judge.

Plaintiff Harold Glynn is a thirty-one year old married male with a high school education. After serving in the Air Force for ten years, plaintiff was honorably discharged in December 1992. Thereafter, he went to work for defendant as a route sales representative in February 1993. Plaintiff's duties involved driving a route truck to ten to twelve stores a day where he would inventory, sell and stock drinks by the case. Prior to 23 June 1993, plaintiff did not have any major physical or medical problems. On 8 February 1993, plaintiff was examined by Dr. Wilkerson, and the physical showed no abnormalities. The physical demands of the job required plaintiff to load trucks and remove the inventory of soda out of the truck onto a hand cart and take the drinks into the stores where he would stack them as needed in each particular store.

On the morning of 23 June 1993, plaintiff made his first stop at Seamark Foods in Nags Head, North Carolina. Instead of going to Seamark, he went to New York Bagels first and took an order, went out to the truck, retrieved the sodas and brought them back into the store. He had the store attendant count them and sign the ticket and make payment. At approximately 7:30 a.m., plaintiff began to unload

the drinks, taking them from his right to left off the pull cart and stacking them onto the shelves. After stacking two to three cases, plaintiff reached to grab another case and while turning to place the case on the shelf, he felt a very sharp, severe kind of breathtaking pain in his lower back. The sharp pain was right in the middle of his back. The pain was so severe that it made him feel nauseous. After the initial pain had passed, he finished what he was doing and went to Seamark Foods.

Still in pain, plaintiff went to Seamark and basically straightened up a few things and took in ten or fifteen cases of soda. Seamark is normally a sixty to seventy case stop. Because of the way he was feeling, plaintiff was unable to complete stocking Seamark because he was in too much pain and was getting weaker by the minute. Plaintiff returned to defendant's plant and talked to the supervisor, David Ward. Thereafter, Mr. Ward sent plaintiff to Beach Medical to be examined.

Plaintiff was seen by Dr. Mark Channer who examined him and performed an x-ray on his lower back. Thereafter, he went to Coastal Rehabilitation. While in rehabilitation, an examiner asked plaintiff to put his toes under his left foot, which he could not do. He could not raise his foot or his toes. At that point, plaintiff was referred by Dr. James S. Wilkerson, Jr. for an MRI study to be taken at Albemarle Hospital. On 29 June 1993, plaintiff had an MRI of the lumbar spine conducted. The result of the MRI study showed a disc space narrowing with degeneration and with a large mostly left-sided herniation at the L5 S1 level. After the MRI results were performed, Dr. Wilkerson referred plaintiff to Dr. David C. Waters, a neurosurgeon, in Norfolk, Virginia.

Dr. Wilkerson first saw plaintiff on 9 July 1993. The history taken by Dr. Waters states:

> The patient began to have problems on or about June 10, 1993. He noted that, after working, he had experienced non-specific cramping in the buttock and posterior aspect of the thigh. On June 23rd, during a lifting episode at work, he had the abrupt onset of fairly severe and intense pain in the right buttock and pain in the left lower extremity. This pain was very intense and quite disabling. Approximately three days later, the patient became abruptly weak in the left ankle and developed numbness and tingling on the posterior aspect of the left leg. Since June 23rd, his symptom complex has remained stable.

On 12 July 1993, at the request of defendant insurance company, plaintiff was seen for a "second opinion consultation" by Dr. Berkley L. Rish in Norfolk, Virginia. The summary taken by Dr. Rish reports that:

> This 30-year-old routeman for Pepsi Cola was lifting a case of drinks on 6/23/93, and had a sudden sharp pain in his low back radiating into his buttock and leg. Since that time, he has been grossly encumbered with pain, numbness, and weakness involving the left sciatic parameters. At the present time, he has significant foot drop on the left foot mechanisms.

After these opinions, plaintiff underwent surgery on 13 July 1993 for left L5-S1 diskectomy and removal of an extruded disc fragment foraminotomy over S1 nerve route, and inspection of the L5 nerve route. After the surgery, plaintiff had three follow-up visits—19 August, 10 September and 8 October 1993. On 8 October, plaintiff was released to work without restrictions.

In an effort to alleviate the necessity of medical depositions, counsel for plaintiff obtained a narrative medical report from Dr. Waters dated 3 December 1993. The patient history contained within the narrative medical report states that:

> On June 23, 1993, after a specific lifting episode at work, he had the fairly abrupt onset of fairly severe pain in the left buttock and left lower extremity. This pain was quite intense and disabling. Approximately three days later, the patient became abruptly weak in the left ankle and developed numbness and tingling in the posterior aspect of the left leg. Since June 23rd, his weakness and pain complaints have been static and non-progressive. There had been no back pain. There had been no right leg symptoms.
>
> . . .
>
> I am of the opinion that Mr. Glynn's work at Pepsi-Cola is directly related to his disc herniation and subsequent need for surgery.

Kimberly Glynn, plaintiff's wife, also testified at the hearing. She testified that two weeks before 23 June 1993, plaintiff had some complaints of pain in his left buttock. This pain did not prohibit plaintiff from working or doing anything around the house. He basically carried on his same routine. On 23 June 1993, Mrs. Glynn was at her parent's house in Newport News, Virginia. She testified that around 5:00 p.m. or 6:00 p.m., she received a telephone call from plaintiff. Plaintiff

told her that he had some bad news. He explained to her how he had stopped at New York Bagels and was turning a case in his hand and felt an extremely sharp pain from his back that radiated to his toes. Plaintiff further stated to her on the telephone that it had made him sick to his stomach. Mrs. Glynn returned home the next day and was with him 24 hours a day thereafter. She noted that his condition deteriorated daily.

Prior to 23 June 1993, Mrs. Glynn did not notice plaintiff having any physical problems moving around. After 23 June, however, she noticed him beginning to limp and she also noted his toes beginning to drag the ground because he could not lift his foot. This was in direct contrast between the way he acted before 23 June 1993. Before 23 June Mrs. Glynn would massage plaintiff's left buttock. After 23 June, she described the appearance of the buttock as "like somebody had let the air out of a balloon. It just—there was nothing there. It was deflated."

Chris Trumble, a route manager with defendant, testified at the hearing. In part of his testimony, Mr. Trumble stated that he was familiar with the job description for plaintiff/employee. Part of the job description involved "honesty." When asked about plaintiff's reputation for honesty, Mr. Trumble testified, "I have no reason to doubt his honesty. He has never come out and lied to me specifically to any of my questions. I have never had that concern or that problem."

On 29 June 1993, at 11:20 a.m., plaintiff was interviewed by Raybon Mayes who was an adjuster with Crawford & Company. When asked what happened, plaintiff stated, "basically, I was just lifting a case of soda and I received a sharp pain in my lower back and it kind of . . . the sharp pain kind of went through my lower back and down into my leg and it's (inaudible) gradually gotten worse, as the days have gone on since then. I wish there was more of a story, but that's it."

QUESTION: Was the pain in your upper back or lower back?

ANSWER: It's in my lower back and down my left leg.

QUESTION: Had you experienced any pain in your back prior to this?

ANSWER: Ah, for about two weeks prior to that, after work one evening, I noticed I just had just like a little aggravation down my left leg. I mean, nothing I

> couldn't work with, but, yeah, just a little bit of aggravation I guess is the best way to put it, kind of a crampy feeling. But prior to that, you know, I could work with it with no difficulty. Wednesday, the 23rd, like I said, I felt that real sharp pain in my back and it kind of took my breath away and (inaudible) kind of gone down hill in a real quick manner.

David Ward testified that he was the area manager for defendant and was the person who hired plaintiff. He testified that prior to 23 June 1993, he had conversation with plaintiff regarding his leg problems. Mr. Ward testified that plaintiff told him that he had been having pain in his lower back that ran down through his left leg, or cramps. Mr. Ward testified that he asked plaintiff two weeks before 23 June 1993 whether he had hurt himself on the job by twisting the wrong way or by picking something up the wrong way or by stepping off the truck or something like that, and plaintiff told him that was not the case.

Mr. Ward testified that he saw plaintiff on 23 June 1993. Mr. Ward testified that plaintiff called him that morning from Seamark and said that his back was hurting. Mr. Ward advised plaintiff to come back to the plant. Once plaintiff returned to the plant, they filled out the Form 19. Defendant relies upon the discrepancy in plaintiff's evidence, the description of his injury in a previous report and the Form 19 in their defense that there was no "specific traumatic incident."

The opinion and award of the Commission found that plaintiff's injury resulted from a gradual deterioration of his back condition, occurring two weeks prior to the incident on 23 June 1993; that plaintiff was not credible; and that his injury did not have a specific traumatic incident. In the alternative, the Commission held that the medical evidence was insufficient even supposing there was a specific traumatic incident on 23 June 1993. They concluded that plaintiff's claim was denied. Commissioner J. Randolph Ward dissented, stating that the medical evidence was compelling, and that the motion to reopen the evidence should have been allowed. Plaintiff appeals from the opinion and award of the Commission.

Plaintiff first argues that the Full Commission erred when it found as a fact and concluded as a matter of law that plaintiff did not sustain a specific traumatic incident on 23 June 1993. We agree.

North Carolina General Statutes § 97-2(6) (Cum. Supp. 1995), defines injury as an

> accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident . . . .

Thus, there are two theories upon which a back injury can be compensated: (1) if the claimant was injured by accident; or (2) if the injury arose from a specific traumatic incident. *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 707, 449 S.E.2d 233, 237 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995); *Richards v. Town of Valdese*, 92 N.C. App. 222, 224, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). In this case, plaintiff is alleging that his injury arose from a specific traumatic incident.

This Court in *Richards* stated that "the General Assembly . . . recognized the complex nature of back injuries, and did not intend to limit the definition of specific traumatic incident to an instantaneous occurrence. Back injuries that occur gradually, over long periods of time, are not specific traumatic incidents; however, we believe that events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature." *Id.* at 225, 374 S.E.2d at 118-19. Plaintiff contends that his injury occurred during a cognizable time period, and that he is therefore entitled to compensation. We agree.

Thus, we address whether plaintiff presented credible and competent evidence that he sustained a compensable injury during a judicially cognizable time period. The Full Commission found that plaintiff had been experiencing pain in his lower back and down his left leg for approximately two weeks prior to the alleged traumatic incident and that plaintiff's testimony about the sudden onset of a different pain while lifting a case of drinks at New York Bagels was not credible or convincing and that "[p]laintiff's back problems developed gradually and worsened over the course of weeks." The Full Commission went on to conclude that the record fails to establish that plaintiff suffered an injury as a result of a specific traumatic incident on 23 June 1993.

It is well-established that the findings of fact and conclusions of law of the Full Commission are conclusive and binding on this Court if supported by competent evidence. *Fish*, 116 N.C. App. 703, 449 S.E.2d 233. This is so, even if evidence exists which would support a contrary finding. *Id.* However, conclusions of law predicated on these findings are subject to review by appellate courts. *Id.*

The Full Commission erred in its findings and conclusions of law that the injury did not occur at a cognizable time. Plaintiff's evidence tends to show that on 23 June 1993, he suffered a specific injury while lifting a case of drinks at New York Bagels at approximately 7:30 a.m.

Plaintiff next argues that the Full Commission erred when it concluded that there was insufficient medical evidence to support a finding that plaintiff's massive herniated disc was caused by a specific incident on 23 June 1993.

Plaintiff's medical evidence shows that Dr. Channer with Beach Medical, in an office note, recorded that plaintiff's symptoms increased on 23 June 1993 while lifting a box on the job; Dr. Water's patient history notes that plaintiff had a "specific lifting incident" on 23 June 1993 and that the subsequent surgery was related to the job; and Dr. Rish, who submitted a second opinion for the insurance carrier, confirmed the back injury and the date upon which it occurred. Thus, plaintiff argues that Commissioner J. Randolph Ward's statement that "[t]he medical evidence in this case is so compelling to me . . . [,]" best describes their position especially since defendant did not provide any medical evidence to contradict the medical evidence offered by Drs. Channer, Water and Rish. Accordingly, the Commission's alternative finding of fact was in error.

Plaintiff's final argument is that the Full Commission erred when it failed to allow plaintiff's motion to reopen the evidence and depose Dr. David C. Waters. North Carolina General Statutes § 97-85 (1991), provides that the Commission may, if good cause is shown, reconsider the evidence and receive additional evidence. However, "[t]he question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion." *Pickrell v. Motor Convoy, Inc.*, 82 N.C. App. 238, 243-44, 346 S.E.2d 164, 168 (1986), *rev'd on other grounds*, 322 N.C. 363, 368 S.E.2d 582 (1988). In this case, the Commission found in its alternative finding of fact that the medical evidence was insufficient, thus, it is arguable that allowing additional medical evidence to

be taken would constitute good cause sufficient to allow plaintiff's motion to reopen the evidence in order to depose Dr. Waters.

For the reasons stated above, we hold that the Commission erred; therefore, this action is reversed and remanded.

Reversed and remanded.

Judges MARTIN, JOHN C. and McGEE concur.

BATOUL ATASSI, PLAINTIFF-APPELLEE v. INAD B. ATASSI, DEFENDANT-APPELLANT

No. COA95-699

(Filed 7 May 1996)

Contempt of Court § 31 (NCI4th)— defendant's interference with court order directed at plaintiff—no civil contempt—attempt to punish defendant—error

Where plaintiff wished to take the parties' child to Syria on vacation, requiring the trial court to grant a deviation from its standing custody order, and the trial court granted plaintiff's request to take the child out of the United States for dates certain, the entire focus of the order was on plaintiff and was not directed at defendant; therefore, the trial court erred in finding defendant in civil contempt for filing a custody action in Syria while plaintiff and the child were in that country, and requiring, as punishment, that defendant reimburse plaintiff her expenses resulting from defendant's contempt, since N.C.G.S. § 5A-21(a)(3) requires violation of an order directed at the alleged contemnor, and civil contempt is not proper as a means of punishment. Rather, plaintiff's remedy against defendant was an action for indirect criminal contempt, as his custody action instituted in Syria while plaintiff and the child were vacationing there flouted the authority of the trial court, interfered with lawful orders of that court, and fell squarely within the definition of criminal contempt in N.C.G.S. § 5A-11(a)(3).

Am Jur 2d, Contempt §§ 17, 18, 130.

Judge GREENE concurring in the result.

Appeal by defendant from judgment entered 28 March 1995 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 1 March 1996.

The McLeod Law Firm, P.A., by Joe McLeod, for plaintiff appellee.

Harris, Mitchell & Hancox, by Ronnie M. Mitchell and Kenneth D. Burns, for defendant appellant.

SMITH, Judge.

The central issues in this appeal are whether the trial court ruled properly in finding defendant in civil contempt, and whether the trial court erred in awarding compensatory damages to plaintiff as a result of the alleged contemnor's conduct. Because the order of contempt allegedly violated was not directed at the contemnor, and the order constitutes improper punishment, we conclude the trial court incorrectly found defendant in civil contempt. Additionally, we reaffirm existing precedent holding that compensatory damages are an inappropriate form of relief in civil contempt proceedings.

At the onset, we note that this is the instant parties' second visit to this Court. *See Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371, *disc. review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995). The parties to this action, Batoul Atassi (plaintiff) and Inad Atassi (defendant), were married in Fayetteville, North Carolina in 1991. Defendant is a neurosurgeon practicing in Fayetteville. The parties have one child, Azmi Atassi, who was born 16 January 1992. On 4 June 1993, plaintiff filed a complaint for alimony, child custody, child support, relief from domestic violence and equitable distribution.

By the trial court's order of 19 November 1993, plaintiff was awarded primary temporary custody, and defendant was awarded secondary temporary custody. On or about 21 April 1994, plaintiff filed a motion requesting a modification of the 19 November 1993 temporary custody order. Plaintiff wished to take the parties' child, Azmi Atassi, to Syria for a visit with plaintiff's relatives. The motion was granted on 24 May 1994 (the 24 May 1994 order). The trial court entered an order authorizing plaintiff to transport Azmi to Syria, and directed plaintiff to return by 1 August 1994.

Plaintiff traveled to Syria with Azmi, taking the trial court's order modifying custody with her. While plaintiff was in Syria with Azmi, defendant filed a separate custody suit in Syria. Defendant asked the

Syrian court to wrest custody from plaintiff and prevent her from returning to the United States with Azmi. Plaintiff was forced to litigate defendant's Syrian action before she was permitted to leave Syria with Azmi.

In defending the action against her in Syria, plaintiff incurred approximately $3,500.00 in attorneys' fees, and $750.00 in document translation fees. Plaintiff was also required to purchase new airline tickets to return to Fayetteville, as her original tickets were not valid on her delayed departure date.

On her return to the United States, plaintiff filed a show cause motion requesting the trial court find defendant in contempt. In her show cause motion, plaintiff alleged that defendant had, "by filing the lawsuit in the Country of Syria, [demonstrated an] intent to thwart and violate the previous Orders of this Court; that such action on the part of Defendant was willful and without legal justification." On plaintiff's motion, the trial court entered an order to show cause directed at defendant. The show cause order noticed defendant of the trial court's intent to "make a determination if you are in civil and/or criminal contempt."

The show cause hearing was held on 28 March 1995. After hearing the parties' evidence the trial court found, *inter alia*:

IV

> That on the 24th day of May, 1994, an Order was entered by Judge Andrew R. Dempster of the Twelfth Judicial District by the terms of which the Plaintiff and the minor child were allowed to leave the State of North Carolina and travel to the Country of Syria for a period of time from May 30, 1994 through August 1, 1994, and directing that the minor child return with the Plaintiff to North Carolina on or before August 1, 1994.

V

> That prior to the Plaintiff's return from the Country of Syria, a lawsuit was filed by the Defendant in the Country of Syria with regard to the custody of the minor child; that a portion of the lawsuit was equivalent to a restraining order preventing the removal of the minor child from the Country of Syria; that as a result of the lawsuit filed, the Plaintiff was not able to return as directed by the Order entered by this Court on May 24, 1994, and the Plaintiff had to expend $6,520.00 in attempt [*sic*] to comply with Judge Dempster's Order.

VI

> That the lawsuit in Syria was filed by the Defendant with the intent to prevent the Plaintiff from complying with the Order of this Court of May 24, 1994; that said conduct of the Defendant was willful, without legal excuse and contemptuous of the Orders of this Court.

Based on the above findings, the trial court concluded that defendant's prosecution of the Syrian legal proceeding was a willful and intentional attempt to prevent plaintiff from complying with the trial court's 24 May 1994 order, and that defendant was in willful contempt of that order. The trial court determined, that

> as punishment for this civil contempt, the Defendant [was] ordered to pay to the Plaintiff the sum of $6,520.00 within 15-days of the date of this hearing for reimbursement to the Plaintiff for expenses resulting from the Defendant's civil contempt.

In addition to plaintiff's Syrian-related defense expenses, the trial court ordered defendant to pay the costs of plaintiff's attorneys' fees associated with the contempt proceeding.

Though the record indicates that defendant's conduct was reprehensible, and contrary to the interests and administration of justice, we conclude that the trial court erred by finding defendant in civil contempt. Two reasons drive our conclusion that civil contempt is inappropriate to this set of facts. First, the statute governing civil contempt, N.C. Gen. Stat. § 5A-21(a)(3) (1986), requires violation of an order *directed at* the alleged contemnor. Second, civil contempt is not proper as a means of punishment, as our case law and statutes make clear.

The 24 May 1994 order at the center of this contempt matter arose upon plaintiff's motion, and was solely directed at the conduct of plaintiff. Plaintiff wished to take Azmi to Syria on vacation, requiring the trial court to grant a deviation from its standing custody order. The trial court granted plaintiff's request to take the minor child out of the United States for dates certain. The only mention of defendant in the 24 May 1994 order was a provision allowing defendant to exercise visitation privileges, if he were in Syria at times coincident with plaintiff's vacation. The entire focus of the order, save for this incidental provision, was on plaintiff.

N.C. Gen. Stat. § 5A-21(a) requires a "[f]ailure to comply with an order of the court," and that said failure arises from "[t]he person to

whom the order is directed . . . ." N.C. Gen. Stat. § 5A-21(a)(3). Here, defendant did not fail to comply with the court order, nor was the order directed at him. Defendant's actions unquestionably impeded plaintiff's ability to comply with the 24 May 1994 order. But, this is not the sort of conduct appropriate to civil contempt under our statute.

Moreover, the Official Commentary to our civil contempt statute states unambiguously that § 5A-21 is not "a form of punishment." In *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980), *overruled on other grounds*, *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993), our Supreme Court followed the Official Commentary, noting that the "statutory definition of civil contempt makes clear that civil contempt is not a form of punishment; rather, it is a civil remedy to be utilized exclusively to enforce compliance with court orders." *Id.* (citing § 5A-21 and Official Commentary). The purpose of civil contempt is "not to punish; rather, its purpose is to use the court's power to . . . coerc[e] the defendant to comply with an order of the court." *Id.* In the instant matter, the trial court itself described the civil contempt action it took as "punishment." Under *Jolly* and § 5A-21, such action by the trial court was error.

Given our determination of the impropriety of the instant civil contempt order, it is unnecessary to fully address defendant's arguments concerning the trial court's award of compensatory damages (pursuant to the contempt order) to plaintiff. This Court is bound by our prior ruling in *Hartsell v. Hartsell*, 99 N.C. App. 380, 390, 393 S.E.2d 570, 577, *review on additional issues denied*, 327 N.C. 482, 397 S.E.2d 218 (1990), *aff'd by*, 328 N.C. 729, 403 S.E.2d 307 (1991), where we held that "compensatory damages . . . [are] not properly within the scope of [a] contempt proceeding."

We acknowledge the persuasiveness of plaintiff's arguments for changing this rule, a rule in which North Carolina is a minority jurisdiction. *See* Annotation, *Right Of Injured Party To Award Of Compensatory Damages Or Fine In Contempt Proceedings*, 85 A.L.R.3d 895 (1978). However, this Court is without authority to dispense with rules adopted by our Supreme Court or another panel of this Court. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985); *and In Re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Therefore, if plaintiff wishes to challenge the continued viability of North Carolina's minority rule, the proper forum is our Supreme Court.

We do not mean to imply that plaintiff is without remedy for the conduct of defendant. That remedy is criminal contempt, not civil. N.C. Gen. Stat. § 5A-11(a)(3) (1986 & Cum. Supp. 1995); and *see Mauney v. Mauney*, 268 N.C. 254, 256, 150 S.E.2d 391, 393 (1966) (" 'Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice.' " (Citation omitted)). It is criminal contempt to act in "[w]illful disobedience of, resistance to, or *interference with* a court's lawful process, *order*, directive, or instruction or its *execution*." N.C. Gen. Stat. § 5A-11(a)(3) (emphasis added). The trial court's characterization of defendant's conduct (in its contempt order) appears to fit squarely within § 5A-11(a)(3).

We note the trial court has satisfied the procedural requirements necessary to punish defendant for indirect criminal contempt. *See* N.C. Gen. Stat. § 5A-13(b) (1986). Indirect contempt (§ 5A-13(b)) is that which arises from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice. *See Cox v. Cox*, 92 N.C. App. 702, 706, 376 S.E.2d 13, 16 (1989); and *see* Black's Law Dictionary 319 (6th ed. 1990).

N.C. Gen. Stat. § 5A-15 (1986 & Cum. Supp. 1995) requires the trial court to conduct a plenary hearing for the purpose of adjudicating indirect criminal contempt. Generally speaking, § 5A-15 requires notice and a hearing before a trial court may find defendant in criminal contempt. *Cox*, 92 N.C. App. at 706, 376 S.E.2d at 16. If the defendant is found in criminal contempt, the trial judge must make findings of fact beyond a reasonable doubt in support of the verdict. *Id.*; N.C. Gen. Stat. § 5A-15(f). Upon a finding of indirect criminal contempt, defendant may be subject to "censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three . . . ." N.C. Gen. Stat. § 5A-12(a) (1986 & Cum. Supp. 1995). Punishment under § 5A-12 requires a *mens rea* of willfully contemptuous conduct, or an act proceeded by a clear warning of the court that the conduct was improper. N.C. Gen. Stat. § 5A-12(b)(1), (2).

It is not for this Court to decide for the trial court whether the instant situation demands a proceeding for criminal contempt. The record does indicate, though, that defendant has flouted the authority of the trial court, and has interfered with lawful orders of that court.

This is the second time defendant has sought to interpose the jurisdiction of a Syrian Court to accomplish what he could not in ours. We agree with Judge John Martin, in speaking for this Court,

that "[o]ur courts will not permit defendant, as an American citizen domiciled in North Carolina, to use his former status and relationship with Syria to evade the laws of North Carolina governing domestic relations." *Atassi*, 117 N.C. App. at 512, 451 S.E.2d at 375. We must regretfully set aside the trial court's finding of civil contempt against defendant for the grounds stated herein. This case is reversed and remanded for such further proceedings as are by law provided or required.

Reversed and remanded.

Judge LEWIS concurs.

Judge GREENE concurs in the result with separate concurring opinion.

Judge GREENE concurring in the result.

I agree with the two reasons given by the majority that the order of the trial court finding the defendant in civil contempt must be reversed: (1) there is no failure by the defendant to comply with a court order directed to him, and (2) compensatory damages are not properly within the scope of a contempt proceeding. Because either of these holdings requires we reverse the order of the trial court, I have not considered the questions of whether the compensatory damage rule represents good law or whether the defendant's conduct constitutes criminal contempt of court. I therefore express no opinion on these additional issues addressed by the majority.

THREE GUYS REAL ESTATE, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF AND PETITIONER V. HARNETT COUNTY, A BODY POLITIC, GEORGE JACKSON, IN HIS OFFICIAL CAPACITY AS HARNETT COUNTY PLANNING DIRECTOR, AND THOMAS TAYLOR, IN HIS OFFICIAL CAPACITY AS HARNETT COUNTY SUBDIVISION ADMINISTRATOR, DEFENDANTS

No. COA95-498

(Filed 7 May 1996)

Zoning § 19 (NCI4th)— plat map for subdivision—authority of defendant to disapprove

The conclusions and decree of the trial court that a plat map of plaintiff's 231-acre tract was not exempt from the Harnett

County Subdivision Regulations were invalid, since the Regulations provided that a plat map which divided a tract of land into parcels consisting of ten or more acres and specifically appropriated for the public access to the proposed parcels was subject to the regulations; defendants admitted that plaintiff's plat map did not show dedicated rights of way; notwithstanding such admission, the trial court found that the series of private driveway easements by which plaintiff intended to provide access to its subdivision lots and which were to be maintained pursuant to a driveway maintenance agreement were "for all intents and purposes . . . open for public use"; and there was no evidence whatsoever in the record to support such finding. However, the trial court's findings that plaintiff's planned subdivision would endanger the public health, safety, and welfare because access to the lots for such county services as law enforcement, fire, or rescue operations would be prohibitive or inadequate were supported by evidence and supported a conclusion that plaintiff's property was subject to defendant county's jurisdiction and that the county was not required to approve plaintiff's plat map of the named subdivision.

Am Jur 2d, Zoning and Planning §§ 556-561.

Appeal by plaintiff from judgment entered 3 January 1995 by Judge Robert L. Farmer in Harnett County Superior Court. Heard in the Court of Appeals 20 February 1996.

Grainger R. Barrett for plaintiff-appellant.

Dwight W. Snow for defendant-appellees.

MARTIN, John C., Judge.

Plaintiff is the owner of an undeveloped tract of real property containing approximately 231.37 acres located in Harnett County, North Carolina. In late 1993, plaintiff submitted a plat map of the property, dated 27 April 1993, to the Harnett County Planning Department. This map showed a proposed subdivision entitled "Weswood 4" containing twenty-three parcels, each of which was in excess of ten acres. Plaintiff requested that the Planning Department certify the map as exempt from Harnett County's Subdivision Regulations so that the map could be recorded with the Harnett County Register of Deeds. The map was denied exemption by Thomas Taylor, Harnett County's Subdivision Administrator; the Harnett

County Planning Board; and the Harnett County Board of Commissioners. The reason given for the denial was that the map showed no road access to the parcels.

Thereafter, plaintiff brought this action seeking (1) a declaratory judgment that the plat map of the Weswood 4 subdivision is exempt from Harnett County's Subdivision Regulations and (2) a writ of mandamus directing Mr. Taylor to certify the map as exempt from the regulations. After filing this action, plaintiff submitted a "revised" plat map of the Weswood 4 subdivision which showed a series of easements providing access to the parcels.

The trial court found the facts to be essentially as summarized above and made the following additional findings of fact:

> 11. Officials of the plaintiff claim that they intend to provide access to the various Weswood 4 subdivision lots with a series of private driveway easements to be maintained pursuant to a driveway maintenance agreement. However, even if such a network of easement roads became a reality, the roads for all intents and purposes would be open for public use.
>
> 12. Any access to the various subdivision lots is currently a dirt roadway from SR 1103 through Lot 6 of the Weswood 1 Subdivision and through Lot 36 of Weswood 4 to a T intersection which branches out into a series of unimproved timber cart paths which do not service each and every lot depicted on the Weswood 4 map.
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> 13. Access to the 23 lots of Weswood Subdivision for county services such as law enforcement, fire or rescue operations would be prohibitive and inadequate. This lack of access condition would provide a dangerous environment for providing county emergency services for the benefit of any Harnett County residents of these prospective lots unless better access was planned or provided by the plaintiff developer.
>
> 14. The Subdivision plan map submitted by the plaintiff is in direct opposition to generally accepted principles of land use planning. The purpose of the Harnett County Subdivision Ordinance would be circumvented as far as the promotion of public health, safety and general welfare of the County if the Weswood 4 Subdivision plat was developed in its current form.

Based on its findings, the court concluded as a matter of law:

1. That the Weswood 4 tract as depicted on that plat dated April 27, 1993 by Mike Cain, RLS is subject to the Harnett County Subdivision authority.

2. The Weswood 4 plat is not exempt from the Harnett County Subdivision regulations.

3. That under the circumstances of this case, the Harnett County Subdivision Administrator does not have a mandatory duty to affix to the Weswood 4 Plat the Harnett County Planning Department Certificate that the Weswood 4 Plat is exempt from the Harnett County Subdivision Regulations.

The court then ordered, adjudged and decreed "[t]hat the Weswood 4 tract . . . is subject to the Harnett County Subdivision authority and further said plat is not exempt from the Harnett County Subdivision Regulations." Plaintiff appeals.

Plaintiff has assigned error to the foregoing findings of fact, conclusions of law, and entry of judgment. "All orders, judgments and decrees in an action for declaratory judgment may be reviewed as other orders, judgments and decrees." *Hobson Construction Co. v. Great American Ins. Co.*, 71 N.C. App. 586, 589, 322 S.E.2d 632, 634 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985), (citing N.C. Gen. Stat. § 1-258 (1983)). Thus, the scope of our review is (1) whether there was competent evidence in the record to support these findings of fact, and (2) whether these findings justify the court's legal conclusions. *Insurance Co. v. Allison*, 51 N.C. App. 654, 277 S.E.2d 473, *disc. review denied*, 303 N.C. 315, 281 S.E.2d 652 (1981).

Section 3.0(1) of the Harnett County Subdivision Regulations, which were enacted pursuant to Chapter 153A of the North Carolina General Statutes, provides, in pertinent part:

Section 3.0 General (As Amended 11-1-82 11-15-82, 4-16-90)

1. All subdivisions of land . . . within the subdivision jurisdiction of Harnett County shall hereafter conform to the procedure contained within the articles of this Ordinance. This Subdivision Regulation Ordinance requires that a plat be prepared, approved, and recorded pursuant to the provisions of this Ordinance whenever a subdivision of land takes place . . . .

The regulations define "subdivision" as including:

> . . . [A]ll divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose whether immediate or future, of sale or building development, and shall include all divisions of land involving the dedication of a new street or a change in existing streets; . . .

However, an exception to this definition is "[t]he division of land into parcels greater than ten (10) acres where no street right-of-way dedication is involved." Although the regulations do not define the words "right-of-way" or "dedication", the word "street" is denoted as "[a] dedicated and accepted public right-of-way for vehicular traffic." Thus, it is apparent that a plat map which (1) divides a tract of land into parcels consisting of ten or more acres and (2) specifically appropriates for the public, access to the proposed parcels is *subject* to the regulations.

In this case, defendants admitted that plaintiff's plat map of the Weswood 4 subdivision "does not show dedicated rights of way from SR 1103 [the only marked road located near, but not providing any direct access to, twenty-two of the twenty-three parcels] . . . ." Notwithstanding such admission, the trial court, in its finding of fact #11, found that the series of private driveway easements, by which plaintiff intends to provide access to the various Weswood 4 subdivision lots and which were to be maintained pursuant to a driveway maintenance agreement, were "for all intents and purposes . . . open for public use." This finding was in error, for there was no evidence whatsoever in the record to support such finding. Hence, the conclusions and decree of the trial court that the plat map is not exempt from the Harnett County Subdivision Regulations are invalid.

This determination, however, does not end our inquiry and does not require us to vacate the trial court's judgment. A municipal planning board is not obliged to approve a subdivision merely because it is exempt from the local subdivision ordinance. In *Sugarman v. Lewis*, 488 A.2d 709 (1985), landowners brought a petition for declaratory judgment seeking a declaration that their real property was not within the town of Exeter, Rhode Island's subdivision ordinance. They had been told "informally" by the town that their plat map of the property would constitute an illegal subdivision and they would not be able to secure the necessary single-family dwelling building permits. Each of the parcels had been divided for the purpose of sale into lots that were to connect to a previously constructed

road by a strip of land varying in width from ten to twenty feet. The trial court decided adversely to landowners and they appealed.

On appeal, the landowners contended that the town's planning board did not have jurisdiction over the proposed plat map because each of the lots as shown was over one acre in size and had some access to an existing public road. In essence, the landowners argued, similarly to plaintiff's contention in this case, that the lots did not fall within the statutory definition of "subdivision" and therefore, did not qualify as a subdivision under the town's ordinance.

Examining the statute at issue, the Rhode Island Supreme Court found that it was clear and unambiguous, and only subjected the sale of real estate to the jurisdiction of the town's planning board when access to the newly created parcels would require the construction of a street. *Id.* Thus, it pronounced, "[s]tanding alone, this interpretation would suggest that the proposed plat does not constitute a subdivision within the meaning of § 45-23-1 [the statute in question] because the subject lots did have access to a public road." *Id.* at 711.

However, the Court's analysis of the case did not end there. It observed that a statute, even though clear and unambiguous, should not be interpreted literally when such a construction would lead to a result at odds with the legislative intent. *Id.* The Rhode Island legislature, the Court noted, had explicitly stated that the subdivision rules at issue were intended to empower local governments to promote the general health, safety, morals or general welfare of the community. *Id.* Thus, the Court, affirming the trial court's judgment, held:

> When we read the subdivision act as a whole, we view the clause "in such a manner as to require provision for a street" as a mechanism to alert the municipality when the proposed development is to be of such dimension as to have a substantial impact on municipal services and the general welfare of the community. In this way, the municipality can take whatever steps are necessary to ensure that the general health and welfare of its citizens and the development of the proposed plat are consonant. The trial justice in the instant case found as fact that the plan prepared by plaintiffs was an attempt to circumvent the subdivision requirement and that is was obvious from the plat maps that in order to protect the general health, welfare, and safety of the community, a street was required . . . .

> . . . We find that plaintiffs have failed to show that the trial justice overlooked or misconceived material evidence or was clearly wrong.
>
> An examination of the plat map suggests that the provisions for the access roads constitute a potential traffic and fire hazard. It is apparent that a better system is required to benefit the general community and the lot owners themselves. We therefore conclude that the property comes within the provisions of the subdivision's regulations and are subject to the planning board's jurisdiction.

Id. at 712.

We think the rationale employed by the Rhode Island Supreme Court in *Sugarman* can be equally applied to the situation now before us. In enacting legislation governing the control of subdivisions by counties, our General Assembly has sought to empower such local governments to promote the health, safety and welfare of communities, *see* N.C. Gen. Stat. § 153A-1 *et seq.* (1991), and has adopted as policy that a county's power "shall be construed to include any powers that are reasonably expedient to the exercise of the power." This objective is more specifically articulated in G.S. § 153A-331:

> A subdivision control ordinance may provide for the orderly growth and development of the county; for the coordination of streets and highways within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision and of rights-of-way or easements for street and utility purposes including the dedication of rights-of-way pursuant to G.S. 136.66.10 or G.S. 136-66.11; and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions essential to public health, safety, and the general welfare . . . .

Moreover, our Supreme Court has likewise scrutinized the effect of a proposed land use on the health, safety and welfare of a community in reviewing decisions of local zoning boards with respect to applications for special use permits. *See Woodhouse v. Board of Commissioners*, 299 N.C. 211, 261 S.E.2d 882 (1980) (developers' application for special use permit was improperly denied where the developers had met the local minimum requirements for a planned

unit development *and* where there was no contrary showing that the planned project would impermissibly compromise the health, safety or welfare of the community). Thus, we hold that even though plaintiff's plat map may not fall within the definition of "subdivision" contained in Harnett County's Subdivision Regulations, defendants are not required to approve the map for plat recordation if plaintiff's proposed use of its land as shown thereon would be a danger to the health, safety and welfare of the community.

In this case, the trial court, by findings of fact #12, #13 and #14, found that the Weswood 4 subdivision as planned would endanger the public health, safety and welfare because access to the lots for such county services as law enforcement, fire or rescue operations would be "prohibitive and inadequate." These findings are supported by the testimony of Harnett County's Sheriff, Emergency Services Director, and Planning Director, and therefore, support a conclusion that plaintiff's property was subject to the defendants' jurisdiction and that defendants were not required to approve plaintiff's plat map of the Weswood 4 subdivision. *See Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975) (where the trial court's findings of fact permit, an appellate court may make its own conclusions of law but affirm the trial court, as modified). The judgment of the trial court, as modified herein, is affirmed.

Modified and affirmed.

Judges JOHNSON and McGEE concur.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD CARR

No. COA95-636

(Filed 7 May 1996)

1. Narcotics, Controlled Substances, and Paraphernalia § 114 (NCI4th)— possession with intent to sell and deliver cocaine—sufficiency of evidence

The evidence was sufficient to support a conviction of defendant for possession with intent to sell and deliver cocaine where the evidence tended to show that pill bottles containing cocaine were found in the area of a car occupied solely by

defendant; defendant had conversed with a known drug user who earlier in the evening was charged with possession of a crack cocaine pipe; defendant was the only passenger who left the vehicle by the passenger side; defendant attempted to give the arresting officer a fictitious name when questioned; and the pill bottles contained one large rock of cocaine and eight smaller rocks, each the size normally sold on the street for between $20 and $40.

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

2. Evidence and Witnesses § 1453 (NCI4th)— admissibility of crack cocaine—chain of custody evidence not required

The trial court did not err in admitting crack cocaine recovered from the car in which defendant was a passenger, and it was not necessary to show a detailed chain of custody, since the packaging and contents of the evidence offered at trial were identified by both the arresting officer and the SBI chemist who tested it as being substantially the same as when they sealed it.

Am Jur 2d, Evidence § 947.

Appeal by defendant from judgment entered 14 March 1995 by Judge Julius A. Rosseau in Guilford County Superior Court. Heard in the Court of Appeals 20 February 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Alexander, Pfaff & Elmore, by E. Raymond Alexander, Jr., for defendant-appellant.

JOHNSON, Judge.

The evidence presented by the State tends to show that on 23 June 1994, Officer Clarence W. Schoolfield was driving his patrol car on Florida Street in Greensboro, North Carolina when he observed a red and white Dodge vehicle. Officer Schoolfield established that the driver was Ms. Myesha Miller and that there were two unidentified passengers in the car. On 24 June 1994, Officer Schoolfield again saw the vehicle in the same area of town, and observed the occupants of the car stop a pedestrian whom the officer recognized as Leon Crosby. Officer Schoolfield had previously charged Crosby with loitering for drug activity, possession with intent to sell and deliver, as well as various misdemeanors involving drug paraphernalia. When Officer Schoolfield approached the vehicle, the vehicle took off and

left the area; however, Officer Schoolfield was able to identify defendant as one of the passengers. Officer Schoolfield stopped Crosby and charged him with trespassing. Crosby was searched incident to arrest and an apparatus for smoking crack cocaine was found in his possession. Crosby was given two citations and released.

Officer Schoolfield next encountered the vehicle at approximately 2:10 a.m. on 25 June 1994 in the same area of town. The car was parked on the side of the road, and Crosby and another pedestrian, Anthony Polk, were standing beside the vehicle. Officer Schoolfield recognized Polk from previous drug-related arrests. Crosby was talking to one of the passengers in the car who the officer identified as defendant. As soon as Officer Schoolfield was seen, Polk and Crosby separated and began walking away from the car. As the car left the area, Officer Schoolfield followed and ran a check on the license plate. The plate was registered to a 1973 Mercedes Benz which had been posted for salvage. On the strength of this information, Officer Schoolfield pulled the vehicle over.

There were three occupants in the car: Miller was driving, defendant was in the front passenger seat, and Larry E. Hawthorne was in the back seat. Officer Schoolfield kept the three in constant view as he approached the car, and when they exited the vehicle, only defendant left from the passenger side. When defendant was questioned by Officer Schoolfield at the scene, he gave the officer a fictitious name. Officer Schoolfield searched the vehicle and found one pill bottle displaying a prescription label for mylan tablets on the floor of the front passenger seat. The bottle contained a rock-like substance and a single mylan tablet. Another pill bottle was discovered between the front passenger seat and the center armrest. It also contained a rock-like substance. A field test, done on the contents of the pill bottles, revealed the presence of cocaine.

As a result of the events which occurred on 25 June 1994, defendant was convicted of possession with intent to sell and deliver cocaine. He was sentenced to ten years active imprisonment. Defendant appeals from this judgment.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge against him as the evidence presented at trial was insufficient to support a conviction. We disagree.

In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged

has been presented, and that defendant was the perpetrator of the offense. *State v. Mlo*, 335 N.C. 353, 440 S.E.2d 98, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 841 (1994). If the trial court so finds, the motion is properly denied. *State v. Tuggle*, 109 N.C. App. 235, 426 S.E.2d 724, *dismissal allowed and disc. review denied*, 333 N.C. 794, 431 S.E.2d 29 (1993). Substantial evidence is that 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). All the evidence, whether direct or circumstantial, must be considered by the trial court in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence, being drawn in favor of the State. *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 883 (1994).

To prevail on the charge against defendant in this case, the State must present substantial evidence of (1) defendant's possession of the controlled substance, and (2) his intent to sell or distribute it. *See State v. McGill*, 296 N.C. 564, 251 S.E.2d 616 (1979). Defendant maintains that the State's evidence was insufficient for both elements.

Possession of controlled substances may be either actual or constructive. *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989). Because defendant did not physically possess the controlled substances found in the car, the State relied on evidence of constructive possession. Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the drugs. *State v. Peek*, 89 N.C. App. 123, 365 S.E.2d 320 (1988). Proving constructive possession where defendant had nonexclusive possession of the place in which the drugs were found requires a showing by the State of other incriminating circumstances which would permit an inference of constructive possession. *State v. Morris*, 102 N.C. App. 541, 402 S.E.2d 845 (1991).

This Court has held in previous cases that the mere presence of the defendant in an automobile containing drugs does not, without additional incriminating circumstances, constitute sufficient proof of drug possession. *See State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976); *see also State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987). In fact, defendant cites *Weems* to support his argument that the evidence was insufficient to show defendant had constructive possession of the drugs. In *Weems*, a case similar to the instant action, the defendant was a passenger in the front seat of an automo-

bile in which forty small foil packets containing a heroine mixture were found. Some of the heroin was found hidden in the front passenger seat in close proximity to the defendant. Likewise, the defendant in *Weems* did not own the vehicle. However, the case *sub judice* is distinguishable from *Weems* in that sufficient incriminating circumstances exist.

In the instant case, the State provided substantial evidence that the pill bottles containing cocaine were found in the area of the car occupied solely by defendant. Moreover, the evidence shows that defendant had conversed with Crosby, a known drug user, who earlier in the evening was charged with possession of a crack cocaine pipe; that defendant was the only passenger who left the vehicle by the passenger side; and that defendant attempted to give the arresting officer a fictitious name when questioned. We find that these facts provide sufficient incriminating circumstances to allow the reasonable inference that defendant had the intent and capability to exercise control and dominion over the drugs.

Defendant also argues that the evidence presented was insufficient to show that he had the intent to sell the cocaine. We disagree. The State presented sufficient circumstantial evidence to permit a reasonable conclusion that defendant intended to sell and deliver the controlled substance. The amount of the controlled substance, the manner of its packaging, labeling, and storage, along with the activities of a defendant may be considered in establishing intent to sell and deliver by circumstantial evidence. *See State v. Williams*, 71 N.C. App. 136, 321 S.E.2d 561 (1984); *State v. Childers*, 41 N.C. App. 729, 255 S.E.2d 654, *disc. review denied*, 298 N.C. 302, 259 S.E.2d 916 (1979). In the instant case, the pill bottles contained one large rock of cocaine and eight smaller rocks, each the size normally sold on the street for between $20.00 and $40.00. Defendant was seen having discussions through the car window with known drug users, one of whom had a pipe for smoking crack cocaine in his possession. Further, defendant attempted to disguise his identity when questioned by police. This evidence was sufficient to overcome defendant's motion to dismiss for insufficient evidence of his intent to sell and deliver controlled substances.

[2] In his second argument, defendant contends that the trial court erred in admitting the crack cocaine recovered from the car into evidence. Defendant argues that the State failed to provide sufficient evidence of the chain of custody of the drugs between the arresting offi-

cer and the State Bureau of Investigation (S.B.I.) chemist, or from the chemist to the prosecuting attorney. For the following reasons, we find no error by the trial court in admitting the evidence.

Officer Schoolfield testified that he placed the pill bottles in a package, sealed it, and then labeled it. The package was then placed in an evidence locker. He further testified that the package he examined in court was in substantially the same condition as it had been when he sealed it. When the package was opened at trial, one of the bottles still contained a single mylan tablet along with the cocaine. Ms. Nancy Gregory, the S.B.I. chemist, testified that the plastic bag she viewed in court was substantially the same as it had been when she received it for testing. Upon receiving the evidence in question, she opened the sealed bag, tested the material inside, replaced the material and resealed the package. The package was placed in Ms. Gregory's evidence locker until the paperwork was completed, and then it was returned to the evidence technician. Ms. Gregory further testified that, according to her records, the evidence technician returned the package to the evidence custodian for the Greensboro Police Department.

A two-pronged test must be met in order to properly admit real evidence: first, the item must be authenticated as the same object involved in the original incident; and second, it must be established that the object has not undergone any material change. *State v. Harding*, 110 N.C. App. 155, 429 S.E.2d 416 (1993). Whether the substance in question has undergone a material change is subject to the exercise of the trial court's sound discretion. *State v. Taylor*, 332 N.C. 372, 420 S.E.2d 414 (1992). The State need establish a detailed chain of custody only in cases where the evidence is not readily identifiable or where the evidence is susceptible to alteration and there is a reason to believe that an alteration has occurred. *Id.*

We find that the evidence presented by the State was sufficient to render the evidence readily identifiable and, therefore, a detailed chain of custody was not necessary. The packaging and contents of the evidence offered at trial was identified by both Officer Schoolfield and Ms. Gregory as being substantially the same as when they sealed it. Defendant has offered no evidence which would tend to show that the substance was not the same cocaine seized by Officer Schoolfield or that it had undergone a material change. Mere weakness in the chain of custody speaks only to the weight of the evidence, not its admissibility. *Taylor*, 332 N.C. 372, 389, 420 S.E.2d 414, 424; *State*

v. Campbell, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984). Accordingly, the trial court did not abuse its discretion by admitting the evidence.

For the foregoing reasons, we find that defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN, JOHN C. and McGEE concur.

TRACY W. MOORE, PLAINTIFF-EMPLOYEE v. STANDARD MINERAL COMPANY DEFENDANT-EMPLOYER, AND CNA INSURANCE COMPANY, DEFENDANT-CARRIER

No. 9410IC652

(Filed 7 May 1996)

Workers' Compensation § 260 (NCI4th)— silicosis—average weekly wage—52 weeks preceding diagnosis—appropriate period for determination

Where plaintiff was exposed to silica dust from 16 March 1959 to 18 July 1960 and from 19 February 1963 to 19 May 1967, thereafter worked in a number of other jobs until becoming self employed in 1972 in the carpet and tile business, and was working in that business on 19 June 1991 when his silicosis was diagnosed, the Industrial Commission properly determined that compensation should be calculated based upon plaintiff's wages during the 52-week period immediately preceding the date of diagnosis rather than the 52-week period preceding his removal from the industry within which silicosis was contracted.

Am Jur 2d, Workers' Compensation § 419.

Appeal by defendants from Opinion and Award filed 1 March 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 February 1995.

Lore & McClearen, by R. James Lore, for plaintiff-appellee.

Young Moore Henderson & Alvis P.A., by Joseph W. Williford and Terryn D. Owens for defendant-appellants.

JOHN, Judge.

Defendants appeal an Opinion and Award of the North Carolina Industrial Commission (the Commission), contending the Commission erred by basing plaintiff's compensation rate on wages earned "at the time he was first diagnosed with silicosis rather than when he was removed from the industry" which exposed him to the hazard. For the reasons set forth herein, we affirm the Commission.

Pertinent facts and procedural information are as follows: From 16 March 1959 to 18 July 1960 and from 19 February 1963 to 19 May 1967, claimant was exposed to silica dust while employed by defendant Standard Mineral Company (Standard). Plaintiff thereafter worked in a number of other jobs until becoming self-employed in 1972 in the carpet and tile business. He was engaged in this latter occupation on 17 February 1994, the date the matter *sub judice* was heard before the Commission. Plaintiff's silicosis was diagnosed 19 June 1991 and the diagnosis confirmed 19 February 1992.

Standard and its insurance carrier, defendant CNA Insurance Company, entered into an agreement with plaintiff pursuant to N.C.G.S. § 97-61.5(b) (1991) for payment of 104 weeks of workers' compensation benefits at the rate of $62.01 per week. The amount was calculated as sixty-six and two-thirds percent of plaintiff's average weekly wage of $93.02 (the amount earned with Standard), subject to a determination by the Commission as to whether the appropriate rate had been paid. Deputy Commissioner W. Joey Barnes subsequently ruled that plaintiff became disabled when diagnosed with silicosis, and that "[a]t the time of disablement, plaintiff's average weekly wage was $395.13," "yielding a compensation rate of $263.42."

Defendants appealed to the Full Commission which adopted *in toto* the findings and conclusions of the Deputy Commissioner. Defendants gave notice of appeal to this Court 4 April 1994.

The sole issue on appeal is whether the Commission properly determined the rate of compensation to be paid plaintiff. Defendants do not contest the diagnosis of silicosis and further admit responsibility for payment of compensation under G.S. 97-61.5(b). However, defendants contend certain findings of fact contained in the Commission's opinion are not supported by the evidence and further argue the Commission's legal conclusions are based upon "a misapprehension of the law," specifically G.S. § 97-61.5(b). We disagree.

The statute provides in pertinent part:

> If the Industrial Commission finds . . . that the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, it 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 1st 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.

Defendants insist the foregoing mandates that the average weekly wage governing compensation is that which the employee was receiving "before removal from the industry" within which silicosis was contracted. Defendants point out that plaintiff "removed" himself from employment with Standard no later than May 1967.

Plaintiff focuses instead upon the phraseology "average weekly wage," defined in N.C.G.S. § 97-2(5) (1991) as follows:

> "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . .

The applicable "date of the injury" herein, plaintiff argues, citing *Wilder v. Amatex Corp.*, 314 N.C. 550, 557, 336 S.E.2d 66, 70 (1985), was the date his disease was diagnosed. Plaintiff therefore maintains compensation should be calculated based upon his wages "during the period of 52 weeks immediately preceding the date" of diagnosis. We find plaintiff's analysis the more persuasive.

Defendants' interpretation that plaintiff's rate of compensation should be based upon the wages he was earning at the time he "removed" himself from Standard ignores the context within which G.S. § 97-61.5 was adopted. Since 1935, the year the statute was originally enacted as N.C. Sess. Laws ch. 123, § 1, industrial workers exposed to the hazards of asbestos and silica dust have been required to undergo periodic medical examinations for the purpose of detect-

ing signs of occupational disease. Upon a diagnosis of asbestosis or silicosis, G.S. § 97-61.5 authorizes the Commission to order the afflicted worker "removed" from the hazardous industry.

Plaintiff contends, and we agree, that the foregoing monitoring and examination procedure manifests that the term "removal" as used by G.S. § 97-61.5 presumes medical diagnosis will occur *during* the hazardous employment. Thus, the language regarding "removal from the industry" has specific application only to occasions when the inspection program has identified victims of occupational disease who are thereafter "removed" from a hazardous industry by directive of the Commission. However, the phrase is inapposite to instances such as that *sub judice* wherein a claimant is diagnosed at some point *subsequent* to leaving hazardous employment. As defendants concede plaintiff is entitled to benefits under G.S. § 97-61.5(b), we therefore focus upon the term "average weekly wages" apart from the phrase "before removal from the industry" to determine the compensation rate, as contemplated by the statute, of a worker diagnosed with asbestosis or silicosis following *voluntary* departure from a hazardous industry.

The definition of "average weekly wages," found at G.S. § 97-2(5), utilizes the earnings of the employee "in the employment in which he was working at the time of the injury" to ascertain the proper benefit amount. The ultimate question, therefore, is what date constitutes "the time of the injury" for purposes of an award under G.S. § 97-61.5(b).

Two decisions of our Supreme Court lend guidance. First, *Wilder v. Amatex Corp.*, 314 N.C. 550, 560, 336 S.E.2d 66, 72 (1985), in discussing the date of accrual of the statute of limitations period for occupational disease claims, observes:

> [T]he legislature and the Court have recognized that exposure to disease-causing agents is not itself an injury. The body is daily bombarded by offending agents. Fortunately, it almost always is capable of defending itself against them and remains healthy until, in a few cases, the immune system fails and disease occurs. That, in the context of disease claims, constitutes the first injury. Although persons may have latent diseases of which they are unaware, it is not possible to say precisely when the disease first occurred in the body. The only possible point in time from which to measure the "first injury" in the context of a disease claim is when the disease is diagnosed.

In addition, in *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979), the Court was asked to decide whether the law of the year of diagnosis or the law of the year of last hazardous exposure applied to the workers' compensation claim of a woman suffering from byssinosis. The Court noted that

> [t]he long-standing rule in both this and other jurisdictions is that the right to compensation in cases of *accidental* injury is governed by the law in effect at the time of injury.

Id. at 644, 256 S.E.2d at 698, and also looked to N.C.G.S. § 97-52 (1991), which provides as follows:

> [d]isablement or death of an employee resulting from an occupational disease . . . shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workers' Compensation Act . . . .

Ultimately, the Court ruled that the law in effect at the time of the claimant's disablement should apply, that being tantamount to the time of injury in the context of occupational disease claims. *Id.*

Moreover, this Court has determined that, for the purposes of G.S. § 97-61.5(b), a diagnosis of asbestosis "is the equivalent of a finding of actual disability." *Roberts v. Southeastern Magnesia and Asbestos Co.*, 61 N.C. App. 706, 710, 301 S.E.2d 742, 744 (1983). We perceive no distinction pertinent to the matter at hand between a diagnosis of asbestosis and that of silicosis. The Commission therefore properly calculated plaintiff's benefits under G.S. § 97-61.5(b) based upon wages earned in his employment "at the time of the injury," G.S. § 97-2(5), *i.e.*, the time of his diagnosis.

Our holding finds support in *Frady v. Groves Thread*, 56 N.C. App. 61, 286 S.E.2d 844 (1982), *aff'd*, 312 N.C. 316, 321 S.E.2d 835 (1984). In *Frady*, this Court stated, *inter alia*, that G.S. § 97-2(5) calls for benefits to be based upon wages earned in the employment "in which [the claimant] was working at the time of the injury," and that "the time of injury is the time of disability in the case of occupational disease." 56 N.C. App. at 67, 286 S.E.2d at 848; *but see Frady v. Groves Thread*, 312 N.C. 316, 318, 321 S.E.2d 835, 836 (1984) (decision of Court of Appeals "left undisturbed but should not be considered as having precedential value"). Moreover, courts in the majority of other jurisdictions have similarly held benefit amounts to be based upon workers' wage levels at the time of either diagnosis or disablement. 1B Arthur Larson & Lex K. Larson, *The Law of Workmen's*

Compensation, § 41.84(a) (1995); *see, e.g., Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1290 (9th Cir. 1983), *cert. denied*, 466 U.S. 937, 80 L. Ed. 2d 459 (1984); *Cote v. Combustion Engineering, Inc.*, 502 So.2d 500 (Fla. Dist. Ct. App., 1st Distr. 1987); *White v. Johns-Manville Sales Corp.*, 416 So.2d 327 (La. Ct. App., 5th Cir. 1982).

In sum, we hold that under the circumstances of the case *sub judice*, the Commission properly determined plaintiff's benefits under G.S. § 97-61.5(b) in accordance with the definition of "average weekly wages" set forth in G.S. § 97-(5), the "time of the injury" being the date plaintiff was diagnosed with silicosis. In so holding, we emphasize that the situation of a claimant no longer employed in any capacity at the time of diagnosis is not before us, and that legislative action to address such an instance may well be required to fulfill completely the intended purpose of compensating workers who have contracted occupational diseases. *See Roberts*, 61 N.C. App. at 710, 301 S.E.2d at 744 (partial purpose of G.S. § 97-61.5 to compensate employees for incurable nature of asbestosis).

Defendant also challenges certain of the Commission's findings relating to plaintiff's wages as being unsupported by evidence of record. This argument is unfounded.

Findings of fact by the Commission are conclusive as long as supported by any competent evidence. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 468 S.E.2d 283 (1996). Upon examination of the record, we find competent evidence in the form of plaintiff's income tax returns for 1990 and 1991 which support the Commission's finding that plaintiff's "average weekly wage was $395.13."

Affirmed.

Judges JOHNSON and MARTIN, Mark D. concur.

PARKER v. TURNER

[122 N.C. App. 381 (1996)]

MICHAEL LEE PARKER, PLAINTIFF v. DAVID L. TURNER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF LONG VIEW, AND THE TOWN OF LONG VIEW, A NORTH CAROLINA MUNICIPALITY, DEFENDANTS

No. COA95-917

(Filed 7 May 1996)

Sheriffs, Police, and Other Law Enforcement Officers § 22 (NCI4th)— public duty doctrine—failure of complaint to allege exceptions

Plaintiff's complaint was insufficient to state a claim for breach of duty or negligence on the part of defendant police officers where plaintiff did not allege any facts tending to show that a special relationship existed between him and defendants or that defendants created a special duty by promising him protection which was not forthcoming; moreover, even if the public duty doctrine does not apply if law enforcement officials know when, where, and by whom a violent crime is going to be committed but make no effort to protect or assist the intended victims, plaintiff did not allege that defendants here knew such information, but only that they should have known it.

Am Jur 2d, Public Officers and Employees § 374; Sheriffs, Police, and Constables § 159.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody. 12 ALR4th 722.

Modern status of the rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances. 38 ALR4th 1194.

Appeal by plaintiff from order entered 6 July 1995 by Judge Ronald E. Bogle in Catawba County Superior Court. Heard in the Court of Appeals 28 March 1996.

DeVore & Acton, P.A., by Fred W. DeVore, III and William D. Acton, Jr., for plaintiff-appellant.

Frank B. Aycock, III for defendants-appellees.

WALKER, Judge.

On 15 March 1995, plaintiff Michael Parker filed a complaint alleging breach of duty and negligence on the part of defendants. Defendants' motion to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) was allowed, and plaintiff appeals.

In his complaint, Michael Parker alleged the following facts. Michael and his parents, Colen and Martha Parker, owned and operated an automobile parts store in the Town of Long View. On 19 March 1992, between 9:00 and 9:30 a.m., Richard Ramseur entered the store and attempted to return a motor he had purchased several weeks earlier. Colen Parker refused to refund Ramseur's money because the motor was not in the same condition as when it was sold. Ramseur became angry and demanded his money. He then struck Colen Parker in the face and kicked him in the ribs, causing visible injuries. As he left the premises, Ramseur told Colen Parker that he would be back at 3:00 to either get his money or "a piece of [Parker's] ass."

Between 9:30 and 10:00 a.m., Michael Parker and his mother arrived at the store and immediately noticed Colen Parker's injuries. They reported the incident to the Long View Police Department. Sometime before noon, defendant David L. Turner, Long View's Chief of Police, responded to the call and observed Colen Parker's injuries. Colen Parker identified Ramseur to Chief Turner by name and description. Chief Turner advised that Colen Parker would have to go to the magistrate's office and swear out a warrant before the police could do anything about Ramseur. According to plaintiff, Chief Turner took no further action regarding the incident.

Between 3:00 and 4:00 p.m., Ramseur returned to the auto parts store and again demanded his money. Colen Parker told Ramseur that his son Michael had gone to get the money. In fact, Michael had gone to the grocery store. Ramseur again made threatening remarks and left the premises vowing to return. Colen Parker called the police at once and reported that he needed immediate assistance. Captain Rogers took the call and attempted unsuccessfully to locate a patrol officer to respond to the scene. Captain Rogers and another officer then headed for the auto parts store, about 1.5 miles away from the police station.

Meanwhile, as Ramseur was leaving the store, Michael Parker returned. Ramseur approached Michael and demanded payment for

the motor. When Michael stated that he did not have the money, Ramseur pulled a handgun and shot Michael in the neck, causing serious injury. Ramseur then entered the store, shot and killed Colen Parker, and injured a customer. The customer escaped and flagged down the officers who were responding to Colen Parker's call. Ramseur was later convicted of murder and assault.

Upon a 12(b)(6) motion to dismiss for failure to state a claim, the issue for the trial court is whether, as a matter of law, the allegations of the plaintiff's complaint, taken as true, are sufficient to state a claim upon which relief may be granted under any legal theory. *Hull v. Oldham*, 104 N.C. App. 29, 35, 407 S.E.2d611, 614, *review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991).

Actionable negligence occurs when a defendant violates some legal duty owed to a plaintiff, and in the absence of any such duty a defendant cannot be held liable to a plaintiff. *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283 (1996). Defendants contend that plaintiff's complaint failed to allege facts demonstrating the existence of any legal duty owed to plaintiff by defendants and that the trial court therefore correctly dismissed the complaint.

The general common law rule in this State, known as the "public duty doctrine," is that "a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991), *rehearing denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). Stated another way, the public duty doctrine holds that law enforcement officials owe no duty of protection to specific individuals. *Hedrick*, 121 N.C. App. at 470, 466 S.E.2d at 284. "This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act." *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901.

Thus, plaintiff's claims here are barred unless he can show that the facts of this case fall within one of two generally recognized exceptions to the public duty doctrine:

> (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forth-

> coming, and the individual's reliance on the promise of protection is causally related to the injury suffered."

Id. at 371, 410 S.E.2d at 902 (citation omitted). Even when viewed in the light most favorable to him, plaintiff's complaint does not allege any facts tending to show that a special relationship existed between him and defendants or that defendants created a special duty by promising him protection which was not forthcoming. Indeed, in his brief, plaintiff does not argue that either of these exceptions applies to his case.

Rather, plaintiff appears to advocate the adoption of a third exception to the public duty doctrine, arguing that the doctrine does not apply if law enforcement officials know when, where, and by whom a violent crime is going to be committed but make no effort to protect or assist the intended victim(s). Plaintiff cites no case law from this State in support of such an exception, and we have found none. Moreover, even if such an exception did exist, plaintiff has not alleged that defendants here knew such information, but only that they should have known it.

In sum, plaintiff's complaint does not allege facts sufficient to state a claim for breach of duty or negligence on the part of defendants. The order of the trial court dismissing plaintiff's complaint is therefore

Affirmed.

Judges JOHNSON and WYNN concur.

YOUNG v. LOMAX

[122 N.C. App. 385 (1996)]

CHARLES YOUNG AND WIFE, ANN YOUNG; TERRY BEAVER AND WIFE, SANDRA BEAVER; JOHN KLUTTZ AND WIFE, DONNA KLUTTZ; MICHAEL CALLAHAN AND WIFE, BRENDA CALLAHAN; HENRY KIVETT AND WIFE, BARBARA KIVETT; JAMES SHOLLY AND WIFE, KIM SHOLLY; ALLEN JOHNSON, II AND WIFE, TERRI JOHNSON; SAMUEL BASS AND WIFE, DENISE BASS; MARY CLINE; LESTER SHELTON; MARK DULANEY AND PAMELA DULANEY; JACK MORGAN, JR. AND WIFE, BEVERLY MORGAN; LARRY PAUL AND WIFE, MYRA PAUL; HAROLD WHITLEY AND WIFE, PATSY WHITLEY; OYSTEIN DAHL AND WIFE, DEBORAH DAHL; CHUCK REX HELMS; MITCH WELLS AND WIFE, CINDY WELLS; AND CHARLES B. LEWIS, SR., PLAINTIFFS V. JAMES F. LOMAX AND RODNEY HELMS, AND DAWN W. O'DELL, IN HER CAPACITY AS TRUSTEE AND NATIONSBANC MORTGAGE CORPORATION, DEFENDANTS

No. COA95-325

(Filed 7 May 1996)

Deeds § 74 (NCI4th)— structure as mobile home—violation of restrictive covenants—summary judgment proper

The trial court properly granted summary judgment for plaintiffs who sought a permanent mandatory injunction compelling removal of a structure from defendant's lot where there was no genuine issue of material fact as to whether the structure was a mobile home within the meaning of the subdivision's protective covenants, since the structure was delivered to the site in two sections; each had its own permanent steel chassis consisting of two "I" beams affixed to the flooring system of the unit; each unit was attached to four axles with two wheels per axle; a truck towed the structure to the site with the structure riding on its own axles and wheels; when the structure reached its destination, the wheels and axles were removed and the structure was placed on concrete blocks; but this did not change the fact that the structure was still a mobile home.

Am Jur 2d, Covenants, Conditions, and Restrictions § 195.

Validity of zoning or building regulations restricting mobile homes or trailers to established mobile home or trailer parks.17 ALR4th 106.

Validity and construction of restrictive covenant prohibiting or governing outside storage or parking of housetrailers, motor homes, campers, vans, and the like, in residential neighborhoods. 32 ALR4th 651.

YOUNG v. LOMAX

[122 N.C. App. 385 (1996)]

Appeal by defendants from order granting summary judgment entered 14 December 1994 by Judge Clarence E. Horton, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 26 March 1996.

Plaintiffs are owners of residential lots in Rhinehardt Estates Subdivision (hereinafter subdivision) in Cabarrus County, North Carolina. In July 1993, Rodney Helms (hereinafter defendant Helms) purchased a "home" manufactured by Imperial Homes of Charlotte and placed the structure on lot 43 of the subdivision. At the time, defendant Helms was purchasing lots 43 and 44 of the subdivision from James F. Lomax (hereinafter defendant Lomax) under an installment contract. On 16 September 1993, plaintiffs filed a complaint in Cabarrus County District Court against defendant Helms and defendant Lomax seeking a permanent mandatory injunction against them compelling removal of the structure. Plaintiffs contended that the structure violated the subdivision restrictions which, *inter alia*, prohibited the installation of trailers and mobile homes in the subdivision. Defendants answered the complaint, denying that the structure violated any subdivision restrictions. On 14 December 1994 the trial court granted plaintiffs' motion for summary judgment.

Defendants appeal.

Ferguson & Scarbrough, P.A., by James E. Scarbrough, for plaintiff-appellees.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison, for defendant-appellants Dawn W. O'Dell, in her capacity as Trustee, and NationsBanc Mortgage Corporation, and Johnson & Hastings, by Randell F. Hastings, for defendant-appellants James F. Lomax and Rodney Helms.

EAGLES, Judge.

We first note that summary judgment is appropriate only "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); *Snipes v. Jackson*, 69 N.C. App. 64, 71-72, 316 S.E.2d 657, 661, *disc. review denied and appeal dismissed*, 312 N.C. 85, 321 S.E.2d 899 (1984). The trial court must view "the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Snipes*, 69 N.C. App. at 72, 316 S.E.2d at 661.

Here, defendants argue that the trial court erred in granting summary judgment in favor of plaintiffs because a genuine issue of material fact exists as to whether defendant Helms' home is a mobile home within the meaning of the subdivision's protective covenants. The pertinent portion of the subdivision's "Protective Covenants" provides:

> TEMPORARY STRUCTURES: No structure of a temporary nature, trailer, mobile home, basement, tent, shack, garage, barn, or other out buildings shall be used on any lot at any time as a residence, either temporarily or permanently. All lots or any structures thereon shall be kept in a neat and orderly manner, free from all unlicensed automobiles and trucks and other debris.

Defendants argue that the term "mobile home" in the covenant is subject to different interpretations and that the correct interpretation of this term should have been determined at a trial. We disagree. Case law clearly sets out the features that make a structure a mobile home.

A "mobile home" is a structure that is designed to be moved, for transport. *Angel v. Truitt*, 108 N.C. App. 679, 683, 424 S.E.2d 660, 663 (1993). In *Starr v. Thompson*, 96 N.C. App. 369, 370-71, 385 S.E.2d 535, 536 (1989), we found that the structure in question was a "mobile home" because the structure was "made up of two sections . . .; each section ha[d] a permanent, built-in chassis equipped to accommodate four removable axles upon which motor vehicle like wheels [could] be affixed at each end;" and the structure was delivered to its location on wheels attached to the axles. We held in *Starr* that the structure was a mobile home "even though the axles, wheels and tongues were removed after the structure was placed on the lot." *Starr*, 96 N.C. App. at 371-72, 385 S.E.2d at 536. *See City of Asheboro v. Auman*, 26 N.C. App. 87, 88, 214 S.E.2d 621, 621 (where we held that creating a lack of mobility of the structure after it is installed does not change the fact that the structure is still a mobile home), cert. denied, 288 N.C. 239, 217 S.E.2d 663 (1975). In *Angel*, 108 N.C. App. 679, 683-84, 424 S.E.2d 660, 663 (1993), we concluded that the structure in question was not a mobile home because the structure did not have a permanent chassis; there were no axles or wheels on the structure; and the structure could only be transported by lifting it with a crane and placing it on a dolly.

Here, defendants admitted that the structure was delivered to the site in two sections; each section had its own permanent steel chas-

sis consisting of two "I" beams affixed to the flooring system of the unit; each unit was attached to four axles with two wheels per axle; and a truck towed the structure to its present site with the structure riding on its own axles and wheels. We conclude that this evidence established as a matter of law that the structure is a mobile home.

We note that once the structure at issue here reached its destination, the wheels and axles were removed and the structure was placed on concrete blocks which were stacked to create piers. Defendants point to *Angel* where, in concluding that a structure was not a mobile home, we noted that once the structure was placed on its foundation, it could only be "moved as one unit in exactly the same manner that a house built on-site is moved." *Angel*, 108 N.C. App. at 684, 424 S.E.2d at 663. Here, defendants argue that the structure is permanent in nature because the axles and wheels have been removed and now it can only be removed in one unit like a house built on-site is removed. Defendants point out that plaintiffs presented a forecast of evidence arguing that the structure is not permanent and can be removed by just reversing the process used to install it. Defendants contend that this contradicting evidence creates a genuine issue of material fact that should have been resolved at trial. Defendants' reliance on *Angel* is misplaced. As we stated above, rendering a structure immobile after it has been installed does not change the fact that the structure is still a mobile home. *Starr*, 96 N.C. App. at 371-72, 385 S.E.2d at 536; *Auman*, 26 N.C. App. at 88, 214 S.E.2d at 621. In *Angel*, we determined that the structure was not a mobile home because it was never designed for transport. Defendants' assignment of error fails.

Affirmed.

Judges LEWIS and McGEE concur.

LEONARD GRAY SPEAKS AND NANCY CARDWELL SPEAKS, PLAINTIFFS V. FAWEZ FANEK AND MARY DALE FANEK, DEFENDANTS

No. COA95-247

(Filed 7 May 1996)

Parent and Child § 25 (NCI4th); Divorce and Separation § 359 (NCI4th)— custody modification proceeding—right of fit natural parent not superior to that of third person

The rule of *Petersen v. Rogers*, 337 N.C. 397, that a fit natural parent not found to have neglected the child has a right to custody superior to third persons, applies only to *initial* custody proceedings and not to a custody modification proceeding.

Am Jur 2d, Divorce and Separation § 1010; Parent and Child §§ 28, 29.

Award of custody of child where contest is between child's father and grandparent. 25 ALR3d 7.

Appeal by plaintiffs from order entered *nunc pro tunc* 25 January 1995 by Judge Kimberly S. Taylor, in Davidson County District Court. Heard in the Court of Appeals 4 December 1995.

Theodore M. Molitoris for plaintiff appellants.

Wilson, Biesecker, Tripp & Sink, by Roger S. Tripp, for defendant appellees.

SMITH, Judge.

The central issue on this appeal is whether the trial court applied the proper legal standard in a custody modification decision. Defendants are the biological parents of the children at issue. Defendants voluntarily relinquished physical custody of the children in 1989, and legal custody in 1992, to plaintiffs. During the span of plaintiffs' custody, plaintiffs and the children have resided together as a family unit.

In 1994, defendants moved the trial court to modify custody, based on alleged material and substantial changes of circumstance. The trial court, pursuant to this motion, awarded custody to defendants, after

> carefully stud[ying] the North Carolina Supreme Court opinion in the case of *Petersen vs. Rogers*, 337 N.C. 397, 445 S.E.2d 901

> (1994) and the holding of the Supreme Court in that case that absent a finding that parents are unfit or have neglected the welfare of their children the constitutionally-protected paramount right of parents to custody, care, and control of their children *must prevail.*

(Emphasis added.) Based on the above finding, the trial court concluded as a matter of law, that "[t]he constitutionally-protected paramount right of the parents of three minor children, to custody, care, and control of their children must prevail."

While the trial court has correctly cited the rule from *Petersen,* it has incorrectly applied *Petersen* to the instant set of facts. Since the Supreme Court's *Petersen* ruling, we have interpreted *Petersen* narrowly. This Court has repeatedly "interpreted *Petersen* as applying only to an initial custody determination, and not to motions for change of custody based on changed circumstances." *Lambert v. Riddick,* 120 N.C. App. 480, 482-83, 462 S.E.2d 835, 836 (1995); and *see Bivens v. Cottle,* 120 N.C. App. 467, 468-69, 462 S.E.2d 829, 830 (1995), *disc. review allowed,* 342 N.C. 651, 467 S.E.2d 704 (1996).

Unquestionably, this case does not involve an initial custody matter. The trial court's order of 23 March 1992 decrees: "The plaintiffs are granted the full care, custody and control of the minor children, namely SARAH JOY FANEK, SERENE JORDAN FANEK and HANNAH DALE FANEK." Then, again, by its order of 17 November 1992, the trial court reaffirmed plaintiffs' physical and legal custody rights to the Fanek children (we note this was a consent order).

As this Court iterated in *Bivens,* "*Petersen*'s directive is simple and clear: In an *initial* custody proceeding, a fit natural parent not found to have neglected the child, has a right to custody superior to third persons." *Bivens,* 120 N.C. App. at 469-70, 462 S.E.2d at 831 (emphasis added). Application of the *Petersen* standard to a custody modification proceeding is error. *Bivens* outlines the appropriate and mandatory procedure, which must be followed pursuant to N.C. Gen. Stat. § 50-13.7(a) (1987):

> "[O]nce the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances [*adversely*] affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Dobos v. Dobos,* 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993) (quoting *Ramirez-*

Barker v. Barker, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992)). Since, there is a statutory procedure for modifying a custody determination, *a party seeking modification of a custody decree must comply with its provisions.* There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified.

Bivens, 120 N.C. App. at 469, 462 S.E.2d at 831 (emphasis added).

The trial court's order of 25 January 1995 altering custody between the parties is devoid of any best interest analysis. It appears the trial court tailored the findings and conclusions in order to abide by the *Petersen* standard. As *Bivens* illustrates, that is the incorrect standard in a custody *modification* setting.

Thus, we reverse the decision of the trial court and remand. On remand, the trial court may in its discretion, hear any evidence offered by the instant parties (for the purpose of conducting the custody modification analysis required by *Dobos*, 111 N.C. App. at 226, 431 S.E.2d at 863); or alternatively, the trial court may proceed with the *Dobos* analysis if current evidence permits.

Reversed and remanded.

Judges JOHNSON and WALKER concur.

JERRY H. BARGER, H. WAYNE KENNERLY, AND HARRY G. YOUNG, JR., PLAINTIFFS v. McCOY HILLARD & PARKS, A NORTH CAROLINA GENERAL PARTNERSHIP, DAVID R. McCOY, MICHAEL W. HILLARD, BRENT H. PARKS AND SHEILA LEE, DEFENDANTS

No. COA94-876

(Filed 7 May 1996)

Accountants § 20 (NCI4th)— negligent misrepresentation—applicable statute of limitations—action not barred

Since there was no contractual duty between plaintiffs and defendant accountants, plaintiffs' claim was one for negligent misrepresentation and was governed by the statute of limitations set out in N.C.G.S. § 1-52(5); therefore, since, according to plaintiffs' forecast of evidence, they discovered the harm from defendants' actions in 1990 and filed their complaint in 1992, their claim was not barred by the statute of limitations, and that portion of the Court's prior opinion holding to the contrary is withdrawn.

Am Jur 2d, Accountants §§ 24, 25.

Liability of public accountant to third parties. 46 ALR3d 979.

Liability of independent accountant to investors or shareholders. 35 ALR4th 225.

Appeal by plaintiffs from order entered 27 April 1994 by Judge William H. Helms in Rowan County Superior Court. Originally heard in the Court of Appeals 9 May 1995.

Caudle & Spears, P.A., by Thad A. Throneburg and Jeffrey L. Helms, for plaintiff-appellants.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe, L. Kristin King, and James J. Hutton for defendant-appellees.

MARTIN, John C., Judge.

Plaintiffs' Petition for Rehearing of our decision filed 3 October 1995, reported at 120 N.C. App. 326, 462 S.E.2d 452, was allowed on 29 November 1995 pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. We allowed the filing of supplemental briefs.

Upon review, we conclude that our earlier opinion was in error in characterizing plaintiffs' negligent misrepresentation claim as an accounting malpractice claim barred by the three-year statute of limitations of G.S. § 1-15(c). In *NCNB National Bank v. Deloitte & Touche*, 119 N.C. App. 106, 458 S.E.2d 4, *cert. denied*, 341 N.C. 651, 462 S.E.2d 514 (1995), this Court stated:

> The instant [accountant's liability] case is not a malpractice case with privity between plaintiff and defendant; it is a negligent misrepresentation case. (*See Insurance Co. v. Holt*, 36 N.C. App. 284, 288, 244 S.E.2d 177, 180 (1978), where our Court held that "claims for relief for attorney malpractice are actions sounding in contract and may properly be brought only by those who are in privity of contract with such attorneys by virtue of a contract providing for their employment. *See also Jefferson-Pilot Ins. Co. v. Spencer*, 336 N.C. at 56, 442 S.E.2d at 319, where our Supreme Court stated that because the claim was one for negligent misrepresentation, "it [was] governed by the statute of limitations set out in N.C.G.S. § 1-52(5)[.]").

Id. at 114-15, 458 S.E.2d at 9. As we stated in our earlier opinion, there was no contractual duty between plaintiffs and defendants in the present case; accordingly, plaintiffs' claim is one for negligent misrepresentation and is governed by the statute of limitations set out in G.S. § 1-52(5).

Under G.S. § 1-52(5), a claim for negligent misrepresentation "does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation and second, the claimant discovers the misrepresentation." *Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 57, 442 S.E.2d 316, 320 (1994). According to the plaintiffs' forecast of evidence in this case, they discovered the harm in 1990, and their complaint was filed in 1992. We therefore withdraw that portion of our previous opinion holding that plaintiffs' negligent misrepresentation claim is barred by the statute of limitations as a matter of law, and we reverse the trial court's entry of summary judgment in favor of defendants as to the negligent misrepresentation claim.

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and GREENE concur.

MARK JONATHAN BUCHANAN, PLAINTIFF-APPELLANT v. ATLANTIC INDEMNITY COMPANY, DEFENDANT-APPELLEE

No. COA93-1241

(Filed 7 May 1996)

Insurance § 532 (NCI4th)— automobile insurance—family member exclusion—UIM coverage—injury in noncovered vehicle

The family member exclusion in an automobile policy did not exclude underinsured motorists coverage for injuries sustained by the insured while occupying a vehicle owned by the insured which is not listed in the policy.

Am Jur 2d, Automobile Insurance § 322.

Recoverability, under uninsured and underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Appeal by plaintiff from order entered 13 September 1993 in Buncombe County Superior Court by Judge Chase B. Saunders. Originally heard in the Court of Appeals 13 September 1994. Reconsidered in the Court of Appeals on 9 April 1996 upon mandate of our Supreme Court.

Ball, Barden, Contrivo & Bell, P.A., by Ervin L. Ball, Jr., for plaintiff-appellant.

Steven D. Cogburn and Wyatt S. Stevens for defendant-appellee.

JOHNSON, Judge.

On 18 October 1994, this Court issued an opinion reversing summary judgment for the defendant in a declaratory judgment action. *Buchanan v. Atlantic Indemnity Co.*, 116 N.C. App. 735, 450 S.E.2d 355 (1994) (unpublished). On 9 February 1996, our Supreme Court vacated our opinion and directed that we reconsider it in light of *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996). *Buchanan*, 342 N.C. 642, 466 S.E.2d 275 (1996). Having so reconsidered, we reject defendant's argument that the family member exclusion in its policy excludes underinsured motorists (UIM) coverage for injuries sustained by the insured while occupying a vehicle owned by the insured which is not listed in the policy. In *Mabe*, this Court rejected, as did our Supreme Court, the "owned vehicle" or "family member" exclusion with regard to UIM coverage. *Mabe*, 115 N.C. App. 193, 444 S.E.2d 664 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996). Accordingly, the trial court's entry of judgment for defendant is reversed and the case is remanded to the trial court for entry of judgment for plaintiff.

Reversed and remanded.

Judges EAGLES and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 APRIL 1996

ANUFORO v. DENNIE No. 95-992	Wake 92CVD253	Affirmed
BARTON v. PROMUS COMPANIES No. 95-655	Ind. Comm. 276674	Affirmed
CAMPBELL v. ROBERT BOSCH CORP. No. 95-667	Ind. Comm. 351847	Affirmed
CREASMAN v. W.N.C. PAVING, INC. No. 95-763	Haywood 94CVS298	Affirmed
CREEL v. P. I. MECHANICAL, INC. No. 95-716	Ind. Comm. 321567	Affirmed
DAVIS v. CENTRAL CAROLINA BANK No. 95-647	Orange 93CVS857	Affirmed
EURY v. NATIONWIDE MUTUAL INS. CO. No. 93-1136-2	Union 91CVS00632	Affirmed
HALL v. STANDARD PRODUCTS CO. No. 95-1100	Ind. Comm. 247195	Affirmed
HIGGINS v. THOMPSON No. 95-1043	Watauga 94CVD202	Affirmed
HUNT v. LUWA BAHNSON, INC. No. 95-980	Ind. Comm. 284482	Affirmed
IN RE ESTATE OF WALKER No. 95-644	Randolph 91E334	Affirmed
IN RE JORDAN No. 95-1038	Cumberland 91J19 92J10	Affirmed
MITCHELL v. CAREFREE HOUSING CENTER No. 95-756	Wayne 92CVS1020	Dismissed
MORRISON v. GAMEWELL MECHANICAL No. 95-838	Ind. Comm. 165824	Affirmed

NATIONWIDE MUTUAL INS. CO. v. PREVATTE No. 95-524	Wake 94CVS09216	Reversed
PACCAR FINANCIAL CORP. v. G&G TRUCKING, INC. No. 95-428	Catawba 93CVS2435	Affirmed
PATE v. FOOD LION, INC. No. 95-537	Wayne 93CVS14	No Error
PRESNELL v. FORD No. 95-494	Ind. Comm. 106936	Affirmed
SHOOK v. CONSOLIDATED FREIGHTWAYS No. 95-660	Ind. Comm. 209899	Affirmed
STATE v. BLAKE No. 95-972	Pitt 94CRS20084 94CRS20085	No Error
STATE v. BOWEN No. 95-1026	Union 95CRS462	As to the guilt-innocence phase of the trial: No Error. As to the sentencing phase of trial: Remanded for resentencing
STATE v. BURNETTE No. 95-1108	Alamance 95CRS12570	No Error
STATE v. CLARK No. 95-1130	Wake 94CRS88972 94CRS88973	No Error
STATE v. EADDY No. 95-1067	Pitt 94CRS27082	No Error 94CRS27083
STATE v. ELLIOTT No. 95-1060	Cleveland 95CRS177	No Error
STATE v. GOODING No. 95-731	Mecklenburg 93CRS79793	No Error
STATE v. HARDING No. 95-1002	Rowan 93CRS2265 93CRS2266	No Error

STATE v. HARPER No. 95-1046	Cumberland 94CRS1980 94CRS1981	No Error
STATE v. MASSEY No. 95-924	Mecklenburg 94CRS52149 94CRS52152 94CRS52154	No Error
STATE v. MOORE No. 95-1028	Cabarrus 94CRS12813 94CRS13153 94CRS13154	No Error
STATE v. MOORE No. 95-969	Rutherford 92CRS2087	Appeal Dismissed
STATE v. PARKER No. 95-777	Edgecombe 95CRS529 95CRS6805	No Error
STATE v. PERRY No. 95-1063	Wake 94CRS71672 94CRS71673	No Error
STATE v. QUINTARO No. 95-930	Wake 94CRS80901 94CRS80913	No Error
STATE v. RODGERS No. 95-687	Gaston 94CRS17674	No Error
STATE v. UNDERWOOD No. 95-781	Forsyth 94CRS34237	No Error
STATE EX REL. LONG v. BEACON INS. CO. No. 95-757	Wake 85CVS444	Affirmed
WEATHERBY HEALTH CARE v. CLARK-DARTMOUTH CLINIC No. 95-213-2	Moore 93CVS396	Affirmed
WOODIE v. ITHACA INDUSTRIES, INC. No. 95-820	Ind. Comm. 140461	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 MAY 1996

ANDREWS v. McCOREY No. 95-1128	Forsyth (95CVD3227)	Vacated and Remanded for new trial

ASSURED POWER, INC. v. MOORE ELECTRIC SUPPLY No. 95-587	Gaston (93CVS2545)	No Error
ATLANTIC POWER SYSTEMS v. ARTMARK ASSOC., INC. No. 95-851	Cumberland (95CVS1156)	Reversed and Remanded
BAKER v. CRAWFORD No. 95-538	Mecklenburg (94CVS11174)	Reversed & Remanded
BAKER v. MECKLENBURG COUNTY No. 95-564	Mecklenburg (94CVS15189)	Affirmed
BARNES v. LACKAWANNA LEATHER No. 95-1311	Ind. Comm. (413781)	Affirmed
BARRETT KAYS & ASSOC. v. COX No. 95-328	Wake (94CVD1081)	Vacated & Remanded
BROWN v. CAROLINA TIRE CO. No. 95-752	Guilford (94CVS2331)	Reversed and Remanded
CAROLINA BEVERAGE CORP. v. COCA-COLA BOTTLING CO. No. 95-784	Rowan (95CVS432)	Dismissed
DaSILVA v. WEEKS No. 95-1061	Cherokee (94CVS52)	Affirmed
GADDY v. CALHOUN No. 95-937	Haywood (93CVD443)	No Error
HAM v. HAM No. 95-696	Durham (77CVD1046)	Vacated and Remanded
IN RE AYERS No. 95-771	Lenoir (94J49) (94J50) (94J51) (94J52)	Affirmed
JACOBS v. JPS CARPET CORP. No. 95-707	Ind. Comm. (249587)	Affirmed
JOYCE v. LJH, INC. No. 95-962	Wake (95CVD1686)	Vacated & Remanded
OXENDINE v. PARKS No. 94-1408	Cumberland (92CVS5820)	Affirmed

PYRTLE v. THOMASVILLE FURNITURE INDUS. No. 95-26	Ind. Comm. (119282)	Appeal Dismissed
STATE v. ABBOTT No. 95-1103	Forsyth (91CRS19186) (91CRS19187) (91CRS19188) (91CRS19189) (91CRS19190)	No Error
STATE v. BASS No. 95-1225	Wayne (93CRS15234)	Affirmed
STATE v. BELLAMY No. 95-424	Edgecombe (93CRS6439) (93CRS6440) (93CRS6441) (93CRS6442)	No Error
STATE v. BROWN No. 95-966	Mecklenburg (94CRS92086)	Affirmed
STATE v. BYNUM No. 95-278	Northampton (91CRS964) (91CRS965) (91CRS966) (91CRS967) (91CRS968) (91CRS969) (91CRS970) (91CRS971) (91CRS972) (91CRS973) (91CRS974) (91CRS975) (91CRS976) (91CRS1078) (91CRS1098) (91CRS1099)	No Error, Judgment Affirmed
STATE v. CAPPS No. 95-481	Guilford (93CRS22899)	No Error
STATE v. CAVINESS No. 95-1071	Moore (93CRS6744)	Affirmed
STATE v. GRATE No. 95-690	Wake (92CRS70674) (92CRS70675) (92CRS70676)	No Error
STATE v. HICKS No. 95-1190	Cherokee (94CRS1608)	No Error

STATE v. HOWARD No. 95-1106	Onslow (94CRS4312)	No Error
STATE v. HUNT No. 95-846	Forsyth (94CRS17280) (95CRS2454)	No Error
STATE v. JOHNSTON No. 95-640	Gaston (94CRS8430) (94CRS8431)	No Error; Remanded for hearing
STATE v. JONES No. 95-891	Union (94CRS9001) (94CRS9002) (94CRS9003) (94CRS9004)	No Error
STATE v. KING No. 95-1040	Rowan (94CRS00805)	No Error
STATE v. LAND No. 95-904	Beaufort (93CRS6413)	No Error
STATE v. MAULTSBY No. 95-780	Robeson (94CRS3979)	No Error
STATE v. McMILLAN No. 95-1045	Mecklenburg (93CRS79206) (93CRS79207) (93CRS79208)	No Error
STATE v. OLIVER No. 94-1149	Guilford (93CRS34724) (93CRS34725)	No Error
STATE v. REECE No. 94-1382	Buncombe (93CRS67371)	No Error
STATE v. RICHARDSON No. 95-808	Craven (94CRS3865)	No Error
STATE v. SHERRON No. 95-637	Mecklenburg (94CRS31590)	No Error
STATE v. THOMPSON No. 95-1293	Buncombe (95CRS1277)	No Error
STATE v. WEBB No. 94-1276	Burke (93CRS6721)	No Error
STATE v. WORTHINGTON No. 95-205	Pitt (92CRS17147)	No Error
STATE v. WYCHE No. 95-1226	Mecklenburg (94CRS52583)	No Error

STRICKLAND v. TW SERVICES INC. No. 95-597	Ind. Comm. (251280)	Affirmed
TURNER v. BRIDGER-WHEDBEE FARMS, INC. No. 95-804	Hertford (91CVS31)	Affirmed in Part, Reversed in Part
WARD v. DOE No. 95-25	Guilford (93CVS5069)	Affirmed
WENTZ v. WENTZ No. 95-909-2	Mecklenburg (94CVD12567)	Affirmed
WINTERBERG v. BURNS AEROSPACE CORP. No. 95-460	Forsyth (94CVS6247)	Dismissed
WYCLIFF ASSOCIATES v. FUJITSU NETWORK SWITCHING OF AMERICA No. 95-765	Wake (95CVS545)	Affirmed

KEVIN E. BRADDY, Plaintiff-Appellant, v. NATIONWIDE MUTUAL LIABILITY INSURANCE COMPANY, Defendant-Appellee.

No. COA95-910

(Filed 21 May 1996)

1. Trial § 120 (NCI4th)— UIM coverage—bad faith refusal to settle—severance from personal injury claim—no error

In an action to recover for personal injuries sustained in a motor vehicle accident, the trial court did not err in severing for trial plaintiff's claims for UIM coverage and bad faith refusal to settle and punitive damages, since the trial court, in severing those claims, clearly reduced the delay, expense and inconvenience to all participants; further, the resolution of the UIM claim obviated the need for a trial on the bad faith refusal to settle claim. N.C.G.S. § 1A-1, Rule 42(b).

Am Jur 2d, Trial §§ 120-125.

Propriety of separate trials of issues of tort liability and of validity and effect of release. 4 ALR3d 456.

Appealability of state court order granting or denying consolidation, severance, or separate trials. 77 ALR3d 1082.

2. Insurance § 527 (NCI4th)— UIM coverage—personal injury rather than contract action

The trial court did not err in ordering that plaintiff's claim for UIM coverage be tried as a personal injury action rather than a contract action since, despite the contractual relation between plaintiff insured and defendant UIM insurer, this action was actually one for the tort allegedly committed by the underinsured motorist.

Am Jur 2d, Automobile Insurance § 334.

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

Insured's right to bring direct action against insurer for uninsured motorist benefits. 73 ALR3d 632.

3. Insurance § 1109 (NCI4th)— UIM carrier as unnamed defendant—no error

The trial court did not err by allowing defendant UIM carrier to remain an unnamed defendant pursuant to N.C.G.S. § 20-279.21(b)(4) after plaintiff voluntarily dismissed the tortfeasor as a party defendant prior to trial. The UIM carrier did not waive its rights under § 20-279.21(b)(4) by including a provision in its policy stating that "liability will be determined only in a legal action against" the carrier.

Am Jur 2d, Automobile Insurance § 334.

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

4. Evidence and Witnesses § 1012 (NCI4th)— insurer's admissions as to value of plaintiff's claims—evidence inadmissible

Assuming *arguendo* that claim estimates by the unnamed defendant UIM carrier constituted admissions by a party opponent, the trial court properly excluded these estimates as evidence of the value of plaintiff's injuries under N.C.R. Evid. 403 since such evidence would prejudice the defense and could circumvent the policy behind N.C.G.S. § 8C-1, Rule 411 and N.C.G.S. § 20-279.21(b)(4) to have the jury focus on the facts and not the existence of liability insurance.

Am Jur 2d, Evidence § 760.

5. Evidence and Witnesses § 2148 (NCI4th)— personal injury—expert testimony as to value of claim—exclusion proper

The trial court did not err in excluding expert testimony regarding the value of plaintiff's personal injury claim.

Am Jur 2d, Expert and Opinion Evidence §§ 32-39, 41-43.

When will expert testimony "assist trier of fact" so as to be admissible at federal trial under Rule 702 of Federal Rules of Evidence. 75 ALR Fed. 461.

Judge GREENE concurring.

BRADDY v. NATIONWIDE MUTUAL LIABILITY INS. CO.

[122 N.C. App. 402 (1996)]

Appeal by plaintiff from judgment entered 27 January 1995 by Judge Donald W. Stephens in Orange County Superior Court. Heard in the Court of Appeals 29 March 1996.

Brown & Bunch, by Charles Gordon Brown and Scott D. Zimmerman, for plaintiff-appellant.

Bryant, Patterson, Covington & Idol, P.A., by Lee A. Patterson, II, and W. Randall Stroud, for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff Kevin E. Braddy (Braddy) appeals from judgment entered on jury verdict awarding Braddy $70,000 in damages.

On 8 June 1990 Braddy, while riding his motorcycle, collided with a pickup truck operated by Thomas Brooks at the intersection of N.C. 157 and State Road 1184 in Orange County. Brooks was issued an unsafe movement citation for his actions leading up to the accident and fined $50. On 16 June 1990 Brooks paid the $50 fine without contesting the citation and, thereby, admitted he was guilty of an unsafe movement.

Brooks was covered under an insurance policy (Brooks policy) issued by Nationwide Mutual Liability Insurance Company (Nationwide) which had a $50,000 limit for bodily injury. Braddy had underinsured motorist (UIM) coverage under three separate policies (UIM policies) also issued by Nationwide. It is undisputed the UIM policies could be stacked to provide $600,000 in UIM coverage. On 24 February 1993 Braddy, Brooks and Nationwide executed a Partial Settlement Agreement (Agreement) under which Brooks and Nationwide agreed to compensate Braddy for his injuries and damages up to the $50,000 limit of the Brooks policy. Braddy also expressly reserved the right "to bring any actions necessary against Brooks [and] Nationwide . . . to recover any unsatisfied portion of Braddy's Claim . . . ."

On 4 June 1993 Braddy, alleging the $50,000 had not fully compensated him for his injuries, instituted the present action. On 23 January 1995 Braddy voluntarily dismissed Brooks without prejudice as a party defendant to the action leaving only Braddy's claims for UIM coverage (Count IV) and bad faith refusal to settle and punitive damages (Count V) against Nationwide. On the same day, the trial court severed Counts IV and V; and, pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), ordered Nationwide remain an unnamed defendant.

After hearing all the evidence, the jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant?

   ANSWER: Yes

2. Did the plaintiff by his own negligence contribute to his injury?

   ANSWER: No

3. What amount, if any, is the plaintiff entitled to recover for personal injury?

   ANSWER: $70,000

On 27 January 1995 the trial court entered judgment in favor of plaintiff for $25,114.98 representing $70,000 less the $50,000 already paid pursuant to the settlement agreement, plus pre-judgment interest and $2,480.46 in costs.

On appeal Braddy contends the trial court erred by: (1) bifurcating Counts IV and V; (2) ordering Count IV tried as a personal injury action rather than a contract action; (3) allowing Nationwide, pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), to proceed as an unnamed defendant; (4) excluding statements by Nationwide valuing Braddy's claim; (5) excluding expert testimony regarding the appropriate amount of damages for Braddy's injuries; and (6) denying Braddy's motion for a new trial.

I.

[1] We first consider Braddy's contention the trial court abused its discretion by bifurcating Counts IV and V.

N.C.R. Civ. P. 42(b) provides, in pertinent part, "[t]he court may in furtherance of convenience or to avoid prejudice . . . order a separate trial of any claim . . . ." N.C. Gen. Stat. § 1A-1, Rule 42(b) (1990). A bifurcation order will not be disturbed on appeal unless the trial court abused its discretion, *Hoots v. Toms and Bazzle*, 100 N.C. App. 412, 417, 396 S.E.2d 820, 822-823 (1990), by making a decision "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In any event, "[a] bifurcated trial is particularly appropriate where separate submission of issues avoids confusion and promotes a logical presentation to the jury, and where resolution of the separated issue will potentially dispose of the entire case." *In*

re Will of Hester, 320 N.C. 738, 743, 360 S.E.2d 801, 804, *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987) (emphasis added) (citations omitted). *See also Hoots*, 100 N.C. App. at 417, 396 S.E.2d at 823 (finding no abuse of discretion when trial court severed certain issues which "had the advantage of possibly making it unnecessary to try the other issues").

The present record establishes the trial court, by severing Counts IV and V, clearly reduced "the delay, expense and inconvenience to all participants." 2 G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 42-3 (2d ed. 1995). Further, we note the resolution of Count IV, in fact, obviated the need for a trial on Count V. *See* N.C. Gen. Stat. §§ 58-63-15(11)g - h (1994). Therefore, under *Hester* and *Hoots*, we cannot say the trial court abused its discretion by bifurcating Counts IV and V.

II.

[2] Braddy also contends the trial court erred by ordering Count IV tried as a personal injury action rather than a breach of contract action.

At the outset we note, although the legal principles herein followed are often enunciated in uninsured motorist (UM) cases, this Court has nonetheless found them applicable to UIM actions. *Brace v. Strother*, 90 N.C. App. 357, 360, 368 S.E.2d 447, 449, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988), *overruled on other grounds*, *Ragan v. Hill*, 337 N.C. 667, 447 S.E.2d 371 (1994).

It is well settled that "[u]nless an insured is ' "legally entitled to recover damages" . . . from the [underinsured] motorist the contract upon which he sues precludes him from recovering against [the UIM carrier].' " *Id.* (*quoting Brown v. Casualty Co.*, 285 N.C. 313, 320, 204 S.E.2d 829, 834 (1974)). See also *Williams v. Insurance Co.*, 269 N.C. 235, 237, 152 S.E.2d 102, 105 (1967) (to recover under a UM endorsement the claimant must show "(1) he is legally entitled to recover damages, (2) from the owner . . . of an uninsured automobile, (3) because of bodily injury, (4) caused by accident, and (5) arising out of the . . . use of the uninsured automobile"). Put simply, the right to recover under a UIM endorsement is "derivative and conditional" and, consequently, any defense available to the alleged tortfeasor is also available to the insurer. *Brace*, 90 N.C. App. at 360, 368 S.E.2d at 449.

We believe, therefore, "[i]t is manifest . . . that despite the contractual relation between plaintiff insured and defendant [UIM]

insurer, this action is actually one for the tort allegedly committed by the [underinsured] motorist." *Brown*, 285 N.C. at 319, 204 S.E.2d at 834. Accordingly, as Count IV sounds in tort, we affirm the trial court's order that Count IV be tried as a personal injury action rather than a contract action.

III.

[3] We next consider Braddy's contention the trial court erred by allowing Nationwide, pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), to remain an unnamed defendant.

Neither party disputes that section 20-279.21(b)(4) applies to the present UIM policies. *See Baxley v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 718, 721, 446 S.E.2d 597, 598 (1994) ("[T]he provisions of [an applicable] statute become terms of the policy to the same extent as if they were written in the policy . . . ."). Therefore, we must now determine whether, under the present facts and circumstances, section 20-279.21(b)(4) permitted Nationwide to remain an unnamed defendant.

Nationwide cites *Sellers v. N.C. Farm Bureau Mut. Ins. Co.*, 108 N.C. App. 697, 424 S.E.2d 669 (1993) as being dispositive of this issue. In *Sellers*, plaintiff filed a negligence action against defendant tortfeasor. *Id.* at 698, 424 S.E.2d at 669. Plaintiff subsequently amended her complaint to add a claim for UIM coverage. *Id.* As plaintiff admitted she had settled and released her claim against the tortfeasor, the trial court granted the tortfeasor's motion for summary judgment. *Id.* at 698, 424 S.E.2d at 669-670. After dismissing the action against the tortfeasor, the trial court substituted the heretofore unnamed UIM carrier as the named defendant in the action. *Id.* at 698, 424 S.E.2d at 670.

On appeal this Court reversed the trial court holding, "release or settlement of an action against the tortfeasor does not vitiate the express statutory terms of N.C.G.S. 20-279.21(b)(4) such that the action can continue with the [UIM] carrier remaining as an unnamed defendant." *Id.* at 699-700, 424 S.E.2d at 670 (emphasis added). Indeed, as the *Sellers* Court admonished:

> [section 20-279.21(b)(4)] is, to us, clear and unambiguous. The [UIM] insurer . . . "*shall* have the right to appear in defense of the claim *without being named as a party therein, and . . . may participate* in the suit as fully as if it were a party." This language and the cases which demonstrate its application convince us that

> even if the tortfeasor is released from the action, the case can continue, if requested [by the UIM insurer pursuant to section 20-279.21(b)(4)], in the tortfeasor's name only.

Sellers, 108 N.C. App. at 699, 424 S.E.2d at 670 (citation omitted) (emphasis added). The *Sellers* Court indicated this interpretation was necessary to ensure "[juries] would . . . concentrate on the facts and the law as instructed, rather than the parties . . . ." *Id.*

In an attempt to distinguish the present case from *Sellers*, Braddy contends he joined Brooks as a party defendant at Nationwide's request and subsequently dismissed Brooks after discovering Nationwide concealed its waiver of subrogation rights against Brooks from 1992 to 1995. Assuming Braddy's allegation is true, we nevertheless conclude this is a distinction without legal significance.

Although the separate concurrence opines that section 20-279.21(b)(4) does not expressly envision the UIM carrier defending as an unnamed party when the tortfeasor has been dismissed as a party defendant prior to trial, we are nonetheless bound by this Court's previous holding that application of section 20-279.21(b)(4) does not hinge on whether or not the tortfeasor remains a party defendant. *Sellers*, 108 N.C. App. at 699-700, 424 S.E.2d at 670. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (one panel of this Court bound by decision of previous panel).

In fact, the present case is virtually identical to *Sellers*. First, the sole issue before the trial court was a claim for UIM coverage. Second, the tortfeasor was dismissed from the action and Nationwide, the UIM insurer, was the only remaining party defendant at trial. Third, Nationwide and Braddy are in privity based on the UIM policies. Last, Braddy is trying to substitute Nationwide as the named defendant. Put simply, the present case and *Sellers* involve the same claim, the same type of plaintiff and defendant, and the same relationship between plaintiff and defendant. Therefore, as an insurer's rights under section 20-279.21(b)(4) are not tied to subrogation rights, we find no meaningful distinction between the present case and *Sellers*. Accordingly, under *Sellers*, we believe Nationwide, at least initially, had a statutory right to prosecute its defense as an unnamed defendant.

Braddy also alleges, however, that Nationwide waived its statutory right in the UIM policies. Specifically, Braddy contends Nationwide waived its rights under section 20-279.21(b)(4) by includ-

ing a provision which states "liability will be determined only in a legal action against [Nationwide]."

Although we recognize an insurance company may waive a right created by statute for its benefit by an express contract provision, *see Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 298, 378 S.E.2d 21, 27 (1989) (whether right based in statute or equity insurance company expressly waived it in the insurance contract), *Carrow v. Weston*, 247 N.C. 735, 737, 102 S.E.2d 134, 136 (1958) ("'A person *sui juris* may waive practically any right he has unless forbidden by law or public policy.' "), we nonetheless believe the plain language of the contested provision merely requires the claimant to join Nationwide as a party-defendant to any action involving a determination of liability. Accordingly, as Nationwide has not waived its statutory rights under section 20-279.21(b)(4), we affirm the trial court's order allowing Nationwide to proceed as an unnamed defendant.

Finally, as we determine Count IV sounds in tort, and Braddy was afforded the opportunity to be heard on his claim for damages against the tortfeasor and, thereby, his derivative claim for UIM coverage against Nationwide—a claim created by the same statute, section 20-279.21, which allows Nationwide to proceed as an unnamed party—we reject Braddy's assertion his due process rights were violated.

IV.

Braddy also argues he was materially prejudiced when the trial court excluded: (1) alleged admissions by Nationwide valuing his claim at over $50,000; and (2) the testimony of Braddy's expert on the appropriate value of his claim.

A.

[4] As the present action sounds in tort, this Court must now determine whether alleged admissions by an unnamed defendant insurer are admissible in a personal injury action as some evidence of the appropriate value to accord a claimant's injuries.

Initially we note the alleged valuations, as with all interdepartmental communications of an insurer, are inadmissible hearsay unless they fall within an exception. 19 MARK S. RHODES, COUCH CYCLOPEDIA OF INSURANCE 2d § 79:167 (Rev. ed. 1983). Braddy, however, contends the valuations constitute admissions by a party opponent. *See* N.C. Gen. Stat. § 8C-1, Rule 801 (1992).

Assuming, without deciding, that claim estimates are admissions by a party opponent, the evidence may nevertheless be excluded under N.C.R. Evid. 403 where it exposes one party to unfair prejudice because the evidence has " '[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one . . . .' " *State v. Moore*, 107 N.C. App. 388, 396, 420 S.E.2d 691, 696 (*quoting* Commentary to N.C. Gen. Stat. § 8C-1, Rule 403), *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). The decision to admit or exclude evidence under Rule 403 is in the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988).

In the present personal injury action, we believe admitting claim estimates prepared by Nationwide, an unnamed defendant insurer, would unduly prejudice the defense. Indeed, if allowed to inform the jury that Nationwide has investigated this claim and prepared claim valuations, Braddy would, in our estimation, circumvent the policy behind N.C. Gen. Stat. § 8C-1, Rule 411 and section 20-279.21(b)(4) which is to have the jury focus on the facts and not the existence of liability insurance. *See Sellers*, 108 N.C. App. at 699, 424 S.E.2d at 670; N.C. Gen. Stat. § 8C-1, Rule 411 (1992). Accordingly, we affirm the trial court's exclusion of alleged claim valuations by Nationwide.

B.

[5] Braddy also contends the trial court erred by excluding expert testimony regarding the value of his claim.

It is well settled "opinions of experts as to matters in the ordinary experience of men are inadmissible, since the jury itself is deemed capable of deciding such questions." 19 RHODES, COUCH CYCLOPEDIA OF INSURANCE 2d § 79:104. As the United States Supreme Court has noted:

> expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are [expert] witnesses . . . ."

Salem v. United States Lines, 370 U.S. 31, 35, 8 L. Ed. 2d 313, 317 (*quoting United States Smelting Co. v. Parry*, 166 F. 407, 415 (8th Cir. 1909)), *reh'g denied*, 370 U.S. 965, 8 L. Ed. 2d 834 (1962).

Indeed, it is beyond question that juries, in a myriad of legal settings, are routinely entrusted with determining the compensation to which a claimant is entitled. Although we recognize expert testimony may be helpful in establishing a range of damages in complex litigation, *see, e.g., Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 671 n.2, 464 S.E.2d 47, 62 n.2 (1995) (expert testimony used to establish diminished market value), we do not view the present personal injury action as such a case. Accordingly, we affirm the trial court's exclusion of Braddy's damages expert.

V.

Finally, we consider Braddy's contention he is entitled to a new trial. In support of this contention, Braddy re-asserts the previously discussed allegations.

"Under N.C. Gen. Stat. § 1A-1, Rule 59, a party may obtain a new trial either for errors of law committed during trial or for a verdict not sufficiently supported by the evidence." *Eason v. Barber*, 89 N.C. App. 294, 297, 365 S.E.2d 672, 674 (1988). A motion for a new trial is nevertheless addressed to the sound discretion of the trial court, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Watkins v. Watkins*, 83 N.C. App. 587, 591, 351 S.E.2d 331, 334 (1986).

As we affirm the trial court's rulings which form the basis for Braddy's new trial motion, we likewise conclude the trial court did not abuse its discretion by denying plaintiff's Rule 59 motion.

No error.

Judge GREENE concurs with separate opinion and Judge JOHN joins in this concurrence.

Judge GREENE concurring.

Although I fully concur with the opinion of the majority, I do so reluctantly with respect to Part III. The facts in this case are somewhat different from those of the *Sellers* case, relied on by the majority in Part III. In *Sellers* the tortfeasor was originally a *named* party defendant and the underinsured (UIM) carrier was an *unnamed* party defendant. The action against the named defendant was dismissed and the trial court ordered that the UIM carrier be included as a named defendant. In this case, both the tortfeasor and the UIM car-

rier were *named* defendants. The plaintiff voluntarily dismissed its claim against the tortfeasor with a reservation that it was "not intended to and shall not affect [its] claims for relief asserted against" the UIM carrier. The trial court thereafter ordered that the case be tried in the name of the tortfeasor, not the name of the UIM carrier. The jury was asked to determine whether the plaintiff had been injured by the negligence of Thomas E. Brooks, the tortfeasor. The jury returned a verdict in favor of the plaintiff on this issue and the trial court entered a judgment against Nationwide.

Nonetheless, the language of *Sellers* does appear to permit the UIM carrier to defend the action in the name of the tortfeasor, although the tortfeasor has been dismissed from the case, and even when the UIM carrier is a *named* party defendant. In other words, the jury can be instructed that the tortfeasor is the defendant in the case, when in fact the tortfeasor is not a party defendant and the UIM carrier is a party defendant.

I am aware of the public policy considerations in support of this type of procedure. As stated in *Sellers*, juries will "more likely concentrate on the facts and the law" and not be influenced by the fact that an insurance company is the party defendant. *Sellers*, 108 N.C. App. at 699, 424 S.E.2d at 670. My concern is that section 20-279.21(b)(4) only speaks in terms of allowing the UIM carrier to defend as an unnamed party defendant when the tortfeasor is a party defendant and that any extension of that rule should be in the province of the legislature. In the absence of legislation permitting the procedure used in this case, it would appear that the action is properly filed against the UIM carrier as a named defendant, with the burden on the plaintiff to show he is legally entitled to recover damages from the tortfeasor for injuries sustained in a collision involving the underinsured vehicle. *See Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 237, 152 S.E.2d 102, 105 (1967); 3 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 34.1 (2d ed. 1995) (plaintiff has burden of showing underinsured motorist was negligent, even though action is against UIM carrier). Because I am bound by *Sellers*, however, I join with the majority in affirming the trial court.

FORSYTH MEMORIAL HOSPITAL, INC., A NORTH CAROLINA NONPROFIT CORPORATION, AND CAROLINA MEDICORP, INC., A NORTH CAROLINA NONPROFIT CORPORATION, PLAINTIFFS v. ARMSTRONG WORLD INDUSTRIES, INC., A PENNSYLVANIA CORPORATION, DEFENDANT

No. COA95-349

(Filed 21 May 1996)

Limitations, Repose and Laches § 29 (NCI4th)— defendant flooring manufacturer—no materialman—real property improvement statute of repose inapplicable

Defendant flooring manufacturer was not a materialman within the meaning of the real property improvement statute of repose, N.C.G.S. § 1-50(5), and the claim of plaintiff hospital owners for willful and wanton conduct in supplying floor coverings containing asbestos used in the construction of additions to plaintiffs' hospital was barred by the products liability statute of repose set forth in N.C.G.S. § 1-50(6), where plaintiffs and defendant had no contract express or implied; plaintiff produced no evidence that defendant ever intended that its product be delivered or that it was delivered to plaintiff's job site; defendant usually delivered its product to a wholesale distributor who then delivered the product to retailers or flooring contractors; flooring materials were shipped F.O.B. Lancaster, Pennsylvania so that title to the materials passed to the wholesale distributor upon delivery to the carrier in Pennsylvania; and defendant thus was not a materialman furnishing materials to a job site but was instead merely a remote manufacturer placing his goods into the stream of commerce. N.C.G.S. § 1-50(5).

Am Jur 2d, Building and Construction Contracts § 114.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor. 1 ALR3d 914.

Appeal by plaintiff from judgment entered 18 January 1995 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 26 March 1996.

Haywood, Denny & Miller, L.L.P., by Michael W. Patrick, for plaintiffs-appellants.

Hutchins, Doughton & Moore, by H. Lee Davis, Jr., for defendant-appellee.

JOHNSON, Judge.

Plaintiffs Forsyth Memorial Hospital, Inc. and Carolina Medicorp, Inc. are North Carolina nonprofit corporations which own and operate the hospital facilities known as Forsyth Memorial Hospital. On 30 August 1990, plaintiffs instituted this action against defendant Armstrong World Industries, Inc., a Pennsylvania corporation, alleging that defendant manufactured, sold and furnished asbestos-containing vinyl flooring which was installed in Forsyth Memorial Hospital, and that the asbestos-containing flooring material constituted a hazard. The complaint further alleged that at the time of installation, defendant had knowledge that asbestos in resilient flooring was hazardous and was not readily identifiable. On 30 October 1990, defendant filed an answer and motion to dismiss for failure to state a claim upon which relief may be granted. Subsequently, defendant's motion to dismiss was granted by the trial court and plaintiffs appealed.

The North Carolina Court of Appeals upheld the trial court's decision, based upon the statute of repose contained in North Carolina General Statutes section 1-52(16) (1983). *Forsyth Memorial Hospital v. Armstrong World Industries*, 107 N.C. App. 110, 418 S.E.2d 529 (1992) (hereinafter "*Forsyth I*"). The North Carolina Supreme Court, however, granted discretionary review; and on 17 June 1994, entered its opinion affirming in part, and reversing and remanding in part a portion of the Court of Appeals' decision. *Forsyth I*, 336 N.C. 438, 444 S.E.2d 423 (1994). The Supreme Court held that since the complaint alleged that defendant was guilty of willful and wanton conduct in furnishing asbestos-containing flooring to the hospital, North Carolina's real property statute of repose, North Carolina General Statutes section 1-50(5) (1983), and not our product liability statute of repose, North Carolina General Statutes section 1-50(6) (1983), would govern plaintiffs' claims if it could be shown that defendant acted as a materialman on plaintiffs' building projects. The Court further held that if defendant was a materialman and had acted willfully and wantonly, there was no statute of repose which would bar plaintiffs' claims. *Forsyth I*, 336 N.C. at 446, 444 S.E.2d at 428.

Recognizing that this case might be resolved on a motion for summary judgment solely addressing the matter of the applicable statute of repose, Judge Judson O. DeRamus, Jr., on 18 September 1994, entered an order scheduling an initial period of limited discovery on that issue alone.

During discovery, the following evidence was disclosed. Defendant was aware of and began warning installers of resilient flooring that existing resilient floors might present hazards because it contained asbestos, and that the asbestos was not readily identifiable, since 1974. However, despite its knowledge of these hazards, defendant did not remove asbestos from its flooring and continued to sell resilient flooring products containing asbestos until 1983. Defendant's asbestos-containing flooring was sold to and installed in Forsyth Memorial Hospital long after defendant knew of the hazards associated with the flooring. Plaintiff hospital discovered asbestos-containing flooring materials in two areas of the hospital in the winter of 1989-90, about six months before instituting this action.

The first area, in which the asbestos-containing products were discovered, was a large addition to the hospital, finished in 1977. Callender Flooring Company of Greensboro, North Carolina installed these flooring materials while working for Nello Teer Company, a general contractor on the 1977 addition. Notably, plaintiffs had initially identified Colonial Flooring and Acoustical Company of Durham, North Carolina as the installer of the flooring materials. The second area containing the hazardous materials was a 1981 addition that houses the hospital's emergency room. These materials were installed by Shields, Inc. of Winston-Salem, North Carolina, a subcontractor working for McDevitt & Street, the general contractor for the 1981 addition.

Mr. William H. Freeman, Jr., one of defendant's home office managers, was deposed by both parties on several occasions. Mr. Freeman testified that defendant protected their wholesale distribution system and sold only to their wholesale distributors, with the exception of certain national accounts (e.g., Sears, J.C. Penney, or Color Tile). Moreover, he testified that defendant would never sell directly to the owner of a construction site or to the owner of a building under construction; that defendant would never sell directly to a general contractor on a construction site; and that defendant would never sell directly to a subcontractor or installer, such as Colonial Flooring.

Mr. Tom B. Turpin, district flooring manager for defendant's Charlotte district sales office from 1974 to 1989, was also deposed. Mr. Turpin's testimony noted, as did Mr. Freeman, that defendant used a wholesale distributor network for flooring products. The North Carolina wholesale distributors were J.J. Haines of Goldsboro,

Peerless, Inc. of Greensboro, and Sullivan Hardware of Asheville, North Carolina. Colonial Flooring, Callender, and Shields, Inc. were not wholesale distributors of defendant's products, but were retailers or flooring contractors. If a flooring contractor or retailer wanted defendant's product, they would call the wholesale distributor and the materials would be shipped from the wholesale distributor's warehouse. In a few cases, the materials may be shipped directly from Lancaster, Pennsylvania by common carrier to a destination chosen by the wholesale distributor. However, in such an instance, the product would be shipped "F.O.B. Lancaster, Pennsylvania" to the destination selected by the wholesale distributor, whether that destination was the wholesale distributor's warehouse, the wholesale distributor's customer (retailer/installer) or the site of installation. The wholesale distributor selected the common carrier to be used for such transportation, and title to the product passed to the wholesale distributor when the product was loaded onto said common carrier.

Neither Mr. Freeman, nor Mr. Turpin could attest to personal knowledge of any sales of flooring products used in the two hospital renovations. However, plaintiff was subsequently able to establish through several other affidavits that Callender Flooring Company of Greensboro had installed Armstrong material in the 1977 addition to the hospital.

Porter Anderson, Callender's job superintendent, indicated that the flooring materials used in the 1977 addition *most likely* were shipped directly to the hospital construction site from the mill, since Callender did not have warehouse facilities to store products prior to installation. Further, Mr. Anderson identified the flooring as resembling defendant's product, and stated that Callender ordered defendant's products through Peerless, Inc. In reference to the 1981 addition, defendant filed a supplemental affidavit from Lloyd Whitley, flooring manager for Shields, Inc., in which he indicated that defendant's material used on the 1981 emergency room would have been shipped to Shields' warehouse facilities. Mr. Whitley did not, however, indicate whether the material could have been shipped from defendant or from a distributor. Defendant did not have company sales or shipping records that could prove or refute that its products were furnished or shipped directly to plaintiff hospital's facility.

On 24 October 1994, defendant made a motion for summary judgment and that motion came on for hearing on 9 January 1995 before Judge Peter M. McHugh in Forsyth County Superior Court. After

reviewing all of the evidence before the court, on 18 January 1995, Judge McHugh entered judgment granting defendant's motion for summary judgment. Again, plaintiffs appeal.

On appeal, plaintiffs bring forth two assignments of error, both of which question the propriety of the trial court's grant of summary judgment. Thus, our inquiry on appeal is essentially whether there is any issue of material fact as to whether defendant is a materialman.

Summary judgment is appropriate "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 judgment as a matter of law." N.C.R. Civ. P. 56. It is the moving party's burden to establish the lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). The moving party meets this burden if it can show that an essential element of the nonmoving party's claim does not exist, or the nonmoving party cannot produce evidence of an essential element of his claim, or cannot overcome an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party has met its burden, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Id.* at 66, 376 S.E.2d at 427.

The Court of Appeals and the Supreme Court previously decided that the statute of repose governing this action is found in North Carolina General Statutes section 1-50(5), the statute of repose governing claims of defective improvements to real property. Section 1-50(5) provides the following:

a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

. . .

> 9. *Actions against any person furnishing materials*, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

N.C. Gen. Stat. § 1-50(5)(a),(b) (1983) (emphasis added). In its discretionary review of the Court of Appeals' decision in *Forsyth I*, the Supreme Court concluded,

> that the phrase, "any person furnishing materials," refers to a materialman who furnished materials to the jobsite either directly to the owner of the premises or to a contractor or subcontractor on the job.

336 N.C. at 443, 444 S.E.2d at 426. The Court went on to explain that if one is simply "a remote manufacturer, whose materials found their way to plaintiffs' jobsite indirectly through the commerce stream, then defendant would not be a materialman and would not have furnished materials on the jobsite within the meaning of [subsection (5)(b)(9),]" and the products liability six-year statute of repose would apply, rather than the real property improvement statute of repose, even if the products became fixtures. *Id.* at 445, 444 S.E.2d at 427.

North Carolina's materialman's lien statute, North Carolina General Statutes section 44A-8, provides further guidance as to who may be a materialman. Section 44A-8 provides,

> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished pursuant to such contract.

N.C. Gen. Stat. § 44A-8 (1989). This Court, in *Wallpaper Co. v. Peacock & Assoc.*, 38 N.C. App. 144, 247 S.E.2d 728 (1978), *disc. review denied*, 296 N.C. 415, 251 S.E.2d 470 (1979), and *Queensboro Steel Corp. v. East Coast Machine & Iron Works*, 82 N.C. App. 182, 346 S.E.2d 248, *disc. review denied*, 318 N.C. 508, 349 S.E.2d 865 (1986), provides additional instruction on who might be a materialman in North Carolina.

In *Wallpaper Co.*, the plaintiff, who had been authorized by defendant-owner to accept orders for carpet and wallpaper from a third-party, sought to enforce a materialman's lien against the defendant-owner pursuant to section 44A-8 of the General Statutes. 38 N.C. App. at 144-45, 247 S.E.2d at 729-30. Though the materials ordered were not delivered to the site by the plaintiff, the materials were nonetheless delivered. *Id.* at 145, 247 S.E.2d at 730. This Court held that, by statute (section 44A-8), a lien claimant is not required to personally deliver the materials to the site of the improvement, "so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed." *Id.* at 149, 247 S.E.2d at 732. Thus, plaintiff was able to maintain a claim of lien as a materialman, even though he did not personally deliver the materials to the jobsite, because he intended that they would be delivered and they were so delivered to the site. *Wallpaper Co.*, 38 N.C. App. 144, 247 S.E.2d 728.

Further, in *Queensboro Steel,* the plaintiff was a third tier subcontractor who attempted to assert a materialman's lien over funds owed by the first tier subcontractor to the second tier subcontractor. 82 N.C. App. at 183, 346 S.E.2d at 249. The subcontractors had contracted with one another to improve the same real property. *Id.* at 185, 346 S.E.2d at 250. Branch Banking and Trust Company (BB&T), a co-defendant, sought to satisfy a portion of the second tier subcontractor's debt to the bank by enforcing its security interest in the second tier subcontractor's account receivable from the first tier contractor. *Id.* at 184, 346 S.E.2d at 249. BB&T argued that the plaintiff did not qualify for a materialman's lien under North Carolina General Statutes section 44A-18 because it did not personally deliver its materials to the site. *Id.* at 184, 346 S.E.2d at 250. This Court held that there was no requirement of personal delivery under section 44A-18 to qualify for a materialman's lien by a third tier subcontractor, so long as the third tier subcontractor delivered the materials to the second tier subcontractor with the intent that the materials ultimately be delivered to the site and the materials are actually delivered to the site. *Id.* at 191, 346 S.E.2d at 254.

In the instant case, plaintiffs were owners and operators of the improved real property, Forsyth Memorial Hospital; McDevitt & Street and Nello Teer Company were general contractors, who employed retail installers, Colonial Flooring, Shields, Inc. and Callender Flooring Company; Peerless, Inc. and J.J. Haines were defendant's wholesale distributors; and defendant was a manufac-

turer of the alleged asbestos-containing flooring. Unlike the parties in *Wallpaper Co.* and *Queensboro Steel*, plaintiffs and defendant in the instant case had no contract, express or implied. In fact, defendant's only intent was that of a manufacturer—to place its product into the stream of commerce. Plaintiff produced no evidence that defendant ever intended that its product, particularly, be delivered to the Forsyth Memorial Hospital jobsite. Quite the contrary, plaintiff's evidence tends to show that defendant usually delivered its product to a wholesale distributor, who then delivered the product to retailers or flooring contractors. In rare instances, however, flooring contractors or retailers would call the wholesale distributor, and because the distributor did not have the materials in stock, the distributor would order the needed materials from defendant and the materials would be shipped directly from defendant's factory in Lancaster, Pennsylvania. But even in those instances, the materials were shipped F.O.B. Lancaster, Pennsylvania. Thus, title to the materials passed to the wholesale distributor, as buyer, when the product was loaded onto the truck in Lancaster, Pennsylvania. *Peed v. Burleson's Inc.*, 244 N.C. 437, 439-40, 94 S.E.2d 351, 353 (1956). More specifically, title passes upon delivery to the carrier, who is the wholesale distributor's agent. *Id.* at 440, 94 S.E.2d at 353. Accordingly, it necessarily follows that under these circumstances, the wholesale distributor, as buyer, through his agent, would have actually delivered the materials to Forsyth Memorial Hospital, the subcontractors or contractors—not defendant, as seller.

In fact, it would seem that in the event of non-payment for its product, defendant would not have a claim of lien against plaintiffs. Since title has already passed to the wholesale distributor at the point of loading in Lancaster, Pennsylvania, defendant could not readily maintain a claim of lien against plaintiffs for the wholesale distributor's non-payment. In this instance, defendant is no longer a materialman, furnishing materials to a jobsite; he is merely a remote manufacturer, placing his goods into the stream of commerce.

After defendant came forth with its forecast of evidence in support of its contention that it was not a materialman, plaintiffs then bore the burden of producing its own forecast of evidence showing that they would be able to make out at least a prima facie case at trial. *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. Plaintiff presented evidence of what might or may have occurred, but never produced definitive evidence that defendant had ever furnished materials directly to Forsyth Memorial Hospital or to a contractor or subcontractor on the

job; that defendant had such intent to do so; or that there was ever any express or implied contract between the parties to furnish such materials. Thus, there is no competent evidence that defendant was a materialman within the meaning of North Carolina's statutory scheme or case law. While plaintiffs argue to the contrary, their evidence is based upon mere speculation.

"A genuine issue is one which can be maintained by substantial evidence." *Wilder v. Hobson*, 101 N.C. App. 199, 202, 398 S.E.2d 625, 628 (1990). Defendant produced substantial evidence to show that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. Plaintiffs, however, failed to come forth with their own forecast of evidence to show the contrary. Thus, the trial court properly granted defendant's motion for summary judgment.

In light of the foregoing, the trial court's decision is affirmed.

Affirmed.

Judges WYNN and WALKER concur.

WILLIAM BLAINE BOWERS, JR., Plaintiff v. HEINZ GUNTHER OLF, Defendant

No. COA95-775

(Filed 21 May 1996)

1. Trial § 23 (NCI4th)— denial of continuance—no error

In plaintiff's action to recover for personal injuries sustained in an automobile accident, the trial court did not err in denying plaintiff's two motions to continue because he was unprepared to present all the necessary medical testimony concerning his treating physician's prognosis for his future condition, since the evidence tended to show that all the physicians who saw plaintiff testified at trial and offered their opinions that plaintiff's condition was permanent; the jury was instructed that plaintiff's damages could include future medical expenses, future pain and suffering, and future lost wages; and the jury was instructed on damages for permanent injury.

Am Jur 2d, Continuance §§ 8 et seq.

2. Evidence and Witnesses § 878 (NCI4th)— plaintiff's statements about pain—exclusion not error

The trial court in a personal injury action did not err in its refusal to allow testimony concerning statements made by plaintiff to a third party concerning pain that he had suffered as a result of his injuries, since the witness in question could not testify to specific statements or complaints he had heard, and there was other significant testimony with regard to plaintiff's statements about his pain.

Am Jur 2d, Witnesses §§ 20, 23, 26, 28.

Admissibility in civil action, apart from res gestae, of lay testimony as to another's expressions of pain. 90 ALR2d 1071.

3. Trial § 302 (NCI4th)— substance of requested instruction given—no error

The trial court did not err in its refusal to instruct the jury pursuant to plaintiff's request where the jury was fully and properly instructed, and the court included the substance of plaintiff's instruction.

Am Jur 2d, Trial §§ 1092 et seq.

Appeal by plaintiff from order signed 8 May 1995 and judgment signed 4 May 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 28 March 1996.

E. Gregory Stott for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Kenyann G. Brown, for defendant-appellee.

JOHNSON, Judge.

On 27 June 1990, at approximately 6:00 p.m., plaintiff was operating a 1983 Datsun automobile in a southerly direction on Kildaire Farm Road in the Town of Cary, North Carolina. At that time and place, plaintiff slowed his vehicle in response to traffic that was stopped ahead of him in his lane of travel. Defendant Heinz Gunther Olf negligently drove his vehicle into the rear end of plaintiff's automobile, thereby propelling it into the rear end of the automobile stopped ahead of plaintiff's vehicle.

Plaintiff alleged that he sustained serious, painful and permanent personal injuries due to the collision. Plaintiff instituted this action on 24 May 1993, seeking damages for injuries allegedly sustained in the accident. Plaintiff offered testimony of his treating physicians and various other lay witnesses in support of his claim for personal injuries.

Plaintiff's testimony at trial consisted of the following: "I broke my foot from the pedal [sic] . . . . And I ended up with what I thought was something minor at the time—the usual soreness or whatever from the wreck—in that I ended up with a back problem that just kept on and on and on and on." Immediately following the accident, due to pain in his back and right leg, plaintiff began treatment with chiropractor John B. Yancho, whom he had seen prior to the accident for a dislocated shoulder.

Dr. Yancho testified that he performed x-rays which revealed subluxations in plaintiff's lumbar spine. In addition, Dr. Yancho testified that his preliminary diagnosis was "segmental dysfunctional sacroiliac and lumbar spine and segmental dysfunction of the cervical spine." X-rays of plaintiff's foot taken at Dr. Yancho's office revealed no broken bones. Plaintiff saw Dr. Yancho on approximately 120 occasions between June 1990 and the time of trial, at a total cost of $7,058.00. At trial, Dr. Yancho testified that his diagnosis of plaintiff had not changed since plaintiff's initial visit, that plaintiff's injuries were caused by the accident, and that, in his opinion, the injuries were permanent. When asked about his prognosis for plaintiff's condition, Dr. Yancho testified that he did not know what results would be obtained by plaintiff's prolotherapy. Therefore, he was unable to provide a conclusive future prognosis.

Because of the pain in plaintiff's foot, Dr. Yancho referred plaintiff to Dr. Milner, a podiatrist. Plaintiff saw Dr. Milner approximately four to five times, and his foot problem was resolved. Plaintiff also consulted Dr. Lee Whitehurst, an orthopaedist, regarding his back pain. At trial, Dr. Whitehurst testified that plaintiff first visited his office on 9 November 1990. He further testified that at the time, plaintiff's motor and reflex functions were normal. Dr. Whitehurst also testified that he reviewed the spinal x-rays taken by Dr. Yancho, and that these x-rays were in no way abnormal.

Dr. Whitehurst examined plaintiff further on 12 March 1992. At that time, Dr. Whitehurst reviewed additional x-rays and plaintiff's MRI, both of which were normal. He performed a test in which plain-

tiff's big toe was moved, producing pain. Dr. Whitehurst in his deposition testified that this test should not produce pain, and that "if the patient relates that it does cause the back pain, it indicates that despite the examiner's best attempts, the patient either did not understand the question or was trying to mislead the examiner." According to Dr. Whitehurst, his examination of plaintiff on 12 March 1992 revealed no abnormalities in plaintiff's back or hip. Dr. Whitehurst testified that plaintiff had reached maximum medical improvement at that time and that "I did not think that there would be any other benefits from medical modalities . . ." from that time forward. Dr. Whitehurst further testified that he found nothing in March 1992 which would preclude plaintiff from working at a desk job or performing routine activities such as mowing the lawn or gardening. Finally, Dr. Whitehurst testified that, in his opinion, ongoing chiropractic treatment was unnecessary and that plaintiff needed no further medical treatment of any kind.

Plaintiff began treatment with Dr. Alan Spanos on 27 April 1993. Dr. Spanos' office treated plaintiff with acupuncture through 8 October 1993. Finally, plaintiff began treatment with Dr. Dennis Fera on 17 February 1995. Dr. Fera's treatment consisted of a series of injections into plaintiff's sacroiliac ligaments, known as "prolotherapy." Dr. Spanos had recommended such treatment to plaintiff in August 1993; however, the closest physician performing this treatment at that time was in Georgia.

At his videotaped deposition, Dr. Spanos testified on direct examination as follows:

Q: Dr. Spanos, based upon your knowledge of this type condition, I would ask you what is the likelihood of Mr. Bowers ever effectuating a complete recovery from his injuries?

. . .

A: I really don't know. In the absence of prolo therapy, I would say confidently that he couldn't get better, but I have no idea what the success rate or the extent of success on prolo therapy is in a case like his.

In addition, Dr. Fera testified as follows on direct examination:

Q: Okay. What is the probability of or likelihood of a complete recovery, Mr. Bowers effectuating a complete recovery from his injuries?

. . .

A: That is, it is very unlikely. As a general rule there will be about 75 to 80% improvement in symptomatology and level of functioning but again that is a general rule. People are individuals, they respond differently. . . .

Plaintiff's medical bills, which were introduced into evidence at trial, totalled $12,660.61. In addition, plaintiff testified that he had missed a total of 1145.8 hours from work through March 1994, and that his hourly rate was $30.00 per hour. Plaintiff testified that he missed this time from work "[i]n some cases because I just didn't work. I hurt too much. A lot of cases, it was trying to seek medical attention to try and resolve these problems."

This case was calendared for trial, at plaintiff's request, during the 1 May 1995 civil session of Wake County Superior Court. On 2 March 1995, plaintiff filed a motion to continue the action from the 1 May 1995 trial calendar on the grounds that plaintiff had begun a new treatment program with Dr. Fera during February of 1995 which would not be completed until after the trial date. Subsequently, on 26 April 1995, plaintiff filed a second motion to continue on the same grounds. Each of these motions was denied, and the action was tried during the 1 May 1995 session.

At the conclusion of the trial, plaintiff's sole request for jury instructions was a written request for N.C.P.I.—Civil 106.42, the pattern jury instruction regarding permanent injury. In response to the court's inquiry as to requested instructions at the charge conference, plaintiff's attorney stated, "That - that's the standard instructions that I just—I do have a permanency instruction I would tender to the court, which is just copied out of the book with the correct numbers in it." Plaintiff made no other oral or written request for jury instructions prior to the court's charge. In its charge to the jury, the court included instructions, over defendant's objection, regarding permanent injury, future medical expenses, future pain and suffering, and future lost wages.

Prior to trial, plaintiff and defendant had stipulated as to defendant's liability; therefore, the sole question submitted to the jury was the issue of damages. This issue was submitted to the jury and answered as follows: "What amount is the plaintiff, William Blaine Bowers, Jr., entitled to recover for personal injuries? Answer: $20,000.00." Judgment was entered on the verdict on 4 May 1995.

Plaintiff's subsequent motion to set aside the verdict and motion for a new trial were denied. Plaintiff filed notice of appeal from the judgment and from the order denying his motion for a new trial, assigning as error the court's denial of his motions to continue, the court's exclusion of certain testimony offered by plaintiff, the court's admission of certain testimony of defendant Olf, and the court's failure to include N.C.P.I.—Civil 106.49 in its charge to the jury.

[1] Plaintiff first argues that the trial court erred in its denial of his two motions to continue because he had begun a new treatment program for the injuries that he had sustained as a result of the accident. We find this argument to be unpersuasive.

North Carolina General Statutes § 1A-1, Rule 40(b) (1990) provides:

> No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require.

A motion to continue is generally not favored, and is within the trial court's sound discretion. *Pickard Roofing Co. v. Barbour*, 94 N.C. App. 688, 381 S.E.2d 341 (1989). "A court's ruling on a motion for a continuance is not reviewable absent a clear abuse of discretion. The burden of showing sufficient grounds for a continuance rests with the party seeking it." *Id.* at 692, 381 S.E.2d at 343 (citation omitted). Additionally, our Supreme Court has stated that:

> [i]n passing on the motion [for continuance] the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. . . . [S]ince motions for continuance are generally addressed to the sound discretion of the trial court . . . a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. . . . The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.

Shankle v. Shankle, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976).

After a careful review of the record, we find that the trial court did not abuse its discretion. Plaintiff's argument is that he needed additional time because of a new treatment regimen and that it would not be concluded prior to the 1 May 1995 trial date. He argued that he

was "unprepared to present all of the necessary, relevant and very important medical testimony concerning his treating physician's prognoses for his future condition." However, the evidence shows that of all the physicians that plaintiff saw between the June 1990 accident and the May 1995 trial, that three of his doctors testified at trial and offered their opinions that plaintiff's condition was permanent; that the jury was instructed that plaintiff's damages could include future medical expenses, future pain and suffering, and future lost wages; and that the jury was instructed on damages for permanent injury. Thus, plaintiff has failed to show any prejudice based on the denial of his motions to continue, or any abuse of discretion by the trial court. Therefore, the trial court did not err in denying plaintiff's motions to continue.

[2] Plaintiff next argues that the trial court erred in its refusal to allow testimony concerning statements made by plaintiff to third parties concerning pain that he had suffered as a result of the injuries sustained in the automobile accident. We find this argument to be without merit.

It is well-established that "[s]tatements as to then existing pain or other physical discomfort, though hearsay, are admissible whenever the physical condition of the declarant is relevant. Anyone who hears a declaration of pain or present physical condition may testify to it." *Roberts v. Edwards*, 48 N.C. App. 714, 718-19, 269 S.E.2d 745, 748 (1980) (citations omitted). *See also Potts v. Howser*, 274 N.C. 49, 161 S.E.2d 737 (1968). Nevertheless, our Courts have also repeatedly held that "[n]ot every erroneous ruling on the admissibility of evidence . . . will result in a new trial." *Board of Education v. Lamm*, 276 N.C. 487, 492, 173 S.E.2d 281, 285 (1970). The moving party has the burden to show not only that the trial court erred, but also to show that he or she was prejudiced and that a different result would have likely resulted had the error not have occurred. *Hasty v. Turney*, 53 N.C. App. 746, 750, 281 S.E.2d 728, 730 (1981).

In the instant action, the evidence shows that witness Donald L. Tew could not testify to specific statements or complaints that he had heard. He had only two general recollections. Further, other witnesses testified for plaintiff who were allowed to provide specific testimony about plaintiff's pain and physical condition. Additionally, Mr. Tew's excluded statement that "[plaintiff] was under a new treatment with the doctor. And he was hoping that it would alleviate the pain, that it was just bothering him constantly," was introduced on other

occasions: through plaintiff's testimony regarding the new treatment he was receiving from Dr. Fera; through Dr. Spanos' testimony regarding his referral of plaintiff to Dr. Fera; through the testimony of Dr. Fera himself; and through the testimony of plaintiff's witness Thomas J. Gelm, who testified that plaintiff "always seems to be limping and hurting. And he told me he was getting some new treatment, some different kind of a treatment." Thus, it is clear that any testimony that Mr. Tew could have provided would have been of "negligible import when compared with other testimony." *Dolan v. Simpson*, 269 N.C. 438, 443, 152 S.E.2d 523, 526 (1967).

Plaintiff's third argument is that the trial court erred in the admission of the testimony of defendant Heinz Gunther Olf concerning the skid marks left at the scene of the accident. This argument, however, is deemed abandoned since plaintiff failed to cite any authority in support of the argument. N.C.R. App. P. 10(b)(1). *See also State v. Figured*, 116 N.C. App. 1, 14, 446 S.E.2d 838, 846 (1994), *disc. review denied*, 339 N.C. 617, 454 S.E.2d 261 (1995). Furthermore, since the amount of damages was the only issue in the case, and defendant has stipulated to liability, this argument is irrelevant and could not have prejudiced or affected the outcome of the trial.

Plaintiff next argues that the trial court erred in allowing the testimony of defendant that he was not injured in the automobile accident. Once again plaintiff has failed to offer any supporting authority for his objection in accordance with N.C.R. App. P. 10(b)(1), thus this argument is deemed abandoned.

[3] Plaintiff also argues that the trial court erred in its refusal to give instruction to the jury—that the jury was to consider only matters in evidence pursuant to the pattern jury instruction N.C.P.I. 106.49 despite his having submitted a written request.

The evidence shows that prior to the trial court's charge to the jury, plaintiff had only requested N.C.P.I. 106.42 entitled "Permanent Injury." However, at the conclusion of the jury charge plaintiff requested N.C.P.I. 106.49. "It is well settled that a refusal of a requested charge is not error where the instructions which are given fully and fairly present every phase of the controversy." *Clemons v. Lewis*, 23 N.C. App. 488, 491, 209 S.E.2d 291, 293 (1974). Moreover, out Courts have held that "the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 103 N.C. App. 288, 308,

407 S.E.2d 860, 871 (1991), *aff'd in part and review improvidently granted in part*, 332 N.C. 1, 418 S.E.2d 648 (1992) (quoting *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984)).

In the instant case, the jury was fully instructed about personal injury damages, including instructions regarding past, present, and future medical expenses, loss of earnings, and pain and suffering, as well as instructions on permanent injury and on proximate cause. It is unquestionable that the trial court included the substance of plaintiff's instruction. Thus, the trial court is not "required to use the precise language of the tendered instruction '. . . so long as the substance of the request is included in language which doesn't weaken its force.' " *Emerson v. Carras*, 33 N.C. App. 91, 97, 234 S.E.2d 642, 647 (1977) (quoting *King v. Higgins*, 272 N.C. 267, 270, 158 S.E.2d 67, 69 (1967)). Plaintiff's suggestion that the jury failed to consider the amount of lost wages he suffered, or alternatively considered that he was paid sick leave from his job, is unpersuasive. Accordingly, the trial court did not err, and plaintiff is not entitled to a new trial on this basis.

Plaintiff's remaining arguments are that the trial court erred in signing the entry of judgment entered on 4 May 1995, and that the trial court erred in its denial of his motion to set aside the verdict and motion for a new trial. These arguments are also without merit for the reasons stated herein.

Accordingly, plaintiff received a fair trial, free from prejudicial error.

No error.

Judges WYNN and WALKER concur.

AL SMITH BUICK CO., INC., D/B/A AL SMITH MAZDA v. MAZDA MOTOR OF AMERICA, INC., AND CARY AUTO INVESTORS COMPANY

No. COA95-814

(Filed 21 May 1996)

1. Appeal and Error § 555 (NCI4th)— 1990 consent order—1993 declaratory judgment—1990 consent order no longer applicable

Plaintiff automobile dealer was not barred by a 1990 consent order between the parties whereby plaintiff agreed not to protest

defendant's intention to establish an additional dealership in the area, since a 1993 declaratory ruling held that plaintiff was not barred from filing a protest so long as the intended new dealership was within plaintiff's relevant market area because a reasonable time had passed from the signing of the consent order and no new dealership had been built, and that ruling became the law of the case since defendant did not appeal therefrom.

Am Jur 2d, Appellate Review §§ 605-613.

Erroneous decision as law of the case on subsequent appellate review. 87 ALR2d 271.

2. Automobiles and Other Vehicles § 181 (NCI4th)— new dealership—relevant market area—method of determining population—Commissioner's error

The Commissioner of Motor Vehicles erred in concluding that the "relevant market area," as that term is used in N.C.G.S. § 20-286(13b), required the counting of the entire population in a census tract when only a portion of that tract is located within a designated radius of the proposed site of a new motor vehicle dealership.

Am Jur 2d, Automobiles and Highway Traffic §§ 394, 395; Private Franchise Contracts § 581.

Validity, construction, and application of state statutes regulating dealings between automobile manufacturers, dealers, and franchisees. 82 ALR4th 624.

Appeal by Al Smith Buick Co., Inc., d/b/a Al Smith Mazda from order filed 4 May 1995 in Wake County Superior Court by Judge Stafford G. Bullock. Heard in the Court of Appeals 17 April 1996.

Johnson, Mercer, Hearn & Vinegar, PLLC, by Richard J. Vinegar and Shawn D. Mercer, for appellant Al Smith Buick Co., Inc. d/b/a Al Smith Mazda.

Smith Helms Mulliss & Moore, L.L.P., by James L. Gale and Mary M. Dillon, for appellee Mazda Motor of America, Inc.

Moore & Van Allen, PLLC, by David E. Fox and Robert A. Meynardie, for intervenor Cary Auto Investors Company.

GREENE, Judge.

Al Smith Buick Co., Inc., d/b/a Al Smith Mazda (Al Smith) appeals from the trial court's order filed 4 May 1995, which affirmed the order of the Commissioner of the North Carolina Division of Motor Vehicles (Commissioner) which authorized Mazda Motor of America, Inc. (Mazda) to establish a dealership in Cary, North Carolina.

On 5 March 1990, Mazda notified Al Smith, pursuant to N.C. Gen. Stat. § 20-305(5), of its intent to enter a franchise agreement, establishing a new Mazda dealership in Cary, North Carolina. Al Smith filed a petition protesting the new dealership with the Commissioner on 30 March 1990, pursuant to N.C. Gen. Stat. § 20-305(5). On 12 July 1990, Al Smith and Mazda entered a consent order settling Al Smith's protest petition. The consent order provided that:

> A. . . . Al Smith Buick agrees that Mazda and/or Mazda's designated representative or authorized dealers may commence at any time prior to July 1, 1991, any and all pre-opening activities and preparations relating to the new dealership, including but not limited to, the construction of the new dealership facilities and advertising relating to the new dealership.
>
> B. Al Smith Buick will not file any further administrative protest or lawsuit or initiate any further administrative or legal proceeding pertaining to or arising from the pre-opening activities and preparations or the establishment of the new dealership and will not oppose in any other way the pre-opening activities and preparations or the establishment of the new dealership.
>
> C. Mazda is hereby authorized to establish the Cary, North Carolina dealership pursuant to the terms of this Consent Order.

Because Mazda had not "obtained a license from the Commissioner at the relevant site . . . or actually commenced operations" there, Al Smith filed a request for a declaratory ruling with the Commissioner on 7 July 1993 requesting the Commissioner to determine whether, "in light of the given state of facts," Mazda must provide notice to Al Smith and "afford Al Smith the opportunity to file a petition with the Commissioner protesting the establishment of said dealership and requesting a hearing before the Commissioner at which it will be determined whether good cause currently exists for the establishment of such dealership."

The Commissioner ruled on 16 August 1993 that the 1990 consent order "ceased to be effective after a reasonable period of time had elapsed during which time the proposed Cary dealership was not constructed or licensed by the North Carolina Division of Motor Vehicles and no Mazda vehicles were sold at said facility." The Commissioner then stated that a "reasonable period" is two years and a reasonable period of time had expired by 7 July 1993. The Commissioner then ruled:

> 5. The 1990 determination, which was entered with the consent of both Al Smith and Mazda, does not bar Al Smith from initiating the present request for a declaratory ruling or from filing a protest before the Commissioner to Mazda's intention to establish an additional dealership under G.S. 20-305(5) based upon the given state of facts presented above so long as said dealership has Al Smith within its relevant market area.

Mazda appeared and presented argument at the hearing for declaratory judgment, was served with a copy of the declaratory ruling and did not appeal from that ruling.

On 15 December 1993, Al Smith received a new notice that Mazda intended to establish a new dealership in Cary, which Al Smith considered its "relevant market area," and Al Smith filed a protest petition with the Commissioner on 12 January 1994. On 29 August 1994, the Commissioner determined that the 1993 declaratory ruling

> provided that any determination made by the Commissioner in the July, 1990 Consent Order could not bind the Commissioner for more than a reasonable time and that a reasonable time had expired since the Consent Order was entered. The request for declaratory ruling did not request a finding that, and the declaratory ruling did not provide that, the separate contractual undertakings between Al Smith and Mazda expired after this reasonable time.

Accordingly, the Commissioner stated that the 1990 Consent Order precluded Al Smith from "pursu[ing] further legal challenges to the establishment of Mazda's Cary dealership." The Commissioner also concluded that "[i]f Al Smith is not within the relevant market area, Mazda is entitled to have the protest proceeding dismissed on this separate and independent ground" because Al Smith would have no standing to bring this protest. It is not disputed that Al Smith is "located more than 10 miles from" the site of the proposed dealership.

The Commissioner concluded that the "proper procedure under N.C. Gen. Stat. § 20-286(13b)" for determining "relevant market area" is to:

i) identify the location of the proposed site;

ii) identify all United States census tracts wholly or partially within a ten-mile radius from the proposed dealership site;

iii) determine the total population for each such census tract as determined in accordance with the most recent population update of NPDC or a similar recognized source; and

iv) to accumulate the population.

The Commissioner further stated in his conclusion that "[t]he statutory directive to accumulate population directs that the entire population of all tracts wholly or partially within a ten-mile radius of the dealership be added together." Finally the Commissioner concluded that when properly measuring population in the ten mile radius of the proposed new dealership, the population exceeds 250,000 and that Al Smith is, therefore, "located outside the relevant market area of the proposed Cary Mazda dealership" and "lacks standing to challenge" the proposed dealership.

The issues are (I) whether the 1993 declaratory ruling permits Al Smith to file a protest with the Commissioner with regard to Mazda's intention to establish an additional motor vehicle dealership within Al Smith's market area; and if so, (II) whether the determination of the "relevant market area," as that term is used in N.C. Gen. Stat. § 20-286(13b), requires the counting of the entire population in a census tract when only a portion of that tract is located within a designated radius of the proposed site of the additional new motor vehicle dealership.

Because both issues present questions of law, our review is *de novo*. N.C.G.S. § 20-305.3 (1993) (review and appeal pursuant to Chapter 150B); N.C.G.S. § 150B-51(b) (1995); *Williams v. North Carolina Dept. of Economic and Community Dev.*, 119 N.C. App. 535, 539, 458 S.E.2d 750, 753 (1995).

I

[1] Mazda argues that Al Smith is barred by the 1990 consent order from contesting the establishment of a new Mazda dealership in Cary. We disagree. The continued viability of the consent order was addressed in the 1993 declaratory ruling. That ruling held that Al

Smith was not barred from "filing a protest before the Commissioner to Mazda's intention to establish an additional dealership under G.S. 20-305(5) . . . so long as said dealership has Al Smith within its relevant market area." Mazda did not appeal from that ruling and cannot now complain about it. *See Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 375, 128 S.E.2d 867, 871 (1963) (declaratory ruling binding when there has been no exception by either party). Thus the law of this case is that the consent decree ceased to be effective because two years had expired after the signing of the consent decree and Mazda had not yet constructed the proposed dealership nor had it been licensed by the North Carolina Division of Motor Vehicles. The 1994 ruling of the Commissioner, therefore, that Al Smith was precluded from "pursu[ing] further legal challenges to the establishment of Mazda's Cary dealership" was error.

II

[2] The statutes relevant to this case provide that a car manufacturer may not enter a franchise agreement with a new dealership, if the new dealership lies within the relevant market area of an existing dealer who deals in the same "line make" without first notifying the Commissioner and the dealer in writing. N.C.G.S. § 20-305(5) (Supp. 1995). The existing dealer then has the right to a hearing, by the Commissioner, to determine whether "there is good cause" for an additional dealership. *Id.* At the time of Mazda's 1993 notice to Al Smith, "relevant market area" was defined as a ten mile radius if the "population in an area within a radius of 10 miles around the proposed site is 250,000" after determining population. N.C.G.S. § 20-286(13b) (1993). In measuring population:

> the most recent census by the U.S. Bureau of the Census or the most recent population update either from the National Planning Data Corporation or other similar recognized source shall be accumulated for all census tracts either wholly or partially within the relevant market area.

Id.

Al Smith argues that section 20-286(13b) "makes clear that partially included census tracts may not be ignored, not that population outside the [radius] must be counted as falling within the [radius]." In other words, only the population of a census tract within the relevant radius of the site is to be included in determining the population of the market area. Mazda, however, argues that "[s]ection 20-286(13b) mandates, simply and unambiguously, that the population shall be

'accumulated,' not . . . 'apportioned' " and that Al Smith's method involves apportioning population instead of accumulating population. In other words, the entire population of any census tract, if any part of it is within the relevant radius of the site, must be included in determining the population of the market area.

Both contentions are reasonable. The legislature has stated unequivocally that only the population "within" a relevant radius of the site is to be determined. N.C.G.S. § 20-286(13b)(a). At the same time, Mazda argues that the language in the statute can be read to state that in determining the population "within" the radius, the population *outside* the radius must be counted to the extent a census tract partially within the radius extends beyond that radius. N.C.G.S. § 20-286(13b). It is also, however, reasonable to read, as Al Smith suggests, the statute as stating that when a census tract lies partially outside the radius, the Commissioner is not to disregard that tract in its entirety but is to include the population of that portion of the census tract that lies within the radius.

When a statute contains an ambiguity, as this statute does, our Court must construe the statute to arrive at the intent of the legislature.[1] *Burgess v. Your House of Raleigh*, 326 N.C. 205, 215, 388 S.E.2d 134, 140 (1990). Legislative intent may be ascertained from amendments to the statute. *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 524-25, 338 S.E.2d 114, 117-18 (1985). In 1995, the legislature enacted a bill entitled: "An Act to Clarify the Definition of the Term 'Relevant Market Area' in the Motor Vehicle Dealers and Manufacturers Licensing Law." 1995 N.C. Sess. Laws ch. 234, § 1. This act did not change any substantive language in section 20-286(13b), but inserted the following language at the end of subsection 13b:

> In accumulating population for this definition, block group and block level data shall be used to apportion the population of census tracts which are only partially within the relevant market area so that population outside of the applicable radius is not included in the count.

---

1. Even if we accept Mazda's argument that the statute stating how the population is to be counted is not ambiguous and requires the counting of the population in the entire census tract, even if partially outside the radius, this reading of the statute violates the manifest intent of the legislature, as revealed by the language requiring the determination of population "within" a relevant radius. Thus, we would be required to interpret and apply the statute consistent with the intent of the legislature. *See Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979); 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.07 (5th ed. rev. vol. 1992).

N.C.G.S. § 20-286(13b) (Supp. 1995). Although the bill amending section 20-286(13b) states that it "does not affect litigation pending at the time of its enactment . . . portions of the amendment[] are [nevertheless] helpful in ascertaining the intent of the legislature in enacting the original version." *General Motors Corp.*, 78 N.C. App. at 524, 338 S.E.2d at 117. This new amendment plainly reveals the intent of the legislature to exclude population outside the designated radius and indicates an intent to clarify the earlier version of the statute. *See id.*; *see also Sykes v. Clayton, Comm'r of Revenue*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968) (title of bill is "a legislative declaration of the tenor and object of the Act"). Therefore, the pre-amendment version of section 20-286(13b) must be construed consistent with the 1995 amendment and population determined in accordance therewith.

Accordingly, the Commissioner erred in his conclusion to include population lying outside the ten mile radius when determining "relevant market area." This matter is remanded for a determination of the "relevant market area" using the proper method of measuring population.

Reversed and remanded.

Judges MARTIN, Mark D. and SMITH concur.

PCI ENERGY SERVICES, INC., PLAINTIFF-APPELLEE, v. WACHS TECHNICAL SERVICES, INC., DEFENDANT-APPELLANT, AND CHARLES L. WACHS, RESPONDENT-APPELLANT.

No. 9426SC225

(Filed 21 May 1996)

1. Judgments § 139 (NCI4th)— consent judgment—enforceability through contempt

Because the trial court did not merely "rubber stamp" the parties' private agreement but instead explicitly approved, adopted, and incorporated the settlement agreement, the court transformed the parties' agreement into the court's own determination of the parties' respective rights and obligations, and the consent judgment was thus a court order enforceable through the court's contempt powers.

Am Jur 2d, Judgments §§ 207-227.

Right to appellate review of consent judgment. 69 ALR2d 755.

2. Judgments § 138 (NCI4th)— press release—violation of consent judgment—sufficiency of evidence

The record contained competent evidence to support the trial court's findings of fact and conclusions of law that defendants violated the parties' consent judgment by writing a press release with regard to confidentiality, its admission of wrongdoing, and its ability to offer welding services which violated the consent judgment; therefore, defendants were properly held in contempt for violating the consent judgment.

Am Jur 2d, Judgments §§ 207-227.

3. Costs § 26 (NCI4th)— enforcement of consent judgment—plaintiff entitled to attorney fees

The trial court did not err in awarding attorney's fees to plaintiff since the parties' consent judgment contained an express provision in which defendant agreed to pay plaintiff's costs associated with enforcing the consent judgment.

Am Jur 2d, Costs §§ 57-70.

Appeal by defendant Wachs Technical Services, Inc. and respondent Charles L. Wachs from order entered 16 December 1993 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 April 1995.

Helms, Cannon, Hamel & Henderson, P.A., by Christian R. Troy; Daniel C. Abeles, Assistant General Counsel, Westinghouse Electric Company; and McDermott, Will & Emery, by William P. Schuman, for plaintiff-appellee.

Chuhak & Tecson, P.C., by James W. Naisbitt, and Robinson, Bradshaw & Hinson, P.A., by Louis A. Bledsoe, III, for defendant-appellants.

McGEE, Judge.

Plaintiff, PCI Energy Services, Inc. (PCI) and defendant, Wachs Technical Services, Inc. (WTS) perform welding services, among other things. On 23 February 1993, PCI filed suit against WTS and its general manager, Richard Bryant, for unfair competition and for theft

and conversion of PCI's property, trade secrets, equipment, and blueprints. Specifically, PCI alleged WTS misappropriated PCI's technology for performing narrow groove welding. The technology at issue included a special type of welding torch and gas cup developed by PCI.

On 18 March 1993, after a hearing with oral arguments from counsel and presentation of evidence by the parties, the trial court entered a preliminary injunction against WTS. The injunction barred WTS from performing narrow groove welding with any welding torch and gas cup derived from PCI technology or from advertising that it could do so. The case was set for trial on 9 August 1993.

On 7 August 1993, the parties entered into a settlement agreement. On 10 August 1993, the trial court entered a consent judgment which found:

> [T]he parties have entered into a Settlement Agreement which can be made the subject of this Consent Judgment and, accordingly, [the court] approves and adopts the Settlement Agreement, the Injunction contained therein, and its other terms and provisions, as a part of this Consent Judgment, and incorporates and attaches hereto such Settlement Agreement among the parties, signed by each of the parties on August 7, 1993 . . . .
>
> NOW, THEREFORE, with the consent of the parties, and in the discretion of the Court, it is Ordered, Adjudged, and Decreed that the aforementioned Settlement Agreement be, and it hereby is, adopted, approved, and hereby made an enforceable Judgment of the Court . . . .

A copy of the settlement agreement was attached to the consent judgment.

The same day the court entered the consent judgment, WTS and its president, Charles Wachs, circulated a press release which PCI alleged violated the terms of the consent judgment. PCI filed a motion for civil and criminal contempt against WTS and Charles Wachs.

The trial court heard PCI's motion for contempt on 14 October 1993 and issued an order holding WTS and Charles Wachs in contempt of the consent judgment. From this contempt order, defendants appeal.

I.

[1] WTS and Wachs (defendants) first argue the trial court erred in using its contempt powers. Specifically, defendants contend the consent judgment is not a court order that can be enforced through contempt.

"If a consent judgment is merely a recital of the parties' agreement and not an adjudication of rights, it is not enforceable through the contempt powers of the court." *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188, 190, 461 S.E.2d 10, 12 (1995); *See also Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 145 (1994). In *Nohejl*, this Court held the trial court's consent order contained findings of fact and that the order was based on those findings. 120 N.C. App. at 191, 461 S.E.2d at 12. Therefore, the consent judgment was enforceable through the court's contempt powers. *Id.* In *Crane*, this Court found the consent judgment contained no determination by the trial court of either issues of fact or conclusions of law and therefore, "the judgment [was] nothing more than a contract which is enforceable only by means of an action for breach of contract." 114 N.C. App. at 106, 441 S.E.2d at 145.

When a trial court uses its contempt powers to enforce a consent judgment, it must demonstrate that it has carefully read the settlement agreement and considered its legal effect. A court should not simply "rubber stamp" the parties' agreement. Here, the consent judgment did go beyond a mere recital of the settlement agreement and actually involved the court's determination and adjudication of the parties' rights.

The procedural history of this case is significant. The same trial judge who entered the consent judgment had also previously entered the preliminary injunction against defendants after conducting a hearing on plaintiff's motion for an injunction. Thus, when the parties presented the settlement agreement to the court, the court was familiar with the facts and issues of the case.

The language of the consent judgment is also significant. In the consent judgment, the trial court found that "the parties have entered into a Settlement Agreement which can be made the subject of this Consent Agreement." The court then explicitly "approve[d,] . . . adopt[ed,] . . . incorporat[ed] and . . . made an enforceable Judgment of the Court," the terms of the settlement agreement. By "adopting" and "incorporating" the settlement agreement, the court transformed

the parties' agreement into the court's own determination of the parties' respective rights and obligations.

Settlements negotiated by parties are encouraged by the courts. *Insurance Co. v. Surety Co.*, 1 N.C. App. 9, 14, 159 S.E.2d 268, 273 (1968). Parties who reach a settlement agreement have the option of filing voluntary dismissals of their claims and then using traditional contract remedies in the event there is a violation of the agreement. However, when parties to a settlement ask the court to make the terms of the settlement a court-ordered judgment, the parties must be prepared for the court to use its contempt powers to enforce its orders.

Because the trial court did not merely "rubber stamp" the parties' private agreement, we find the consent judgment is a court order enforceable through the court's contempt powers.

II.

[2] Defendants next contend the trial court erred as a matter of law in determining that the text of the WTS press release violated terms of the consent judgment. We disagree.

"Review in contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986).

The trial court concluded the press release was "inaccurate and misleading and violates the terms of the settlement agreement and consent judgment." It held the publication of the press release was in contempt of the court's order and corrective action was needed. We find there is competent evidence to support the trial court's conclusion. The settlement agreement, which was incorporated into the court's consent judgment, prohibited defendants from advertising for eighteen months that WTS had the ability to perform narrow groove welding services:

> with any welding torch and gas cup, *other than* Commercially Available welding torches and gas cups (a) obtained from [vendors unrelated to PCI] . . . (b) . . . [which were] not created or procured with any confidential information . . . obtained . . . from PCI, and (c) which are not modified by WTS or Bryant. (emphasis added).

The agreement also prohibited defendants from advertising for three years that WTS had the ability to:

> (a) [use] an oblong gas cup that sits above or outside or on the lip of the groove while welding in a Narrow Groove or any welding groove having an included angle of fifty (50) degrees or less, *other than* a Commercially Available gas cup that (i) is not created or procured with any information . . . obtained, directly or indirectly, from WTS or Bryant, (ii) . . . was not created or procured with any confidential information . . . obtained, directly or indirectly, from PCI, and (iii) was not modified by WTS or Bryant; or
>
> (b) [use] a gas cup design that sits above or outside or on the lip of the groove while welding in grooves of approximately two and one-half (2 1/2) inches deep or greater, other than a Commercially Available gas cup that (i) is not created or procured with any information . . . obtained, directly or indirectly, from WTS or Bryant, (ii) . . . was not created or procured with any confidential information . . . obtained . . . from PCI, and (iii) was not modified by WTS or Bryant. (emphasis added).

The press release by defendants stated "[WTS] retains the right to fully compete in ALL types of welding with its new state-of-the-art welding systems . . . ." Defendants argue the consent judgment permitted WTS to perform narrow groove welding as long as the welding torch and gas cup used were not derived from PCI products or plans nor modified by WTS or its general manager, Bryant. We agree with defendants' reading of the consent judgment. However, we find this reading is not the message conveyed by the press release.

In its press release, defendants stated, "neither party admitted to any wrongdoing" and that if the case had gone to trial, they are "certain [they would] have been vindicated of all charges." However, the settlement agreement clearly states defendants "unlawfully possessed and used" PCI equipment and technology, and that defendants recognized the "wrongful nature of [their] acts." Defendants further stated in their press release:

> We would like to be able to divulge all of the facts of this settlement but the agreement precludes either party from making those facts public. We would welcome a waiver of that confidentiality clause by PCI . . . any time that they are willing to let the public and the industry know the true facts.

The agreement, however, stated the parties have a "continuing confidential obligation with regard to confidential information that is the subject of a Protective Order in the above referenced litigation." In addition, the agreement prohibited a disclosure of "the amount of any payments made or to be made." Except for these limitations, the "parties have no confidential obligation with respect to this Agreement or the subject matter of the dispute which it addresses."

In light of the cumulative effect of defendants' assertions, we find the record contains competent evidence to support the trial court's findings of fact and conclusions of law that defendants violated the consent judgment.

III.

[3] Finally, defendants contend the trial court erred in awarding attorney's fees to PCI. We disagree.

The settlement agreement contained a specific "Litigation Costs" provision in which:

> WTS agrees to indemnify PCI for all costs and expenses incurred in furtherance of any litigation brought by PCI to enforce this Agreement in which PCI is awarded . . . relief to preserve the value of the PCI Narrow Groove Proprietary Technology.

In *Nohejl*, this Court said, "[a]bsent express statutory authority for doing so, attorney's fees are not recoverable as an item of damages or costs." 120 N.C. App. at 191, 461 S.E.2d at 12 (citing *Powers v. Powers*, 103 N.C. App 697, 706, 407 S.E.2d 269, 275 (1991)). A trial court "has no authority to award damages [in the form of costs] to a private party in a contempt proceeding." *Green v. Crane*, 96 N.C. App. 654, 659, 386 S.E.2d 757, 760 (1990) (quoting *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E.2d 60, 63 (1985)). We note, however, that the *Nohejl* Court refused to award attorney's fees to the party seeking to enforce a consent judgment because "there was *no express contractual provision* or statutory authority permitting plaintiffs to recover" such fees. 120 N.C. App. at 191-92, 461 S.E.2d at 12 (emphasis added).

This case is distinguishable from both *Green* and *Nohejl*. Neither the consent judgment in *Green* nor in *Nohejl* contained a provision to indemnify a party for costs of enforcing the judgment. Here, the consent judgment contained an express provision in which WTS agreed to pay PCI's costs associated with enforcing the consent judgment.

Therefore, the trial court's order awarding attorney fees to PCI is affirmed.

Affirmed.

Judges JOHNSON and COZORT concur.

JOSEPH T. COACHMAN, APPELLANT, v. WILLIE GOULD, APPELLEE.

No. COA95-103

(Filed 21 May 1996)

Husband and Wife §§ 52, 58 (NCI4th)— criminal conversation—alienation of affections—insufficiency of evidence

The trial court properly granted summary judgment for defendant on plaintiff's claims of criminal conversation and alienation of affections where the evidence was insufficient to show sexual intercourse between defendant and plaintiff's wife or an opportunity for sexual intercourse; the only possible evidence of malicious acts producing the alleged alienation of affections was defendant's phone calls to plaintiff's wife; those phone calls were allegedly for business purposes, which plaintiff did not refute; and plaintiff's request that defendant not call his wife, which apparently was ignored by defendant, did not cause the calls to rise to the level of maliciousness required to satisfy this element of plaintiff's claim.

Am Jur 2d, Husband and Wife §§ 278, 279.

Element of causation in alienation of affections action. 19 ALR2d 471.

Attachment in alienation of affections or criminal conversation case. 67 ALR2d 527.

Appeal by plaintiff from summary judgment entered 13 June 1994 by Judge Robert L. Farmer, in Cumberland County Superior Court. Heard in the Court of Appeals 9 January 1996.

The Lee Law Firm, P.A., by C. Leon Lee, II, for plaintiff appellant.

No brief filed for defendant appellee.

SMITH, Judge.

In this case, plaintiff appeals from summary judgment against him on his claims of alienation of affections and criminal conversation. Our review of the record indicates plaintiff has failed to produce competent evidence sufficient to establish the elements of a claim for alienation of affections, thus it fails as a matter of law. As plaintiff's claim of criminal conversation rests on nothing more than mere conjecture, it too fails as a matter of law.

Plaintiff and Annie Jean Williams Coachman (Annie Jean) were married on 17 October 1988, separated on 16 August 1991, and divorced on 5 March 1993. Prior to the events which gave rise to this case, plaintiff maintains he and his wife had a marriage "filled with warmth and happiness." Plaintiff describes "[t]he atmosphere in the home [as] such that [his] family was often compared to the family portrayed in a popular Bill Cosby television sitcom." This tranquil atmosphere proved transient, however, when plaintiff began to sense that his wife's affections were turning elsewhere.

Plaintiff's suspicions that his wife was having an extra-marital affair arose after overhearing multiple telephone conversations between his wife and defendant. Plaintiff states that defendant would call his wife at the marital residence almost every evening, with the phone calls lasting fifteen to forty-five minutes. Based on the context of the conversations between defendant and plaintiff's wife, the tone of their discussion, and the frequency of the calls, plaintiff concluded that the relationship between defendant and Annie Jean was not platonic.

Defendant maintains that his phone calls to Annie Jean were of a business nature. According to defendant, his calls to Annie Jean were to discuss janitorial contracts between his company, "G & H Building Maintenance," and Annie Jean's company, "Shipshape Janitorial." During the period of the alleged telephone conversations, defendant maintains his residence was in Florida, which meant that he had to call Annie Jean in order to conduct business with her in North Carolina. Plaintiff chose to tolerate defendant's phone calls, (calls plaintiff then believed were inappropriate) until May of 1990, at which time he told defendant, over the telephone, to "please stop call-

ing my house. Annie Jean is my wife." According to plaintiff, defendant told him that the calls would continue until Annie Jean requested that he stop.

Defendant has a different version of these events. Defendant states that he did not know Annie Jean was married during the period at issue. Defendant also maintains plaintiff did not identify himself as Annie Jean's husband during their phone conversation. Moreover, defendant states that Annie Jean told him that the person he spoke to on the phone was a repairman, and that the conversation should be ignored.

Shortly after his phone conversation with defendant, plaintiff asserts his marriage began to deteriorate. Arguments between plaintiff and his wife centered on the continuing phone calls of defendant to the marital home. Plaintiff asserts that defendant's relationship with Annie Jean led to a dearth of physical intimacy, as Annie Jean began to "spurn all physical contact with her husband." One evening in 1992, plaintiff alleges Annie Jean told him that she had not "been with" defendant in six or seven months. Plaintiff interpreted "been with" as meaning that Annie Jean and defendant had engaged in sexual relations six or seven months prior. According to plaintiff, this "admission" by Annie Jean was made while she was "in a medicated stupor," thus "[plaintiff did not] even believe [Annie Jean] realized what she was saying. . . . [S]he'd be sitting up and she'd go to sleep."

Plaintiff's only evidence of Annie Jean and defendant actively engaging in social contact occurred when plaintiff returned home at an unusual hour during the day. Plaintiff had left his home to assist his daughter, who had run out of gas at Fort Bragg, and upon return to the Coachman residence, he observed his wife leaving with defendant in an automobile. Plaintiff was unable to establish the date on which this purported rendezvous occurred, where Annie Jean and defendant had been, or what they had been doing.

Defendant admits to a prior intimate relationship with Annie Jean, which lasted five or six years and ended sometime in 1987 or 1988. This relationship took place after Annie Jean separated from her first husband, and defendant maintains the relationship ended prior to the phone calls which led, in part, to this litigation.

The fact that this relationship occurred, and possibly overlapped a period in which plaintiff and Annie Jean were married (plaintiff and Annie Jean married in October of 1988), is legally irrelevant. "For

criminal conversation, or for any other injury [including alienation of affections] to the person or rights of another, not arising on contract and not hereafter enumerated," the statute of limitations is three years. N.C. Gen. Stat. § 1-52(5) (1983 & Cum. Supp. 1995). Since this particular relationship allegedly occurred in 1988 at the latest, and plaintiff's complaint was not filed until 1993, the statute of limitations bars this act from constituting a cause of action relevant to the instant case.

Plaintiff asserts the trial court erred in granting summary judgment for defendant on plaintiff's claims of criminal conversation and alienation of affections. To sustain summary judgment, defendant, as the moving party, must show that no material facts are in dispute and that he is entitled to judgment as a matter of law. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904-05 (1995). In addition, the record is to be viewed in the light most favorable to the non-movant, giving him the benefit of all inferences which reasonably arise therefrom. *Id.* Evidence properly considered on a motion for summary judgment "includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

To withstand defendant's motion for summary judgment on his claim of criminal conversation, plaintiff must present evidence demonstrating: "(1) marriage between the spouses and (2) sexual intercourse between defendant and plaintiff's spouse during the marriage." *Chappell v. Redding*, 67 N.C. App. 397, 401, 313 S.E.2d 239, 241, *disc. review denied*, 311 N.C. 399, 319 S.E.2d 268 (1984). While it is undisputed that plaintiff and Annie Jean were married, plaintiff has nevertheless failed to present evidence sufficient to establish the second element of criminal conversation, to wit: proof of sexual intercourse between defendant and Annie Jean.

Plaintiff has presented no direct evidence of sexual intercourse between defendant and Annie Jean. The circumstantial evidence presented by plaintiff consists of: phone calls between defendant and Annie Jean; an ambiguous statement by Annie Jean that she had "been with" defendant (which is subject to multiple interpretations, especially since Annie Jean was in a "medicated stupor" when the statement was made); and a car ride which plaintiff observed. We

have previously stated that evidence of sexual intercourse must rise to more than " 'mere conjecture'." *Chappell*, 67 N.C. App. at 401, 313 S.E.2d at 242 (quoting *Horney v. Horney*, 56 N.C. App. 725, 727, 289 S.E.2d 868, 869 (1982)).

Our Supreme Court has noted that, "given the fact-specific nature of these types of cases . . . the [analytical] language used by the court must be considered in light of the facts of each case." *In Re Estate of Trogdon*, 330 N.C. 143, 150, 409 S.E.2d 897, 901 (1991). The *Trogdon* Court emphasized that:

> Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations.

Trogdon, 330 N.C. at 148, 409 S.E.2d at 900 (citations omitted). Thus, if a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than "mere conjecture" exists to prove sexual intercourse by the parties.

Even after viewing the instant facts in the light most favorable to plaintiff, we come to the ineluctable conclusion that the interaction between defendant and Annie Jean, in this legal context, is innocuous, demonstrates no specific opportunity for sexual intercourse, and amounts to no more than "mere conjecture." Certainly, telephone calls and a car ride are not the type of "opportunities" for sexual intercourse intended under the *Trogdon* analysis. *See Trogdon*, 330 N.C. at 151, 409 S.E.2d at 902 (in *Trogdon*, the wife would leave the marital home for days, admitted she and defendant were "living together," and refused to testify about her relationship to defendant.) Since "opportunity" has not been shown through the evidence before us, in the sense indicated by the *Trogdon* Court, there is no need to address the question of whether defendant had an adulterous inclination toward Annie Jean. Thus, under the "mere conjecture" rule enumerated in *Chappell*, and the "opportunity and inclination" test encouraged by *Trogdon*, summary judgment was properly granted defendant on this issue.

Plaintiff's cause of action for alienation of affections requires that he show: (1) that plaintiff and Annie Jean enjoyed a happy marriage, and that genuine love and affection existed between them; (2) that

the love and affection were alienated and destroyed; and (3) that *wrongful and malicious* acts of defendant produced the alienation of affections. *Chappell*, 67 N.C. App. at 399, 313 S.E.2d at 241 (emphasis added). The malicious acts referred to are acts constituting " 'unjustifiable conduct causing the injury complained of.' " *Chappell*, 67 N.C. App. at 400, 313 S.E.2d at 241 (quoting *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980)).

Based on our review of the record, the only possible wrongful and malicious instances of conduct by plaintiff are the phone calls made to the marital home by defendant. Two facts prevent us from viewing the phone calls as sufficient evidence of malicious and wrongful conduct. First, plaintiff admits that defendant and his wife had an ongoing business relationship. Thus, defendant allegedly had a valid, inoffensive reason for calling the Coachman home. Given this preexisting business relationship, plaintiff had the burden of forecasting evidence which would demonstrate that the phone calls were not for business purposes, but were for the malicious purpose of alienating the affections of Annie Jean.

The second fact concerns the phone conversation between plaintiff and defendant. When plaintiff spoke to defendant on the phone, he did no more than ask defendant to "[p]lease stop calling my house. Annie Jean is my wife. Please stop calling my house." Plaintiff states that he would listen to Annie Jean talk to defendant for extended periods of time, and that he noted from his long distance bills that numerous collect calls were being made from defendant's residence to Annie Jean at the Coachman residence. Plaintiff describes the telephone conversations as only partially business, the rest he says, was just "talk, talk, talk, talk, talk."

While this evidence may be proof of a gregarious spouse, it cannot be said to rise to the level of malicious conduct by defendant, designed to alienate the affections of Annie Jean. Plaintiff's deposition (in the record) indicates that he gave no reason to defendant as to why he wanted the conversations between Annie Jean and defendant to stop. Plaintiff merely stated that Annie Jean was his wife. Without delving into complicated First Amendment issues, or modern-day interpretations of inter-spousal hierarchies, suffice it to say that Annie Jean had a right to speak to defendant if she chose to do so. There is no indication that the phone conversations were marked by salacious whisperings, plans for clandestine meetings, or any other intonation of improper conduct by defendant.

On these facts, all that exists in the record to show malicious and wrongful conduct is evidence tending to show numerous phone calls from defendant to Annie Jean, and plaintiff's request that defendant not call his wife on the telephone. Even assuming that defendant had no legitimate business reason to call Annie Jean, the calls, in and of themselves, do not rise to the level of maliciousness necessary to satisfy this element of alienation of affections. Plaintiff does not describe the phone calls as harassing, threatening or otherwise improper. Thus, we conclude plaintiff has failed to produce evidence fulfilling all elements of his cause of action. Therefore, his claim of alienation of affections necessarily fails.

Plaintiff's causes of action for criminal conversation and alienation of affections are untenable, as a matter of law, due to plaintiff's failure to forecast sufficient evidence on all elements of his claims. As such, the trial court's grant of summary judgment for defendant on both issues is

Affirmed.

Judges JOHNSON and JOHN concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. 95-317

(Filed 21 May 1996)

1. Insurance § 652 (NCI4th)— timely notice of accident—absence of findings and conclusions—dismissal of claim error

Plaintiff automobile insurer's claim for contribution against defendant trailer insurer was improperly dismissed for lack of prompt notice of the accident absent findings and conclusions as to whether notice of the accident was given as soon as practicable; if it was not, whether plaintiff acted in good faith; and whether defendant was materially prejudiced by the delay.

Am Jur 2d, Automobile Insurance §§ 373 et seq.

Failure to give notice, or other lack of co-operation by insured, as defense to action against compulsory liability insurer by injured member of the public. 31 ALR2d 645.

2. Insurance § 652 (NCI4th)— insured's delay in giving notice of accident—circumstances under which insurer relieved of duty to defend

The rule of *Great American Ins. Co. v. Tate Construction Co.*, 303 N.C. 387, that an unexcused delay by an insured in giving notice of an accident to its insurer does not relieve the insurer of the duty to defend and indemnify unless the delay materially prejudiced the insurer's ability to investigate and defend, though not applicable to disputes between insurance companies over contracts of reinsurance, was nevertheless applicable to this claim for contribution by plaintiff automobile insurer against defendant trailer insurer, since the contract at issue in this case was formed between defendant and its insured, and it was therefore not negotiated at arm's length between two insurance companies as are contracts of reinsurance.

Am Jur 2d, Automobile Insurance §§ 373 et seq.

Failure to give notice, or other lack of co-operation by insured, as defense to action against compulsory liability insurer by injured member of the public. 31 ALR2d 645.

3. Insurance § 692 (NCI4th)— costs of defense and settlement—claim for contribution stated—no claim for subrogation

Plaintiff automobile insurer stated a viable claim for contribution against defendant insurer of the trailer the automobile was towing at the time of an accident for defendant's share of the defense costs (including attorney's fees) incurred and settlement payments made in defense of the driver and the owner of the vehicle involved in the accident, since plaintiff's complaint did not seek relief under a theory of subrogation; plaintiff's complaint and its policy failed to show that plaintiff was entitled to sue as a subrogee of its insureds; an insurer who has a duty to defend may not recover its defense costs, under a theory of equitable subrogation, from another insurer who also has a duty to defend; plaintiff was not a mere volunteer in defending and settling the claims and therefore barred from contribution under that theory; the "no legal action" provision of defendant's policy did not support the

trial court's dismissal of plaintiff's claim, as that provision would be reflective if the trial court found that defendant had a duty to defend and breached that duty; and the three-year statute of limitations of N.C.G.S. § 1-52(1) applied rather than the one-year statute of N.C.G.S. § 1B-3, so that plaintiff's action was not barred by the statute of limitations.

Am Jur 2d, Automobile Insurance §§ 432 et seq.

Appeal by plaintiff from orders entered 14 December 1994 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 December 1995.

Morgan & Reeves, by Robert Morgan and Robert R. Gardner, for plaintiff-appellant.

Law Offices of Douglas F. DeBank, by Douglas F. DeBank and John T. Honeycutt, for defendant-appellee.

LEWIS, Judge.

In this appeal, plaintiff seeks the opportunity to recover contribution from defendant for settlement payments made and defense costs incurred by plaintiff in regard to claims arising out of a traffic accident.

On 28 June 1986, James Elvin Browning, Jr. ("J.E. Browning") was driving a 1978 Ford Bronco owned by Brett Robbins and was pulling a trailer owned by Robert Franklin Caylor. Brett Robbins, Angie Robbins, and Teenia Warner Browning ("T.W. Browning") were passengers. J.E. Browning lost control of the Bronco; all occupants were injured. The Bronco was covered by a Nationwide policy issued to Brett Robbins. The trailer was allegedly covered by a State Farm policy issued to Wanda Seagroves Caylor, the wife of Robert Franklin Caylor. Plaintiff settled the claims of Brett and Angie Robbins. On 8 June 1989, T.W. Browning filed suit against J.E. Browning and Brett Robbins ("tort suit"). Nationwide hired a law firm to defend J.E. Browning and Brett Robbins. On 31 January 1991, Nationwide notified State Farm that the trailer owned by Robert Caylor was involved in the accident. The tort suit came on for trial for the first week of May 1991 and was settled by Nationwide on 2 May 1991. On 11 December 1991, State Farm denied coverage.

Plaintiff filed this action on 3 December 1993 seeking contribution from defendant for settlement payments made and defense costs

incurred in regard to the suit filed by T.W. Browning. On 14 February 1994, defendant answered and moved to dismiss the claim. On 27 September 1994, plaintiff moved for summary judgment. On 14 December 1994, Judge Henry W. Hight, Jr. denied plaintiff's motion for summary judgment and granted defendant's motion to dismiss under N.C.R. Civ. P. 12(b)(6). Plaintiff appeals.

Plaintiff assigns error to the trial court's order dismissing its complaint.

[1] Plaintiff argues that it is entitled to contribution because defendant breached its duty to defend J.E. Browning and Brett Robbins. Defendant asserts that it was relieved of any alleged duty it had to defend by plaintiff's delay in giving notice of the accident.

[2] Relying on *Great American Insurance Company v. Tate Construction Company* ("*Tate*"), 303 N.C. 387, 279 S.E.2d 769 (1981), plaintiff contends that it acted in good faith and that defendant was not prejudiced by the delay in notice. Defendant contends that *Tate* does not apply, and even, if it does, that it has been prejudiced by the delay in notice.

In *Tate*, our Supreme Court, overruling previous caselaw, held that an unexcused delay by an insured in giving notice of an accident to its insurer does not relieve the insurer of the duty to defend and indemnify unless the delay materially prejudices the insurer's ability to investigate and defend. *Tate*, 303 N.C. at 390, 279 S.E.2d at 771. Relying on *Stonewall Insurance Co. v. Fortress Reinsurers Managers*, 83 N.C. App. 263, 350 S.E.2d 131 (1986), *disc. review denied*, 319 N.C. 410, 354 S.E.2d 728 (1987), defendant argues that *Tate* does not apply to this dispute because it is between two insurance companies. We disagree. *Stonewall* held that *Tate* did not apply to disputes between insurance companies over contracts of reinsurance because these contracts are negotiated at arm's length between insurance carriers who stand on equal footing. *Id.* at 269, 354 S.E.2d at 134. The contract at issue here was formed between the defendant and its insured. It was not negotiated at arm's length between two insurance companies as are contracts of reinsurance. We hold that *Tate* applies.

Under *Tate*, we cannot now determine whether defendant was relieved of its alleged duty to defend due to lack of timely notice. When an insurer claims notice was untimely, the insured must prove that notice was given as soon as practicable, and if it was not, that he

or she acted in good faith. *Tate*, 303 at 399, 279 S.E.2d at 776. If good faith is shown, the burden then shifts to the insurer to prove that its ability to investigate and defend was materially prejudiced by the delay. *Id.* The trier of fact must make findings as to whether notice was given as soon as practicable, and if it was not, as to whether the insured, or here plaintiff, acted in good faith. *See id.* If plaintiff did act in good faith, the trier of fact must then determine whether State Farm was materially prejudiced by the delay. *See id.* Dismissal of plaintiff's claim for lack of prompt notice was not proper absent findings and conclusions on these issues. *See id.* at 400, 279 S.E.2d at 777.

Defendant contends that dismissal was proper because neither Brett Robbins nor J.E. Browning are covered by its policy. Plaintiff asserts that both are covered persons under defendant's policy. We have reviewed the complaint filed in the tort suit, the pleadings filed in this suit, and the provisions of defendant's policy. These are sufficient to permit plaintiff to proceed with its proof of coverage. Dismissal of plaintiff's claim, if premised on this coverage issue, was premature.

[3] Defendant further asserts that dismissal by the trial court was proper because plaintiff has not stated a viable claim. Plaintiff contends that it is entitled to recover, either in contribution under its own name or through subrogation rights it has through its insureds, defendant's share of the defense costs (including attorney's fees) incurred and settlement payments made in the defense of J.E. Browning and Brett Robbins. We conclude that plaintiff has not stated a claim for subrogation but has stated a claim for contribution.

We first note that plaintiff, in its complaint, does not seek relief under a theory of subrogation but simply asserts that it is entitled to contribution from defendant. Furthermore, plaintiff's complaint and the policy it issued to Brett Robbins fail to show that plaintiff is entitled to sue as a subrogee of its insureds. An insurer who has a duty to defend its insured may not recover its defense costs, under a theory of equitable subrogation, from another insurer who also has a duty to defend the insured. *See Fireman's Fund Ins. Co. v. North Carolina Farm Bureau Mut. Ins. Co.*, 269 N.C. 358, 362, 152 S.E.2d 513, 517 (1967) (*"Fireman's Fund"*). In contrast, an insurer may recover under subrogation theory if the insurer defends an insured with the good faith belief that he has an interest to protect although the insurer in fact has no duty to defend and no liability. *See Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 220-21, 176 S.E.2d 751,

755 (1970) ("*Jamestown*"). The insurer who sought recovery by subrogation in *Jamestown* had no liability due to a "super escape" clause in its policy. *See Jamestown*, 277 N.C. at 220, 176 S.E.2d at 755; *see also Horace Mann Ins. Co. v. Continental Casualty Co.*, 54 N.C. App. 551, 555-57, 284 S.E.2d 211, 213-14 (1981) (defining a "super escape" clause). Since plaintiff's policy does not have a "super escape" clause, *Jamestown* does not apply.

In its complaint, plaintiff admits that the policy it issued to Brett Robbins provided liability coverage for Robbins and J.E. Browning. Accordingly, plaintiff had a duty to defend. *Cf. Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). Given this duty, as in *Fireman's Fund*, plaintiff may not recover any portion of its defense costs or settlement payments made under subrogation theory.

However, plaintiff may proceed by way of contribution. The policy defendant issued to Wanda Caylor included an "other insurance" clause which provides the following, in pertinent part:

> If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits . . . .

Plaintiff has stated only a claim for contribution to recover defendant's share of defense costs incurred and settlement payments made to settle the tort suit. *See Ames v. Continental Casualty Co.*, 79 N.C. App. 530, 540, 340 S.E.2d 479, 486, *disc. review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986).

Defendant asserts that plaintiff is not entitled to contribution in that plaintiff was a mere volunteer in defending J.E. Browning and Brett Robbins and making the settlement payments. When suing as a subrogee, a mere volunteer may not recover defense costs and settlement payments. *See Jamestown*, 277 N.C. at 221-22, 176 S.E.2d at 755-56. It would be illogical not to apply the same rule to claims for contribution between insurers. However, we need not decide if a mere volunteer may recover in a claim for contribution, because plaintiff was not a mere volunteer. In defending J.E. Browning and Brett Robbins and settling the claims, plaintiff was protecting a "real or supposed right or interest" of its own. *See id.*

Defendant asserts that plaintiff's claim is barred by the "no legal action" provision of its policy. This provision declares:

LEGAL ACTION AGAINST US

No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under Part A, no legal action may be brought against us until:

1. We agree in writing that the **covered person** has an obligation to pay; or

2. The amount of that obligation has been finally determined by judgment after trial.

Provisions of this type generally are enforceable. *E.g. Fleming v. Insurance Co.*, 269 N.C. 558, 153 S.E. 2d 60 (1967). However, an insurer who unjustifiably refuses to defend an insured breaches the insurance contract and waives any provisions that define the insured's duties and obligations. *Ames*, 79 N.C. App. at 538, 340 S.E.2d at 485 (citing *Nixon v. Ins. Co.*, 255 N.C. 106, 120 S.E.2d 430 (1961)). If the trial court finds that defendant had a duty to defend and breached that duty, the "no legal action" provision is ineffective. Accordingly, the "no legal action" provision of defendant's policy does not support the trial court's dismissal of plaintiff's claim at this stage of the proceedings.

Defendant also contends that plaintiff's claim is barred by the applicable statute of limitations. We disagree. An insurer who sues another insurer under a theory of equitable subrogation to recover settlement payments and defense costs is barred from recovering payments made and expenses incurred more than three years before suit was filed. *See Jamestown*, 277 N.C. at 222, 176 S.E.2d at 756; *see also Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 669-70, 384 S.E.2d 36, 40-41 (1989). Although we have held that plaintiff has not stated a claim under subrogation theory, we hold that its claim for contribution is sufficiently analogous to a claim for subrogation under *Jamestown* to warrant application of the three year statute of limitations set out in N.C. Gen. Stat. section 1-52(1). We disagree with defendant's assertion that the one year statute of limitations under N.C. Gen. Stat. section 1B-3 bars plaintiff's claim. G.S. section 1B-3 applies to actions for contribution among joint tortfeasors. *Wise v. Vincent*, 265 N.C. 647, 649, 144 S.E.2d 877, 879 (1965). We hold that it does not apply to claims between insurance companies who both provide coverage to the same tortfeasor(s).

Given the three-year statute of limitations affecting contracts under G.S. section 1-52(1), an insured has three years from the date

each legal expense is incurred to bring suit against the insurer for its refusal to defend the insureds. *See Duke Univ.*, 95 N.C. App. at 672, 384 S.E.2d at 41. In like manner, if defendant breached a duty to defend, plaintiff is not barred from seeking contribution for payments made and expenses incurred on or after the date of breach.

Plaintiff also assigns error to the trial court's denial of its motion for summary judgment. Generally, an order denying summary judgment is interlocutory, does not affect a substantial right, and is not immediately appealable. *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991). This assignment of error is overruled.

The order dismissing plaintiff's claim for contribution against defendant is reversed.

Reversed and remanded.

Judges WYNN and JOHN concur.

WALTER T. HIGGS, PLAINTIFF-EMPLOYEE v. SOUTHEASTERN CLEANING SERVICE, EMPLOYER, AND CNA INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA95-919

(Filed 21 May 1996)

Workers' Compensation § 209 (NCI4th)— tuberculosis not occupational disease—no correlation between janitorial work and disease

The evidence was insufficient to meet the requirements for recovery for an occupational disease under N.C.G.S. § 97-53(13) where plaintiff's evidence failed to show any correlation between his work as a janitor and the development of tuberculosis, with the exception of his exposure to an employee with the disease; plaintiff would have been exposed to the disease of tuberculosis whether he was a janitor or a worker in some other capacity; and plaintiff's treating physician testified that there was nothing about the nature of a janitorial job in a department store which would increase a person's risk of developing tuberculosis.

Am Jur 2d, Workers' Compensation§ 329.

HIGGS v. SOUTHEASTERN CLEANING SERVICE

[122 N.C. App. 456 (1996)]

Appeal by defendants from Opinion and Award entered 26 May 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 April 1996.

Monroe, Wyne and Lennon, P.A., by George W. Lennon, for plaintiff-appellee.

Robinson Maready Lawing & Comerford, L.L.P., by Jane C. Jackson and Jolinda J. Steinbacher, for defendants-appellants.

JOHNSON, Judge.

Plaintiff Walter T. Higgs brought this action to recover benefits for the alleged occupational disease of tuberculosis after defendant Southeastern Cleaning Service (hereinafter "Southeastern") and its workers' compensation insurance carrier, defendant CNA Insurance Company (hereinafter "CNA"), denied plaintiff's claim. Plaintiff claimed that he contracted tuberculosis while employed as a janitor for defendant Southeastern. Defendants, however, denied plaintiff's claim because they were of the opinion that tuberculosis was not characteristic of and peculiar to the nature of plaintiff's job as a janitor.

The evidence tends to show that plaintiff began working for defendant Southeastern in the Hudson-Belk Department Store at Crabtree Valley Mall, in Raleigh, North Carolina in 1991. Plaintiff worked three hours each morning from approximately 6:30 a.m. to 9:30 a.m. spot-mopping floors. The Belk store consisted of three floors of open space, but on occasion plaintiff did have opportunity to interact with other Southeastern employees while working at the Belk store.

At the same time that plaintiff was employed by defendant Southeastern, he was also working eight hours per night for Sun State Cleaning Services, where he was assigned to clean Roche Bio Medical Laboratories. Roche Bio Medical is in the business of testing various body fluids for diseases. While plaintiff was cleaning Roche's facilities, he often saw test tubes containing samples of various body fluids to be tested.

In the summer of 1992, plaintiff and other Southeastern employees who had worked the early morning shift at Belk were told by a Southeastern supervisor that a former employee, with whom plaintiff had worked closely, had tested positive for tuberculosis. Each worker

was urged to be tested for the disease at the county health department. As a result, plaintiff went to the Wake County Health Department in July 1992 to undergo a skin test and chest x-ray. The skin test and chest x-ray were negative for any signs of tuberculosis. During the fall of 1992, however, plaintiff began to have increasing problems with shortness of breath. In late November or early December of 1992, an x-ray disclosed a lesion on plaintiff's left lung. Plaintiff advised his supervisor of this problem. Thereafter, plaintiff was referred to the surgery clinic at Wake Medical Center in Raleigh, where he was treated by Dr. William Sullivan and Dr. Pascal Udekwu. Subsequent surgery on 28 January 1993, during which forty (40) percent of plaintiff's left lung was removed, revealed that plaintiff was suffering from tuberculosis.

Notably, in December 1992, defendant Southeastern's contract with Belk had ended, but plaintiff chose to work for the new Belk cleaning contractor, D & D's Cleaning Services. Thus, defendant was no longer employed with defendant Southeastern after December 1992.

After surgery, plaintiff returned to work for D & D's Cleaning Services at Belk and for Sun State Cleaning Services at Roche Bio Medical on or about 1 May 1993. Thereafter, plaintiff has not missed any time from work due to tuberculosis. Plaintiff reached maximum medical improvement by 24 May 1993, but as late as October 1993, plaintiff was still complaining of palpitations and fatigue.

This matter came on for hearing before Deputy Commissioner Tamara R. Nance on 4 January 1994 in Raleigh. After hearing lay testimony, and reviewing the transcript of Dr. Udekwu's expert testimony, documents stipulated into evidence, and plaintiff's medical records, Deputy Commissioner Nance entered an Opinion and Award on 13 June 1994, denying plaintiff's claim for benefits. Deputy Commissioner Nance concluded that plaintiff failed to meet his burden of proving the elements of an occupational disease claim and that plaintiff's employment as a janitor did not increase his risk of contracting tuberculosis. Plaintiff appealed to the Full Commission.

On 26 May 1995, the majority of the Full Commission filed an Opinion and Award, reversing the deputy commissioner's decision, and awarding plaintiff certain workers' compensation benefits. Commissioner Thomas J. Bolch dissented. Defendants now appeal.

Defendant first argues on appeal that the Industrial Commission erred in failing to apply clear statutory language and follow established case precedents requiring plaintiff to prove the elements of an occupational disease claim. We 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 of fact and whether the Commission's findings support its conclusions of law. *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 the evidence tends to support the findings of the Commission, these findings are binding on appeal, although there may be some evidence to support findings to the contrary. *Mayo v. City of Washington*, 51 N.C. App. 402, 406-07, 276 S.E.2d 747, 750 (1981) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390-91 (1980)). A finding of fact which is a mixed question of fact and law is not binding on appeal. *Taylor v. Cone Mills*, 306 N.C. 314, 320, 293 S.E.2d 189, 193 (1982). In *Taylor*, our Supreme Court held that the determination of whether an illness falls within the statutory definition of an occupational disease is such a mixed question, and hence, is fully reviewable on appeal. *Id.*

The disease of tuberculosis is not listed as an occupational disease in section 97-53 of the North Carolina General Statutes. Plaintiff must, then, meet the requirements of the more general portion of the workers' compensation statute which defines an occupational disease thusly:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53(13) (1991). Our Supreme Court in *Booker v. Medical Center* and *Rutledge v. Tultex Kings Yarn* discussed the requisite elements of an occupational disease claim. They are as follows:

(1) The disease is "characteristic of and peculiar to a particular trade or profession";

(2) The disease is not an ordinary disease to which the general public is equally exposed; and

(3) Exposure to a hazard in employment contributed to, or was a significant causal factor, in the development of the disease.

Booker, 297 N.C. 458, 472-475, 256 S.E.2d 189, 198-200 (1979); *see Rutledge*, 308 N.C. 85, 301 S.E.2d 359 (1983). The plaintiff bears the burden of proving each and every element of the claim under section 97-53(13). *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, *disc. review denied*, 301 N.C. 401, 274 S.E.2d 226 (1980).

In the instant case, taking the evidence in the light most favorable to the plaintiff, the facts tend to show that plaintiff worked alongside a co-worker who was diagnosed with tuberculosis. At all times relevant, plaintiff cannot remember coming into contact with anyone else who has been diagnosed with tuberculosis. Plaintiff was tested for tuberculosis in July 1992 and those tests were negative. In the later part of 1992, however, a lesion was found on plaintiff's left lung, and subsequent surgery revealed that plaintiff had tuberculosis.

A sole expert witness, Dr. Udekwu, who was plaintiff's diagnosing physician, was deposed and testified that tuberculosis can no longer be characterized as an ordinary disease of life. He also noted that it is more likely that a person would contract the disease through close contact—such as a close working or family relationship—than from casual, infrequent contact. While Dr. Udekwu admitted that he did not know for a certainty where plaintiff contracted tuberculosis, he opined that if the co-worker was the only person with tuberculosis that plaintiff had come into close contact with, that exposure would indeed be the "but for" cause of plaintiff's contracting the disease.

As a result of plaintiff's contracting tuberculosis, forty percent (40%) of his left lung was removed during a January 1993 surgery—described by Dr. Udekwu as "a major operation." While plaintiff was noted to have reached maximum medical improvement on 24 May 1993, plaintiff still suffered from palpitations and fatigue as of October 1993.

In the light most favorable to the plaintiff, however, the evidence fails to show that plaintiff suffers from an occupational disease.

North Carolina case law mandates such a conclusion. In *Booker v. Medical Center*, Mr. Booker was employed as a laboratory technician at Duke Medical Center. Each day, he performed various chemical analyses of blood and other bodily fluids, in the process, often spilling blood onto his hands. *Booker*, 297 N.C. at 461, 256 S.E.2d at 192. Some of the samples tested by Mr. Booker were infected with serum of hepatitis—an infectious viral disease which is transmitted when the blood of one infected with the disease enters the blood of another, usually through cuts or scratches on the skin. *Id.* at 462, 256 S.E.2d at 192. After working at the Medical Center for approximately five years, Mr. Booker was diagnosed as suffering from serum hepatitis and subsequently died from the disease. *Id.* Mr. Booker's widow and minor children filed for death benefits under the Workers' Compensation Act. *Booker*, 297 N.C. 458, 256 S.E.2d 189.

Our Supreme Court held that Mr. Booker's death was noncompensable. The Court particularly noted,

> The requirement that the disease be "characteristic of or peculiar to" the occupation of the claimant precludes coverage of diseases contracted merely because the employee was on the job. For example, it is clear that the Law was not intended to extend to an employee in a shoe factory who contracts pneumonia simply by standing next to an infected co-worker. In that example, the employee's exposure to the disease would have occurred regardless of the nature of the occupation in which he was employed. To be within the purview of the Law, the disease must be so distinctively associated with the employee's occupation that there is a direct causal connection between the duties of the employment and the disease contracted.

Id. at 473-74, 256 S.E.2d at 199 (quoting *Russell v. Camden Community Hospital*, 359 A.2d 607, 611-12 (Me. 1976) (addressing a nurse's aid contracting tuberculosis from a patient)). *See Morrow v. Hospital*, 21 N.C. App. 299, 204 S.E.2d 543 (1974); *Smith v. Hospital*, 21 N.C. App. 380, 204 S.E.2d 546 (1974).

In the instant case, plaintiff's evidence fails to show any correlation between his work as a janitor and the development of tuberculosis, with the exception of his exposure to an employee with the disease. Plaintiff would have been exposed to the disease of tuberculosis whether he was a janitor or a worker in some other capacity. In fact, plaintiff's treating physician, Dr. Udekwu, himself testified that there was nothing about the nature of a janitorial job in a department store

which would increase a person's risk of developing tuberculosis. North Carolina case law mandates that the evidence, as presented, is insufficient to meet the requirements for recovery for an occupational disease under section 97-53(13) of the General Statutes. Plaintiff's arguments to the contrary, unfortunately, must fail.

As the evidence in the light most favorable to plaintiff failed to make a showing of the presence of an occupational disease, we need not address defendants' other argument on appeal at this juncture.

In light of the foregoing, the Commission's decision must be reversed.

Reversed.

Judges WYNN and WALKER concur.

JOYCE HOYLE, PLAINTIFF-EMPLOYEE, v. CAROLINA ASSOCIATED MILLS, DEFENDANT-EMPLOYER, AND LIBERTY MUTUAL INSURANCE, DEFENDANT-CARRIER

No. COA95-196

(Filed 21 May 1996)

1. Workers' Compensation § 235 (NCI4th)— payments for temporary total disability—presumption of continuance—insufficiency of record to determine applicability

There was no merit to plaintiff's contention that the Industrial Commission erred by failing to apply the presumption of *Watkins v. Motor Lines*, 279 N.C. 132, that her temporary total disability continued until she returned to work at the same wage earned prior to injury, since the parties stipulated that plaintiff was paid compensation for temporary total disability for a period not specifically identified in the record; and because the record did not reveal whether the payments made by defendants pursuant to approved agreements were payable during disability, the Court could not determine whether the *Watkins* presumption should have been applied.

Am Jur 2d, Workers' Compensation §§ 395-399.

2. Workers' Compensation § 406 (NCI4th)— preexisting condition aggravated by injury—failure to make determination—error

The Industrial Commission erred in failing to make a determination as to whether plaintiff's 9 October 1986 injury aggravated a preexisting condition so that it contributed in some reasonable degree to her current disability.

Am Jur 2d, Workers' Compensation § 615.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 15 December 1994. Heard in the Court of Appeals 15 November 1995.

Killian and Reilly, by Mark L. Killian, for plaintiff-appellant.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendants-appellees.

LEWIS, Judge.

On 9 October 1986, plaintiff injured her back and right leg while at work. The parties have stipulated that this was an injury by accident arising out and in the course of her employment. Pursuant to a Form 21 agreement, defendants accepted the accident as compensable and paid compensation for temporary total disability for a period of four months. Plaintiff filed a Form 33 Request for Hearing seeking payment for permanent partial disability or permanent total disability. On 17 September 1991, a hearing was held before Deputy Commissioner Charles Markham. In opinion filed 23 March 1993, Deputy Commissioner Markham denied plaintiff's claim. She appealed to the Full Commission which denied her claim in opinion filed 15 December 1994. Plaintiff appeals.

In an appeal from the Industrial Commission our review is limited to a determination of whether the findings of the Commission are supported by " 'any competent evidence,' " and " 'whether the Commission's findings of fact justify its legal conclusions and decision.' " *Roberts v. A.B.R. Assocs., Inc.*, 101 N.C. App. 135, 138, 398 S.E.2d 917, 918 (1990) (quoting *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 120-21, 334 S.E.2d 392, 394 (1985)). The Commission's findings of fact are conclusive on appeal if supported by competent evidence; however, its legal conclusions are reviewable on appeal. *Roberts*, 101 N.C. App. at 141, 398 S.E.2d at 920.

[1] In her first assignment of error, plaintiff contends that the Commission erred by failing to apply the presumption, in *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E.2d 588 (1971), that her temporary total disability continues until she returns to work at the same wage earned prior to the injury.

N.C. Gen. Stat. section 97-2(9) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." G.S. § 97-2(9) (Cum. Supp. 1995). In order to find a worker disabled under the Workers' Compensation Act, the Commission must find: (1) that plaintiff was incapable after her injury of earning the same wages she earned before her injury in the same employment, (2) that she was incapable after her injury of earning the same wages she earned before her injury in any other employment, and (3) that her incapacity to earn was caused by her injury. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Under the *Watkins* presumption, if the Commission makes an award payable during disability, it is presumed that the disability continues until the employee returns to work and that the disability ends when the employee returns to work at the same wages he was receiving at the time of the injury. *Watkins*, 279 N.C. at 137, 181 S.E.2d at 592. The *Watkins* presumption only applies if the Commission approves an award payable during disability. *See Nash v. Conrad Industries*, 62 N.C. App. 612, 619, 303 S.E.2d 373, 377, *aff'd per curiam*, 309 N.C. 629, 308 S.E.2d 334 (1983) (citing *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E.2d 109 (1951)). For example, an award of payments that continue "for necessary weeks" is payable during disability. *See Nash*, 62 N.C. App. at 619, 303 S.E.2d at 377.

The *Watkins* presumption has been applied when an employee requests additional temporary total disability payments after an employer has ceased making payments it had agreed to pay during disability. *E.g. Radica v. Carolina Mills*, 113 N.C. App. 440, 439 S.E.2d 185 (1994); *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 374 S.E.2d 483 (1988). Here, plaintiff is not requesting additional compensation for temporary total disability, but is seeking compensation for permanent disability. Furthermore, the stipulation was for "temporary total disability," not permanent. She cites no cases and we have found none that apply the *Watkins* presumption in this context.

However, we need not decide whether the presumption applies here because the record does not show that the payments made by defendants were payable during disability. The parties stipulated at the hearing that, on 9 October 1986, plaintiff sustained an injury by accident arising out of and in the course of her employment and that this accident resulted in injuries to her back and right leg. They also stipulated that, pursuant to a Form 21 agreement, she was paid compensation "for temporary total disability *for a period not specifically identified in the record*" (emphasis added). In their response to plaintiff's request for hearing, defendants agreed that they had admitted compensability in a Form 21 agreement approved on 2 April 1987 and in a Form 26 agreement approved on 19 March 1987. Neither of these forms is in the record. The record does not reveal whether the payments made by defendants pursuant to these approved agreements were payable during disability. Thus, we cannot determine whether the *Watkins* presumption should have been applied. This assignment of error is overruled.

[2] In her second assignment of error, plaintiff asserts that the Commission erred by determining that she had not established by expert testimony the causal connection between her work-related injury and her inability to work.

Plaintiff first contends that defendants have admitted that her permanent disability was caused by her 9 October 1986 accident. The parties have stipulated that, on 9 October 1986, plaintiff suffered an injury by accident arising out of and in the course of her employment. They have also stipulated, pursuant to a Form 21 agreement, that plaintiff was paid compensation for temporary total disability "for a period not specifically identified in the record." This stipulation alone does not establish that defendants have admitted liability for plaintiff's alleged permanent disability. Neither the Form 21 stipulated to by the parties nor the Form 26 agreement referenced on defendants' response to plaintiff's request for hearing are in the record. We reject plaintiff's contention that the record shows that defendants have admitted liability for her alleged permanent disability.

In further support of her second assignment of error, plaintiff asserts that she established a causal connection between her injury and her disability because the stipulated medical records show she had a preexisting condition that was aggravated by her injury. The work-related injury need not be the sole cause of the problems to render an injury compensable. *Kendrick v. City of Greensboro*,

80 N.C. App. 183, 186, 341 S.E.2d 122, 123, *disc. review denied*, 317 N.C. 335, 346 S.E.2d 500 (1986). If the work-related accident "contributed in 'some reasonable degree' " to plaintiff's disability, she is entitled to compensation. *Id.* at 187, 341 S.E.2d at 124. " 'When a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.' " *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 196, 352 S.E.2d 690, 694 (1987) (quoting *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981)).

It is not clear that the Commission applied this aggravation rule. The Commission's opinion began:

> The greater weight of the evidence—and particularly the objective medical tests results and the interpretations by the several physicians who saw her—support the conclusion that her pain cannot be found to be related to the compensable accident beyond the four month period that . . . compensation was paid. That evidence suggests that the accident temporarily exacerbated her symptoms, but that any physical cause of her pain thereafter is more likely to be due to the scarring that developed from the non-work related injury.

In support of its conclusion that plaintiff had not proven a causal connection between her disability and her injury, the Commission made the following statements:

> The medical evidence is inconclusive as to the causal relation between the accident of October 9, 1986 and the back problems which plaintiff continues to suffer and the permanent partial back disability for which she has received ratings ranging from 10 to 15 percent, or the total disability which she claims. *At least two of the physicians who examined or treated plaintiff's [sic] indicate there is a causal connection between her continuing and current problems and the surgery performed in 1986 by Dr. Sims, which was not occasioned by an injury at work.*

(Emphasis added). We are particularly troubled by the last (italicized) sentence. This sentence suggests that the Commission concluded that plaintiff could not recover if the evidence showed a causal connection between her current disability and a prior condition.

The existence of competent record evidence that tends to show aggravation also suggests that the Commission did not apply the aggravation rule. None of the physicians who examined plaintiff concluded that there was not a causal relation between her injury and her continuing back problems. Although the Commission found that Dr. Andrea Stutesman "believed that plaintiff's problems were a result of the scar from Dr. Sims' previous operation *and not any accident of October 9, 1986*," the last clause of this finding (italicized portion) is not supported by the record evidence. In contrast, two of the doctors, concluded that there was a causal relationship between her 9 October 1986 injury and her continuing back problems. Dr. Donald B. Glugover first reported that he was uncertain as to how much of her disability was due to plaintiff's surgery and how much of her disability was due to her injury. However, after testing plaintiff for psychological problems, Glugover opined that half of her disability could be attributed to the surgery and half to the 9 October 1986 injury. In addition, Dr. Joseph Nicastro opined that plaintiff had aggravated a pre-existing condition.

It is for the Commission, not for this Court, to weigh this evidence and to assess its credibility. *See Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). However, the Commission must do so by correctly applying the law. When "facts are found or the Commission fails to find facts under a misapprehension of the law, a remand may be necessary so that the evidence may be considered in its true legal light." *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 158, 314 S.E.2d 833, 838 (1984). We reverse and remand for a determination of whether plaintiff's 9 October 1986 injury aggravated a pre-existing condition so that it contributed in some reasonable degree to her current disability. If the Commission concludes that plaintiff's injury did so contribute to her disability, it should then determine whether she is permanently disabled, either partially or totally, and award whatever compensation is appropriate. *See Fleming v. K-Mart Corp.*, 312 N.C. 538, 545-46, 324 S.E.2d 214, 218 (1985) (stating that an employee is totally disabled if incapable of earning any wages and partially disabled if capable of earning some wages that are less than what she earned at the time of the injury).

Reversed and remanded.

Judges WYNN and JOHN concur.

IN RE JOSEPH CHILDREN

[122 N.C. App. 468 (1996)]

IN RE THE JOSEPH CHILDREN

No. COA95-948

(Filed 21 May 1996)

1. Parent and Child § 115 (NCI4th)— termination of parental rights—service by publication—no specific compliance with statute—respondent not prejudiced

Even though petitioner's service by publication in a proceeding to terminate parental rights did not specifically comply with N.C.G.S. § 7A-289.27(b) in that it failed to state that the "parents may contact the clerk immediately to request counsel" and that the proceeding is a "new case" for which a new appointment of counsel will be required, such error was not prejudicial to respondent since the notice supplied information that, if seen by respondent, would inform her of the petition filed against her, her need to answer the service of process, the availability of counsel if she was indigent, and the phone number of the Deputy Clerk of Juvenile Court if respondent needed further information.

Am Jur 2d, Process § 242.

2. Attorneys at Law § 17 (NCI4th)— evidence presented by law student—respondent not prejudiced

Respondent parent failed to show that the presentation of evidence by a law student working with the guardian ad litem program who had not been properly certified to practice law pursuant to the State Bar Rules, instead of by the student's supervising attorney who was present at the hearing, rose to the level of prejudicial error.

Am Jur 2d, Attorneys at Law § 115.

Activities of law clerks as illegal practice of law. 13 ALR3d 1137.

Appeal by respondent from order entered 27 April 1995 in Durham County District Court by Judge Carolyn D. Johnson. Heard in the Court of Appeals 23 April 1996.

Assistant County Attorney Wendy C. Sotolongo, for appellee Durham County Department of Social Services.

Browne, Flebotte, Wilson & Horn, by Martin J. Horn, for respondent-appellant.

GREENE, Judge.

Reggie McCuller (respondent) appeals an Order Terminating Parental Rights (TPR) as the mother of two minor children, Kalonji Joseph and Ebony Joseph.

The children are in the custody of the Durham County Department of Social Services (DSS). Steve Moore (Moore) represented the children's interests as Guardian ad Litem since 5 October 1993 until the date of the TPR hearing. On 3 November 1993 the children were adjudicated to be dependant and neglected pursuant to N.C. Gen. Stat. §§ 7A-517(13) and (21) (1995). At the time of respondent's TPR hearing, respondent had not begun a substance abuse program and had not secured adequate housing or stable employment, as required by the adjudication order. Between the adjudication hearing and the TPR hearing respondent made only two of the scheduled visits with her children, the most recent being 5 January 1994.

Moore and Janice Paul (Paul), the attorney for the Guardian ad Litem program, brought a petition to terminate respondent's parental rights. The custody order was not attached to the petition as required by N.C. Gen. Stat. § 7A-289.25(5) (1995), nor were there statements within the petition explaining petitioner's efforts to ascertain the whereabouts of respondent, required by section 7A-289.25(3). The petition did include respondent's last known address and current residence, although no street address was given for her current address.

A summons was issued pursuant to N.C. Gen. Stat. § 7A-289.27 (1995), naming respondent as the "respondent." The summons gives notice that the petition has been filed to terminate parental rights and failure to answer within thirty days will result in parental rights being terminated. The summons also states that:

> Parents are entitled to have counsel appointed by the court if they cannot afford one, provided that they request such counsel at or before the time of the hearing . . . . Parents may contact the Clerk of Superior Court immediately to request counsel. This is a new case and any attorney appointed previously will not represent the parent in this proceeding unless ordered by the court.

Respondent could not be located, however, to obtain service of process by hand or mail, so service of process was obtained by publication pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j1) (1990). The publication notices, one for each child, ran for three successive weeks in the *Durham Herald Sun* newspaper and stated:

STATE OF NORTH CAROLINA, COUNTY OF DURHAM, FILE NO. 93J211; IN THE GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION.

In the matter of: Kalonji Joseph a minor child.

NOTICE OF SERVICE OF PROCESS RE: TERMINATION OF PARENTAL RIGHTS TO: Reggie McCuller, Bernard Anthony Thompson and unknown father,

PLEASE TAKE NOTICE that a petition has been filed by the Durham County Department of Social Services seeking termination of any parental rights that you have to the minors named in the petition. You are required to answer the petition within forty (40) days of the first date of publication (written below) and your failure to do so will result in an order of termination entered against you. The children involved:

Name: Kalonji Attiba Joseph

Date of Birth: [sic] Brooklyn County, NY

County of residence: Durham County, NC

You are entitled to be represented by counsel. If you are indigent, counsel will be appointed for you.

The date, time and place of hearing of the petition will be mailed to you on your filing of an answer if your whereabouts are then known.

You may call the Deputy Clerk of the Juvenile Court of Durham County at (919) 560-6824 for further information.

This the 20th day of February, 1995.

WENDY C. SOTOLONGO
ASSISTANT COUNTY ATTORNEY
P.O. BOX 3508
DURHAM, NC 27702
(919) 560-0717

Paul filed affidavits on 12 April 1995 stating the efforts made to ascertain respondent's whereabouts before serving process by publication.

At the termination hearing, David Swanson (Swanson), a third year law student, presented evidence before the court on behalf of the Guardian ad Litem program. No written consents from the

Guardian ad Litem program or the supervising attorney, Paul, were filed with the court or made a part of the record in this case, as required by Chapter 1, Subchapter C, § .0206(g) of the North Carolina State Bar Rules, although Paul did supervise Swanson at the hearing.

Based on its findings of fact the trial court concluded it was in the best interests of the minor children that the parental rights of respondent be terminated.

The issues are whether (I) the service of process by publication must comply with both N.C. Gen. Stat. § 1A-1, Rule 4(j1) and N.C. Gen. Stat. § 7A-289.27(b); and (II) a third year law student's participation in the trial requires reversal if that student has not been properly certified to practice law.

I

[1] Respondent argues that she was "denied assistance of counsel by petitioner's failure to follow the mandatory guidelines of the statute" which requires the summons to state that the "parents may contact the clerk immediately to request counsel," N.C.G.S. § 7A-289.27(b)(3), and that the TPR hearing is a "new case" for which a new attorney may be necessary to be appointed. N.C.G.S. § 7A-289.27(b)(4). In response, petitioner argues that the requirements of section 7A-289.27(b) only govern the summons to be issued by the court upon the filing of a TPR petition and do not govern service of process by publication.

Service of process by publication is governed by N.C. Gen. Stat. § 1A-1, Rule 4(j1). When the whereabouts of a respondent parent is unknown, "the petitioner in a parental rights termination case must proceed under G.S. 7A-289.27 and must comply with Rule 4(j1) as regards service by publication." *In re Clark*, 76 N.C. App. 83, 86, 332 S.E.2d 196, 199, *appeal dismissed*, 314 N.C. 665, 335 S.E.2d 322 (1985). In other words, compliance with both Rule 4(j1) and section 7A-289.27(b) is required.

In this case, the petitioner's service by publication complied in every respect with Rule 4(j1). It did not specifically comply with section 7A-289.27(b) and this constitutes error. We do not, however, believe the discrepancy is material in this case so as to result in any prejudice to the respondent. *See Highway Comm'n v. Nuckles*, 271 N.C. 1, 22, 155 S.E.2d 772, 789 (1967) (new trial will only be granted for errors which were prejudicial). The notice by publication went beyond the Rule 4(j1) requirements and stated that respondent is

"entitled to be represented by counsel" and if she is indigent, "counsel will be appointed for you." It also stated that respondent may "call the Deputy Clerk of the Juvenile Court of Durham County at (919) 560-6824 for further information." The notice, therefore, supplied information that if seen by respondent would inform her of the petition filed against her, her need to answer the service of process, the availability of counsel if she was indigent, as well as the phone number of the Deputy Clerk of Juvenile Court if respondent needed further information. From these facts, respondent was supplied with the necessary information from which she could have been represented at the TPR hearing by counsel. *See In re Nolen*, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222 (1995) (even if respondent shows a statute was violated, respondent must also show any error was prejudicial).

II

[2] Respondent also assigns error to a third year law student presenting evidence at the TPR hearing on behalf of the Guardian ad Litem program when the law student had not been properly certified to practice law pursuant to Chapter 1, Subchapter C, § .0206 of the North Carolina State Bar Rules. Respondent argues that because the law student was not properly certified, any evidence presented by him was not properly before the court, and therefore, there is no evidence to support the TPR order.

Section .0206 allows a student to appear in court on behalf of a client if the student has received written consent from both the client and the supervising attorney. Rules and Regulations of the North Carolina State Bar, Subch. C, § .0206(g) (1996). That consent must be "filed with the court and made a part of the record in the case." *Id.* The petitioner concedes that "to the extent that written consents from the Durham Guardian *ad litem* program and its attorney, Janice Paul, were not made a part of the record in this case" there was a violation of the State Bar Rules. Only upon a showing of prejudice by respondent, however, will such a violation mandate a reversal. *Pope v. Jacobs*, 51 N.C. App. 374, 376, 276 S.E.2d 487, 489 (1981) (although attorney from Michigan did not comply with statute governing appearance by out-of-state attorneys, new trial not required where no prejudice shown by plaintiff); *see also Jones v. State*, 902 P.2d 686, 695 (Wyo. 1995) (failure to obtain client's written consent before law student wrote client's appellate brief was a procedural technicality that does not constitute ineffective assistance of counsel); *People v. Perez*, 594 P.2d 1, 7 (Cal. 1979) (where law student was supervised

and represented criminal defendant, court held that every violation of a rule respecting the practice of law does not require reversal of a judgment in the case in which the violation occurred). Respondent has failed to show that the presentation of evidence by a law student, instead of by the student's supervising attorney, who was present at the hearing, rose to prejudicial error and this assignment of error is overruled.

We have reviewed respondent's remaining assignments of error and determined that even where there was error, none of the assignments rise to the level of prejudicial error. *See In re Norris*, 65 N.C. App. 269, 274, 310 S.E.2d 25, 29 (1983) (technical errors will not authorize a new trial unless it appears that the respondent was prejudiced, and the burden is on the respondent to show prejudice), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984).

Affirmed.

Judges JOHN and MARTIN, Mark D., concur.

WILLIE M. BROWN, PLAINTIFF-EMPLOYEE, v. PUBLIC WORKS COMMISSION, DEFENDANT-EMPLOYER, SELF-INSURED, DEFENDANT-CARRIER

No. COA95-751

(Filed 21 May 1996)

1. Workers' Compensation § 258 (NCI4th)— term of partial disability—interpretation of statute

The plain meaning of N.C.G.S. § 97-30 is that the term of partial disability, not the term of total and partial disability *combined*, is to last no longer than 300 weeks less the period of total disability.

Am Jur 2d, Workers' Compensation § 381.

2. Workers' Compensation § 478 (NCI4th)— costs of appeal—recovery by employee

Even though plaintiff employee had appealed decisions within the Industrial Commission, plaintiff is entitled to recover his costs, including attorney's fees, incurred in this appeal by

defendant employer of the order of the Full Commission where the appellate court affirmed the directive that defendant pay additional benefits to plaintiff. Furthermore, plaintiff was not required to show that defendant's appeal was "without reasonable ground" in order to recover such costs.

Am Jur 2d, Workers' Compensation §§ 722, 725.

Appeal by defendant from order entered 3 May 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 March 1996.

Patterson, Harkavy & Lawrence, by Donnell Van Noppen III, for plaintiff-appellee.

Reid, Lewis, Deese, Nance & Person, by Renny W. Deese, for defendant-appellants.

JOHN, Judge.

[1] Defendant appeals an order of the North Carolina Industrial Commission (the Commission) awarding plaintiff 48 2/7 additional weeks of partial disability compensation pursuant to N.C.G.S. § 97-30 (1991). We affirm the Commission's order.

Pertinent facts and procedural history are as follows: Plaintiff was injured 1 April 1988 by accident in the course of his employment with defendant. He thereafter received temporary total disability benefits for a period of 48 2/7 weeks. Although plaintiff returned to work, his wages were reduced 7 February 1990 from their pre-injury level in consequence of his diminished physical capacity. Plaintiff subsequently received partial disability benefits pursuant to G.S. § 97-30, which provides in pertinent part:

> Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and *in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury. In case the partial disability*

begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability.

(emphasis added).

The period of 300 weeks from the date of plaintiff's injury ran until 6 January 1994. However, defendant ceased paying partial disability benefits to plaintiff 25 February 1993, 48 2/7 weeks prior to 6 January 1994. Defendant's proffered rationale was that G.S. § 97-30 calls for a reduction in the 300 week maximum benefit period by the number of weeks a claimant has received temporary total benefits. According to defendant, therefore, plaintiff was entitled to receive benefits (either temporary total *or* partial) no longer than 251 5/7 weeks—the maximum statutory period of 300 weeks minus the 48 2/7 weeks of temporary total benefits he received.

Upon request of plaintiff to resolve the parties' dispute concerning the proper term of his benefit period, the Full Commission ultimately ordered defendant to pay plaintiff 48 2/7 additional weeks of compensation. In its order, filed 3 May 1995, the Commission observed:

> Defendant has misread the second sentence of [G.S. § 97-30]. . . . [E]ven if the "incapacity for work resulting from the injury" was initially total rather than partial, claimant would receive periodic benefits of either kind for no more than 300 weeks following the injury. The "period of total disability" is "deducted" by counting that period as a part of "the maximum period herein allowed for partial disability."

Defendant filed notice of appeal to this Court 5 June 1995.

Defendant reiterates to this Court the interpretation of the statute at issue which it advanced before the Commission. Defendant also notes that no reported appellate decision has addressed the meaning of the directive in G.S. § 97-30 that the period of total disability benefits "shall be deducted from the maximum period herein allowed for partial disability." Plaintiff responds that the section is unambiguous and thus appellate analysis has been unnecessary:

> Because periods of partial disability often follow periods of total disability, the General Assembly needed to clarify whether the 300-week maximum partial disability period *includes* the time during which temporary total disability is paid or is in *addition* to

> the time in which temporary total disability is paid. The language [in the second sentence of the statute] makes clear that temporary total disability is *included* in the 300-week period.

We agree.

The plain meaning of the statute is that the term of partial disability, not the term of total and partial disability *combined*, is to last no longer than 300 weeks less the period of total disability. Indeed, the statute pointedly and specifically states that the period of total disability "shall be deducted from the maximum period herein allowed for *partial* disability." (emphasis added). Defendant's interpretation could be sustained only if the statute mandated that the period of total disability be "deducted" from the period permitted for *any* disability rather than from the maximum period allotted for *partial* disability.

Were we to adopt defendant's approach, moreover, an employee who has suffered serious injury and received total disability would be eligible for *less* partial disability when healed than an individual with a less serious injury who became only partially disabled, rather than totally, upon sustaining the injury. For example, under defendant's analysis, an employee who suffers a devastating injury and is totally disabled for 150 weeks would be entitled to no subsequent wage-loss benefits despite a probable drastic reduction in earning power, since the 150 week period of temporary total disability benefits would be "deducted" from the 300 week maximum period to yield only 150 weeks—which had already been paid as temporary total disability. On the other hand, an employee with a less severe injury who experiences some wage loss over the entire 300 weeks would be permitted to receive 300 weeks of benefits without "deduction."

Such illogical results as the foregoing could not have been intended by our General Assembly. *See Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) (Courts construing statutes are to adopt an "interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results."). Accordingly, we reject defendant's first assignment of error and likewise determine its second, couched in similar vein, to be without merit.

[2] In addition to responding to defendant's appeal, plaintiff has also requested pursuant to N.C.G.S. § 97-88 (1991) that defendant be

ordered to pay plaintiff's expenses incurred in connection with the instant appeal. Defendant retorts that plaintiff has appealed all decisions entered below save the Order for the Full Commission at issue herein on defendant's appeal. Defendant further argues that plaintiff has nowhere suggested defendant's appeal is "without reasonable ground," citing N.C.G.S. § 97-88.1 (1991).

Regarding defendant's first argument, we note this Court has previously held that attorney's fees may be awarded an injured employee by the Commission or a reviewing court

> [u]nder section 97-88, . . . if (1) the insurer has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee.

Estes v. N.C. State University, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994). Appeals by plaintiff within the Commission notwithstanding, defendant has appealed the Full Commission's order to this Court, which has affirmed the directive that defendant pay additional benefits to plaintiff. The statutory requirements thus have been met. Moreover, the proviso that "reasonable ground" be found lacking applies to fees sought under G.S. § 97-88.1 at the original hearing before the Commission. G.S. § 97-88, governing "[e]xpenses of appeals brought by insurers," contains no similar "without reasonable ground" language. Defendant's second argument thus is inapposite.

In our discretion, *see Estes*, 117 N.C. App. at 128, 449 S.E.2d at 764, we grant plaintiff's request, and remand this matter to the Commission for determination of the amount owed plaintiff for the costs of this appeal, including a reasonable attorney's fee.

Affirmed and remanded.

Judges EAGLES and WALKER concur.

CITY OF FAYETTEVILLE v. M. M. FOWLER, INC.

No. COA95-785

(Filed 21 May 1996)

1. **Eminent Domain § 123 (NCI4th)— lost rents—evidence showing diminished value of land—admissibility**

The trial court in a condemnation action did not err in denying plaintiff's motion *in limine* to exclude the landowner's testimony as to loss of profits by his gas station lessee and loss of rent since defendant's testimony did not represent an attempt to recover lost rents as an element of damages from the taking, but instead was an attempt to show that the value of the remaining property would be diminished because of the impact of the taking on the rental income generated by the property.

Am Jur 2d, Eminent Domain §§ 152, 266-268, 406, 409.

2. **Eminent Domain § 259 (NCI4th)— circuity of travel—instruction not required**

The evidence did not entitle plaintiff condemnor to its requested instruction that defendant landowner was not entitled to compensation for circuity of travel because of plaintiff's exercise of its right to restrict the flow of traffic on the public street which abutted defendant's property.

Am Jur 2d, Eminent Domain §§ 205, 242, 328.

Appeal by plaintiff from judgment entered 23 May 1995 by Judge William A. Gore, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 16 April 1996.

Robert C. Cogswell, Jr. for plaintiff-appellant.

Hutson Hughes & Powell, P.A., by James H. Hughes, for defendant-appellee.

WALKER, Judge.

Plaintiff instituted this action as a public condemnor pursuant to Chapter 40A of the North Carolina General Statutes seeking to acquire portions of property owned by defendant and leased to a third party for operation of a gasoline service station. The proposed taking was comprised of a 287-square-foot corner acquisition, a temporary

construction and permanent utility easement, and the closing of one of four driveways providing access to the business located on the property. A trial was held on the issue of the amount of compensation due to defendant as a result of the taking, and the jury awarded defendant the sum of $32,500 as just compensation for the taking.

[1] Prior to trial, plaintiff moved *in limine* to exclude from evidence the following matters relative to the issue of just compensation: (1) loss of profits by defendant's lessee; (2) loss of rent by defendant; and (3) loss of business, customers, rents or profits due to circuity of travel as a result of plaintiff's plan to restrict the traffic lane abutting defendant's property to a right-turn-only lane. Following a *voir dire* hearing, the trial court denied plaintiff's motion. Thereafter, Mr. Marvin L. Barnes, defendant's president, testified over plaintiff's objection that the closing of the driveway in connection with the taking would affect business and would render the property less valuable. Plaintiff on appeal assigns as error the denial of the motion *in limine* and the allowance of Mr. Barnes' testimony.

In *Kirkman v. Highway Commission*, 257 N.C. 428, 126 S.E.2d 107 (1962), our Supreme Court addressed the issue of what damages may be recovered when property is condemned:

> Loss of profits or injury to a growing business conducted on property or connected therewith are not elements of recoverable damages in an award for the taking under the power of eminent domain. However, *when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that fact is a proper item to be considered in determining whether the taking has diminished the value of the land itself. If it is found to do so, the diminution is a proper item for inclusion in the award.* The condemner is not required to pay compensation for a loss of business but only for the diminished value of land which results from the taking. When rental property is condemned the owner may not recover for lost rents, *but rental value of property is competent upon the question of the fair market value of the property at the time of the taking.*

Id. at 432, 126 S.E.2d at 110 (citations omitted) (emphasis added).

At trial, Mr. Barnes was allowed to testify on direct examination that the amount of rent he charges for his property has two components: a fixed building rent and a percentage rent based on the volume of gasoline sold. Mr. Barnes estimated that, as a result of closing

one of the four driveways, gasoline sales would be reduced by twenty-five percent. The following exchange then took place:

> Q. Does the fact that this property is now going to have as few as 25 percent fewer customers for the sales of gasoline, does that have an impact on the amount of rental that you can charge for this property?
>
> . . .
>
> A. Yes, it will, because less people will come in and purchase gas, the fuel rent, the variable fuel rent will be less, and because there will be less customers coming into the location, I'll be able to—have to charge less rent for the building. *So that impact will make the property worth less after the taking.*

(Emphasis added.)

We disagree with plaintiff's contention that Mr. Barnes' testimony represented an attempt by defendant to recover lost rents as an element of damages from the taking. Rather, the thrust of Mr. Barnes' testimony was that the value of the remaining property would be diminished because of the impact of the taking on the rental income generated by the property. This testimony was entirely permissible under *Kirkman*.

Moreover, immediately prior to Mr. Barnes' testimony above, the trial court gave a limiting instruction, quoting the rule in *Kirkman* and adding the following:

> So I want you to understand that these things about which the owner is testifying at this point may be competent on the question of fair market value, but only as they impact on that question may you consider these matters. Lowered rents or lost rents or lost business or less business in and of themselves are not elements of damages and I instruct you that you are not to consider those.

We are of the opinion that this instruction adequately addressed plaintiff's concerns about Mr. Barnes' testimony. Plaintiff's first assignment of error is overruled.

[2] Plaintiff also assigns as error the court's denial of its requested jury instruction regarding circuity of travel. It is well established that a property owner is not entitled to compensation for circuity of travel when the government exercises its right to restrict or alter the flow of traffic on public roadways which abut the property. *See, e.g., Moses v. Highway Commission*, 261 N.C. 316, 320, 134 S.E.2d 664, 667, *cert.*

denied, 379 U.S. 930, 13 L.Ed.2d 342 (1964); *Barnes v. Highway Commission,* 257 N.C. 507, 516-17, 126 S.E.2d 732, 739 (1962). Plaintiff here argues that its requested instruction on circuity of travel should have been given in its entirety because "Mr. Barnes was allowed to testify that the closing of one of the lanes would have a devastating impact upon the operation of the service station."

Plaintiff's argument is misplaced. A review of the transcript fails to reveal any testimony by Mr. Barnes regarding the effect of plaintiff's decision to change the lane directly beside the station from a straight lane to a right-turn-only lane. What he did testify to was that *the closing of the driveway* would have "a devastating impact" on the property and would be "a dramatic negative to the value of this property." We find nothing in Mr. Barnes' testimony to support plaintiff's assertion that defendant was claiming damages for circuity of travel due to restricted access to its property. Rather, taken in context, it is apparent that Mr. Barnes' testimony was offered only to support defendant's position that the elimination of the driveway would diminish the market value of the property.

Thus, we agree with defendant that Mr. Barnes' testimony did not entitle plaintiff to an instruction on circuity of travel. Nonetheless, the court in its discretion chose to give a portion of the requested instruction, instructing the jury that "[a]n abutting landowner is not entitled to compensation because of circuity of travel to and from his property." We cannot conclude that the trial court erred by failing to give the remainder of the requested instruction, and this assignment is overruled.

Following oral argument, plaintiff submitted a memorandum of additional authority citing the case of *City of Winston-Salem v. Robertson,* 81 N.C. App. 673, 344 S.E.2d 838 (1986). We have reviewed *Robertson* and find it inapplicable to the instant case. In *Robertson,* the issue was whether the city's closure of one of defendant's driveways was a compensable taking or a legitimate exercise of the city's police power which did not require compensation. *Id.* at 674, 344 S.E.2d at 838-39. In contrast, the instant case was tried solely on the issue of what represented just compensation for plaintiff's taking of defendant's property.

No error.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD McCOY

No. COA95-918

(Filed 21 May 1996)

1. Homicide § 361 (NCI4th)— manslaughter premised on acting in concert—lesser offense of second-degree murder

There was no merit to defendant's contention that voluntary manslaughter cannot be a lesser included offense of second-degree murder when premised on the doctrine of acting in concert.

Am Jur 2d, Homicide § 216.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter. 19 ALR4th 861.

2. Homicide §§ 319, 329 (NCI4th)— voluntary manslaughter—involuntary manslaughter—sufficiency of evidence

The evidence was sufficient to be submitted to the jury on the charges of voluntary manslaughter and involuntary manslaughter where it tended to show that defendant and his accomplice drove to the victim's house armed with deadly weapons which defendant supplied; upon arrival at the house, defendant parked his car down the street, hid from view, and instructed the accomplice to lure the victim out of the house; when the victim exited the house both defendant and his accomplice fired on him as he attempted to dodge the gunfire by running into the bushes; defendant intentionally fired his weapon into the bushes; and defendant and his accomplice left the scene and went to another person's house where defendant admitted that they had killed the victim.

Am Jur 2d, Homicide § 425.

Appeal by defendant from judgment entered 23 March 1995 by Judge Chase B. Saunders in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 April 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General John R. Corne and Associate Attorney General Bruce S. Ambrose, for the State.

Richard H. Tomberlin for defendant-appellant.

MARTIN, Mark D., Judge.

Defendant Charles Edward McCoy appeals from conviction on one count of voluntary manslaughter.

At trial, the State's evidence tended to show the following: In the early morning hours of 22 June 1992, Arthur Springs (Springs), the deceased, allegedly assaulted Ginette McCoy (McCoy), defendant's sister. Later that same morning, after learning of the incident, defendant and a companion named Elbow drove to Springs' house. Defendant armed himself with a .45 caliber automatic handgun and armed Elbow with a .357 caliber handgun. Upon arrival at Springs' residence, defendant parked the car down the street; hid behind a bush; and instructed Elbow to "go to the door to get [Springs] outside."

Shortly after 2:45 a.m., Elbow knocked on the front door of the house. Springs opened the door and stepped onto the front porch. As Elbow was talking to Springs, defendant emerged from behind the bush. Defendant watched Elbow draw the .357 caliber handgun and fire three to four shots at Springs. Springs ran toward some bushes near the side of the house while Elbow continued to shoot in Springs' direction.

Defendant saw Springs near the bushes and fired two shots into the bushes where Springs had fled. Defendant alleges he shot at the base of the bushes. Patricia McClelland (McClelland) testified defendant told her he shot at the bushes. After firing two additional shots into the air, defendant's gun jammed and he stopped shooting. Springs ran to the front of the house with his hands over his bloody chest. Springs looked at defendant and stated, "Coon, why did you do this?" Springs entered the front door of his house, collapsed on the floor, and died.

Defendant and Elbow left the scene together and went to McClelland's house, where defendant said, "we killed the motherf——." Later that same day, defendant disposed of both weapons by throwing them into a river in South Carolina.

Defendant told investigating officers he did not know whether he or Elbow shot Springs but that Elbow fired from a closer range. Defendant also told the investigators his intention was to "kick [Springs'] ass" and the guns were only for self-protection.

An autopsy disclosed two bullet wounds, one of which entered Springs' back, pierced a lung, and grazed his heart before exiting his chest cavity; the other entered through the rear flank area and passed through several internal organs before exiting through the abdominal wall. Dr. Robert Thompson, the medical examiner who performed the autopsy, testified Springs died from both gunshot wounds. Dr. Thompson further testified that the bullet which entered Springs' back was the immediate cause of death and was probably fired from a large caliber gun.

Police officers recovered four .45 shell casings from the edge of the street near Springs' house, four .45 caliber bullets from Springs' front yard, and one bullet from either a .357 magnum or .38 special from the front wall of the house.

At the close of the State's evidence, defendant made a motion to dismiss the case which the trial court denied. Defendant did not present any evidence. The trial court instructed the jury on the charges of second degree murder, voluntary manslaughter, and involuntary manslaughter.

At the conclusion of trial, the jury found defendant guilty of voluntary manslaughter and the trial court imposed an active sentence of seventeen years.

[1] On appeal defendant contends the trial court erred by allowing the jury to find defendant guilty of voluntary manslaughter. Specifically, defendant argues that voluntary manslaughter cannot be a lesser included offense of second degree murder when premised on the doctrine of acting in concert. We disagree.

At the outset we note defendant fails to cite any authority to support his proposition that the doctrine of acting in concert is inapplicable to voluntary manslaughter. In any event, it is well established the doctrine is applicable when the State presents "sufficient evidence that two or more persons acted together with a common plan to commit a crime," *State v. Moxley*, 78 N.C. App. 551, 555, 338 S.E.2d 122, 124 (1985), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 904 (1986), and has been applied to voluntary manslaughter and involuntary manslaughter, *see, e.g., id.* (voluntary manslaughter), *State v. Robinson*, 83 N.C. App. 146, 148-149, 349 S.E.2d 317, 319 (1986) (involuntary manslaughter).

Defendant's reliance on *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), is wholly misplaced. In *Blankenship* our Supreme Court concluded:

> [O]ne may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent.

Id. at 558, 447 S.E.2d at 736. Because the *Blankenship* rule does not apply to general intent crimes, and voluntary manslaughter is a general intent crime, *State v. Clark*, 324 N.C. 146, 164, 377 S.E.2d 54, 65 (1989), defendant's contention is meritless.

[2] Defendant next contends the trial court erred by denying his motion to dismiss the charges of voluntary manslaughter and involuntary manslaughter because the evidence was insufficient to prove defendant fired the shot which killed Springs. We again disagree.

In ruling on a motion to dismiss, "the trial court must view all the evidence . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it . . . ." *State v. Abraham*, 338 N.C. 315, 328, 451 S.E.2d 131, 137 (1994). If there is substantial evidence of the essential elements of the offense charged, or of a lesser included offense, and of defendant being the perpetrator, "the trial court must deny the motion to dismiss . . . and submit [the charges] to the jury . . . ." *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992).

Voluntary manslaughter is the unlawful killing of a human being without malice. *State v. Mathis*, 105 N.C. App. 402, 405, 413 S.E.2d 301, 303-304, *disc. review denied*, 331 N.C. 289, 417 S.E.2d 259 (1992). Involuntary manslaughter, on the other hand, is defined as the " 'unintentional killing of a human being without malice, proximately caused by . . . a culpably negligent act or omission.' " *State v. Lane*, 115 N.C. App. 25, 28, 444 S.E.2d 233, 235 (*quoting State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985)), *disc. review denied*, 337 N.C. 804, 449 S.E.2d 753 (1994).

In the instant action, the State's evidence tended to show defendant and his accomplice drove to Springs' house armed with deadly weapons. Defendant supplied the weapons. Upon arrival at Springs' house, defendant parked his car down the street; hid from view; and instructed Elbow to lure Springs out of the house. After Springs exited the house, both defendant and Elbow fired on Springs as he

attempted to dodge the gunfire by running into nearby bushes. Defendant intentionally fired his .45 caliber handgun into the bushes where Springs had fled. Defendant and Elbow left the scene together and proceeded to McClelland's house where defendant admitted the pair had killed Springs. A police technician later recovered four .45 shell casings from the edge of the street near the house and four .45 caliber bullets on the other side of the yard from the cartridge casings.

Taken in the light most favorable to the State, substantial evidence was introduced from which the jury could reasonably infer that defendant and his accomplice were acting pursuant to a common plan or purpose or, alternatively, that defendant's solitary acts resulted in Springs' death. Accordingly, the trial court did not err by denying defendant's motion to dismiss.

Finally, defendant's remaining assignment of error which he failed to bring forward or argue in his brief is deemed abandoned pursuant to N.C.R. App. P. 28(b)(5).

No error.

Judges GREENE and JOHN concur.

FINN MORTENSEN v. MAGNETI MARELLI U.S.A., INC., F/D/B/A WEBER U.S.A., INC.

No. COA95-350

(Filed 21 May 1996)

Labor and Employment § 63 (NCI4th)— employment at will— no breach of contract

The relationship between plaintiff and defendant was terminable at the will of either party for any reason, and the trial court did not err in granting summary judgment for defendant on plaintiff's breach of contract claim since the terms of the employment agreement did not expressly state or imply that the employment was to be permanent or that the plaintiff could be discharged only for cause.

Am Jur 2d, Master and Servant §§ 27-33.

Modern status as to duration of employment where contract specifies no term but fixes daily or longer compensation. 93 ALR3d 659.

Recovery for discharge from employment in retaliation for filing workers' compensation claim. 32 ALR4th 1221.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge. 33 ALR4th 120.

Appeal by plaintiff from order entered 2 November 1994 in Wake County Superior Court by Judge Robert H. Hobgood. Heard in the Court of Appeals 27 March 1996.

John C. Hunter for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice, by Charles A. Edwards and F. Bruce Williams, for defendant-appellee.

GREENE, Judge.

Finn Mortensen (plaintiff) appeals an order granting summary judgment for Magneti Marelli U.S.A., Inc., f/d/b/a Weber U.S.A., Inc. (defendant).

In 1988 defendant advertised for a Product Manager in Remanufacturing in its Sanford, North Carolina plant. After an interview at defendant's Sanford plant, plaintiff was offered the job by letter from defendant dated 17 January 1989. The letter stated in pertinent part: "I am very pleased to offer you the position of Project Manager-Remanufacturing . . . . This offer is contingent upon obtaining your visa. Your annual salary will be $56,000." On or about 20 January 1989 plaintiff called defendant and accepted the offer and informed defendant that it would be "very easy" for him to get his labor certification and other necessary documents that would allow him to work permanently in the United States. On or about 27 January plaintiff notified his other employer, CAPCO, that he would be leaving that employment on 1 March 1989.

Although plaintiff was not able to secure his visa and other necessary documents by 1 March 1989, defendant employed plaintiff as a consultant pending plaintiff's receipt of the required documents that would allow him to permanently work and live in the United States. Prior to obtaining the visa, plaintiff and his family, in 1989, bought a

house in Cary, North Carolina, and relocated to Cary. Although the permanent visa was obtained in October 1992, defendant informed the plaintiff that he would not be hired as a full-time employee until 1 January 1993. Defendant, however, later informed plaintiff that he would not be employed full time and his last day of part-time employment would be 31 May 1993.

Plaintiff's complaint alleges that he has an "enforceable contract for employment" with the defendant and that defendant breached that contract. Defendant denied the allegations and moved for summary judgment on the grounds that the "relationship between the parties was terminable at will."

The issue is whether the relationship between the plaintiff and the defendant was terminable-at-will.

The general rule is that an "employee without a definite term of employment is an employee at will and may be discharged without reason." *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446 (1989). This general rule, however, is subject to several statutory exceptions which "proscribe the discharge of an at-will employee in retaliation for certain protected activities." *Id.* Furthermore, the employer does not have the right to terminate an at-will employee for an "unlawful reason or purpose that contravenes public policy." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992) (quoting *Coman*, 325 N.C. at 175, 381 S.E.2d at 447).

The plaintiff, while conceding that he was not terminated in violation of any statute or for an unlawful reason, argues that his at-will status was "converted into an enforceable . . . obligation" because he provided "consideration for the employment contract in addition to his mere rendering of the services contemplated by the employment agreement." We disagree.

The providing of additional consideration by the employee does not convert every employment-at-will agreement into an enforceable contract. If, however, the employment agreement expressly or impliedly provides that the employment will be permanent, for life or terminable only for cause *and* the employee gives an independent valuable consideration other than his services for the position, *see Sides v. Duke University*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985); *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 658-59, 412 S.E.2d 97, 101 (1991),

cert. denied, 331 N.C. 119, 415 S.E.2d 200 (1992); *Tuttle v. Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 2-9 at 60-63 (3d ed. 1987); *see also* 30 C.J.S. *Employer-Employee* § 43, at 83 (1992), the employment can be terminated only for cause until the passage of a reasonable time. *See* 3A Arthur L. Corbin, *Corbin on Contracts* § 684 (1960 & Supp. 1994); *Tuttle*, 263 N.C. at 219, 139 S.E.2d at 251; 30 C.J.S. *Employer-Employee* § 43, at 83 (1992). After the passage of a reasonable time the employment relationship can be terminated without cause.

In this case we need not decide whether the plaintiff's relinquishment of his legal rights as a resident of Canada, his resignation from his former employment, and his relocation from Canada to North Carolina qualifies as additional consideration. *See Humphrey v. Hill*, 55 N.C. App. 359, 362, 285 S.E.2d 293, 296 (1982) (waiving right to pursue other employment does not constitute additional consideration). The terms of the employment agreement do not expressly state, or imply, that the employment was to be permanent or that the plaintiff could be discharged only for cause. It thus follows that the relationship between the plaintiff and the defendant was terminable at the will of either party for any reason and the trial court did not err in granting summary judgment for the defendant on the plaintiff's breach of contract claim.

In so holding, we also reject plaintiff's argument that even if the defendant had the right to terminate the relationship after the employment began, it had no right to terminate that relationship prior to the first day of employment. The time of termination is immaterial when the relationship between the parties is within the at-will doctrine. Thus the relationship was properly terminated prior to the day the plaintiff was to begin employment. *See Tatum v. Brown*, 29 N.C. App. 504, 505, 224 S.E.2d 698, 699 (1976) (Court upheld termination of prospective employee before she began the job).

Affirmed.

Judges JOHN and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. MARYLIN RUDD MAHALEY

No. COA95-816

(Filed 21 May 1996)

1. **Robbery § 5 (NCI4th)— spouses exempted from larceny prosecutions—rule inapplicable to armed robbery**

The common law rule exempting spouses from prosecution in larceny cases in order to preserve family unity did not apply to these prosecutions, since defendant was convicted of robbery with a dangerous weapon, a crime involving dangerous violence and an offense mainly against the person rather than against property.

Am Jur 2d, Robbery § 5.

2. **Robbery § 32 (NCI4th)— robbery with dangerous weapon—spouse as victim—indictment proper**

An individual may be indicted and convicted of robbery with a dangerous weapon against his or her spouse.

Am Jur 2d, Robbery § 41.

3. **Criminal Law § 980 (NCI4th)— judgments arrested—death sentence vacated—arrested judgments properly set aside**

Arresting conspiracy and robbery judgments did not operate to vacate the verdicts which remained intact and viable after defendant's death sentence was reversed; therefore, it was proper for the trial court to set aside the arrested judgments and sentence defendant for conspiracy to commit murder and robbery with a dangerous weapon.

Am Jur 2d, Criminal Law § 524.

Appeal by defendant from judgments and commitments entered 1 May 1995 by Judge J.B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 26 March 1996.

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

Robert E. Collins for defendant-appellant.

LEWIS, Judge.

Defendant was indicted for first degree murder, conspiracy to commit murder and robbery with a dangerous weapon. The jury returned guilty verdicts on all counts. The court sentenced the defendant to death for the murder conviction and arrested judgment on the other charges. Defendant appealed her murder conviction to the North Carolina Supreme Court, which upheld the conviction but vacated the sentence. On remand, defendant received a life sentence. Subsequently the State moved to set aside the judgment in arrest in the conspiracy and robbery charges and impose sentences for those convictions. On 1 May 1995 a hearing was held by Judge J.B. Allen after which he imposed consecutive sentences for the crimes. Defendant appeals.

The Supreme Court provided a detailed recitation of the facts in this matter the first time it was up on appeal. *See State v. Mahaley*, 332 N.C. 583, 587-90, 423 S.E.2d 58, 60-62 (1992), *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 649 (1995).

[1, 2] In her first assignment of error, defendant contends that the trial court erred in denying her motion to dismiss the charge of robbery with a dangerous weapon. She argues that her marriage to the victim is an absolute bar to a robbery prosecution under the common law rule that a spouse cannot be found guilty of stealing his or her spouse's property.

Defendant is correct in her assertion that under the common law, spouses could not be prosecuted for crimes committed against the property of the other because the law viewed them as one person. *See State v. Fulton*, 149 N.C. 485, 489, 63 S.E. 145, 146 (1908); *see also State v. Lindley*, 81 N.C. App. 490, 494, 344 S.E.2d 291, 293 (1986) (acknowledging the larceny rule but finding "no family unity left to undermine" because parties had separated). However, at common law one could be found guilty of assault or other acts of "malicious outrage or dangerous violence" against a spouse. *State v. Mabrey*, 64 N.C. 592, 593 (1870).

Despite defendant's implication that we should treat this action in the same manner as a pure theft or larceny case, we decline. Defendant's crime involved more than just stealing her spouse's property. A jury found her guilty of robbery with a dangerous weapon, most assuredly a crime involving "dangerous violence." Her contention that she should not be held responsible for armed robbery due to family unity strains reason.

"In an indictment for robbery with firearms or other dangerous weapons (G.S. 14-87), the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon." *State v. Harris*, 8 N.C. App. 653, 656, 175 S.E.2d 334, 336 (1970). While robbery can be classified as an offense against both person and property, it is primarily an offense against the person. 77 CJS Robbery § 2 (1994).

Since we determine that armed robbery is mainly an offense against the person, we hold that the common law rule exempting spouses from prosecution in larceny cases in order to preserve family unity does not apply to these prosecutions. We further hold that an individual may be indicted and convicted of robbery with a dangerous weapon against his or her spouse. This assignment of error is overruled.

[3] In her second assignment of error, defendant contends that the trial court erred in setting aside the arrests of judgment and imposing sentences for the conspiracy and robbery convictions. She argues that the effect of arresting a judgment is that the verdict and sentence are vacated. We hold that this issue is controlled by *State v. Pakulski*, 326 N.C. 434, 390 S.E.2d 129 (1990).

In *Pakulski*, the defendant was convicted of felony murder based on felonious larceny and felonious breaking and entering. *State v. Pakulski*, 319 N.C. 562, 564, 356 S.E.2d 319, 321 (1987). Judgment was arrested on the larceny and breaking and entering charges since they were the underlying felonies to the felony murder charge. *Id.* The defendant was sentenced to life for the murder and appealed. *Id.* The Supreme Court reversed the felony murder conviction and remanded for a new trial. *Id.* at 576, 356 S.E.2d at 327. After a mistrial, the State prayed for judgment on the breaking and entering and larceny convictions. *Pakulski*, 326 N.C. at 436, 390 S.E.2d at 130. The trial court imposed consecutive ten year sentences for these crimes, *id.* at 438, 390 S.E.2d at 131, and the defendant appealed. Our Supreme Court concluded that "the sentencing was proper in this case because judgment was arrested only because 'these offenses formed the offenses upon which the convictions of felony murder were predicated.' " *Id.* (quoting *State v. Pakulski*, 319 N.C. at 564, 356 S.E.2d at 321).

In *Pakulski* the defendant made the same argument that Ms. Mahaley presents to us: that an arrest of judgment vacates the verdict. The *Pakulski* Court explained, "While we agree that in certain

cases an arrest of judgment does indeed have the effect of vacating the verdict, we find that in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact." *Id.* at 439, 390 S.E.2d at 132.

We conclude that the present case is one such situation where the verdicts remained intact after the arrest of judgments. The record indicates that the conspiracy and robbery judgments were arrested only because defendant was sentenced to death. At the outset of the sentencing hearing on 1 May 1995, Judge Allen, the same judge who had earlier arrested the judgments, found as fact that "in view of the fact that she was sentenced to death . . . , the Court arrested judgment."

Therefore, in this case, arresting the judgments did not operate to vacate the verdicts, which remained intact and viable after defendant's death sentence was reversed. We hold that it was proper for the trial court to set aside the arrested judgments and sentence the defendant for conspiracy to commit murder and robbery with a dangerous weapon. This assignment of error is overruled.

No error.

Judges EAGLES and McGEE concur.

JON N. DAWN AND ANN E. DAWN, PLAINTIFFS v. JOE EDWARD DAWN AND WIFE, MILDRED H. DAWN; AND JOE EDWARD DAWN, JR., INDIVIDUALLY AND AS TRUSTEE, DEFENDANTS

No. COA95-864

(Filed 21 May 1996)

Limitations, Repose, and Laches § 98 (NCI4th)— breach of fiduciary duty—when discovery should have been made—genuine issue of fact—applicability of statute of limitations

The trial court erred in holding that plaintiffs' claim against defendant trustee for breach of fiduciary duty for cancellation of a deed of trust was barred by the statute of limitations where there was a genuine issue of material fact as to whether plaintiffs

exercised due diligence in investigating the status of the indebtedness secured by the deed of trust.

Am Jur 2d, Limitation of Actions § 476.

Appeal by plaintiffs from order entered 23 May 1995 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 28 March 1996.

Corry, Cerwin & Luptak, by Todd R. Cerwin, for plaintiffs-appellants.

Arthurs & Foltz, by Nancy E. Foltz, for defendant-appellee Joe Edward Dawn, Jr.

WALKER, Judge.

Plaintiffs' complaint alleged the following facts: On 30 October 1980, defendants Joe Edward Dawn (plaintiff Jon N. Dawn's brother) and his wife Mildred H. Dawn (hereinafter defendants) borrowed the sum of $30,000 from plaintiffs. On that date, defendants executed a note evidencing the debt to plaintiffs and setting forth the terms of repayment. To secure the note, defendants executed a deed of trust to real property located in Gaston County, North Carolina. The Dawns' son, defendant Joe Edward Dawn, Jr. (hereinafter the trustee), was named as trustee. The deed of trust was recorded in the Gaston County Registry on 10 March 1981.

Defendants allegedly defaulted on the loan. Plaintiffs made repeated demands on defendants, but no payments were made on the loan after 10 April 1986. As of 3 May 1994, the balance due on the loan, including interest, was in excess of $100,000.

In late 1990, defendants attempted to refinance the indebtedness on their property in Gaston County in connection with an agreement to sell the property. To facilitate the refinancing, a title search was conducted which revealed the existence of the deed of trust evidencing defendants' debt to plaintiffs. Defendants then advised the attorney who was handling the sale of the property that their debt to plaintiffs had been satisfied on 15 January 1986 but had not been marked "Cancelled of Record." Based upon defendants' representations, the attorney prepared a document entitled "Cancellation of Deed of Trust by Trustee and Notice of Satisfaction." He then forwarded the document to the trustee for execution. On 3 October 1990, the trustee, pursuant to specific instructions from defendants, executed the docu-

ment, had it notarized, and returned it to either defendants or their attorney. Plaintiffs alleged that the trustee failed to make adequate inquiry into the status of defendants' indebtedness to plaintiffs in that he did not contact plaintiffs to determine whether they agreed that the debt had been satisfied or to obtain their consent to the cancellation of the deed of trust.

On 7 December 1990, allegedly at the direction of defendants and with the acquiescence of the trustee, the cancellation document was recorded in the Office of the Register of Deeds of Gaston County. Plaintiffs were not notified that the deed of trust had been cancelled of record.

In 1993, defendants sold the Gaston County property. Plaintiffs learned of this sale in February 1994. On 17 March 1994 plaintiffs conducted a title search and discovered the cancellation of the deed of trust. On 12 December 1994, plaintiffs filed this action against the trustee, defendant Joe Edward Dawn, Jr., seeking damages caused by his negligence and breach of fiduciary duty.

Joe Edward Dawn, Jr. filed a 12(b)(6) motion to dismiss, alleging that plaintiffs' claims against him were barred by the statute of limitations. The trial court agreed and ordered that plaintiffs' claims against him be dismissed with prejudice.

In order for a defendant to succeed on a 12(b)(6) motion to dismiss based on a statute of limitations, he must show that the plaintiff's complaint on its face discloses that the action is time-barred. *Long v. Fink*, 80 N.C. App. 482, 484, 342 S.E.2d 557, 559 (1986). Where, as here, the action is one for damages caused by a trustee's breach of fiduciary duty, the applicable statute of limitations is three years. *Tyson v. N.C.N.B.*, 305 N.C. 136, 141-42, 286 S.E.2d 561, 564-65 (1982). The statute begins to run when the claimant " 'knew or, by due diligence, should have known' of the facts constituting the basis for the claim." *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332 (citation omitted), *review denied*, 340 N.C. 261, 456 S.E.2d 833 (1995).

Our cases suggest that the question of when a plaintiff knew or should have known of an alleged breach of fiduciary duty is for the trier of fact to resolve. *See Pittman*, 117 N.C. App. at 591-92, 452 S.E.2d at 333 (where evidence at trial was conflicting as to when plaintiff knew or should have known of facts giving rise to claim for alleged breach of fiduciary duty, trial court sitting as factfinder was

required to make findings on the evidence in order to resolve conflict); *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 239, 330 S.E.2d 649, 653 (in action alleging breach of fiduciary duty by corporate director and officer, question as to when plaintiffs knew or should have known true facts giving rise to alleged breach was for jury to decide), *review denied*, 314 N.C. 541, 335 S.E.2d 19 (1985).

Plaintiffs here alleged that they received no notice of the cancellation of the deed of trust at the time it was recorded. They therefore assert that the statute of limitations here did not begin to run until 17 March 1994, the date upon which their title search revealed the cancellation. Defendant Joe Edward Dawn, Jr., however, claims that "plaintiffs, in the exercise of due diligence with regard to the conduct of their own affairs, could have easily discovered the alleged breach when the cancellation of the Deed of Trust was filed on December 7, 1990." Thus, he argues, their lawsuit filed on 12 December 1994, more than four years later, was time-barred.

Taking all allegations in plaintiffs' complaint as true, as we are required to do at this stage of the proceedings, *Rawls v. Lampert*, 58 N.C. App. 399, 400, 293 S.E.2d 620, 621 (1982), we cannot conclude, as a matter of law, that plaintiffs' claims against the trustee are time-barred. We hold that, as in *Pittman* and *Lowder*, the question of when plaintiffs here knew or should have known of the trustee's alleged breach of fiduciary duty is for the trier of fact to resolve. Because of the close family relationships of the parties involved here, the issue of whether plaintiffs exercised due diligence in investigating the status of defendants' indebtedness is one that is not easily resolved. More evidence is needed regarding the circumstances surrounding the cancellation of the deed of trust before it can be determined whether plaintiffs should have known of the cancellation prior to 17 March 1994.

For the foregoing reasons, the order of the trial court dismissing plaintiffs' action against the trustee is reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed.

Judges JOHNSON and WYNN concur.

STATE OF NORTH CAROLINA v. EMIL KEITH BYRD

No. COA95-830

(Filed 21 May 1996)

Criminal Law § 47 (NCI4th)— aiding and abetting—principal found not guilty—conviction invalid

Defendant's conviction for assault based on aiding and abetting was invalid where the named principal alleged in the indictment was subsequently found not guilty of the crime.

Am Jur 2d, Criminal Law § 167.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor. 9 ALR4th 972.

Appeal by defendant from judgments entered 20 March 1995 in Orange County Superior Court by Judge Donald W. Stephens. Heard in the Court of Appeals 27 March 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Floyd M. Lewis, for the State.

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

GREENE, Judge.

Emil Keith Byrd (defendant) appeals a jury verdict finding him guilty of aiding and abetting a robbery with a dangerous weapon and aiding and abetting an assault with a deadly weapon with intent to kill inflicting serious bodily injury. Defendant was sentenced to serve twenty years in prison.

Defendant was indicted with aiding and abetting Vincent McKinney (McKinney) in assaulting Andre Allen (Allen) with a deadly weapon with intent to kill inflicting serious bodily injury. He was also indicted with the armed robbery of Allen. At the close of all the evidence, the State requested the robbery indictment be "submitted [to the jury] as aider and abettor." Without objection from the defendant the trial court agreed to submit "both charges on a theory of aiding

and abetting." Subsequent to defendant's trial, McKinney was tried and found not guilty of both the assault and robbery of Allen.

The issue presented is whether defendant's conviction for assault based on aiding and abetting is valid where the person whom defendant was charged with aiding and abetting is found not guilty of the crime.

In North Carolina the acquittal of a *named* principal at a *separate* trial requires acquittal of one charged as an aider and abettor of that named principal. *See State v. Beach*, 283 N.C. 261, 269, 196 S.E.2d 214, 220 (1973) (because the indictments did not charge the defendant with aiding and abetting a named person, the acquittal of that person "was not a sufficient basis for dismissal of the charges"), *overruled on other grounds*, *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984); *see also State v. Suites*, 109 N.C. App. 373, 378, 427 S.E.2d 318, 321-22 (pursuant to N.C. Gen. Stat. § 14-5.2, accessories before the fact are treated the same as principals, and an acquittal of a named principal at a subsequent trial is an acquittal of the accessory before the fact), *disc. rev. denied*, 333 N.C. 794, 431 S.E.2d 29 (1993); *State v. Wilson*, 338 N.C. 244, 254, 449 S.E.2d 391, 397 (1994) (a person may not be convicted of accessory before the fact if the principal is acquitted). The acquittal, in a *separate* trial, of a principal not named in the indictment does not serve as an acquittal of the one charged as an aider and abettor of the *unnamed* principal. *Beach*, 283 N.C. at 269, 196 S.E.2d at 220; *compare State v. Soles*, 119 N.C. App. 375, 380, 459 S.E.2d 48 (acquittal of one coconspirator in a trial does not require acquittal of other coconspirator in separate trial), *disc. rev. denied*, 341 N.C. 655, 462 S.E.2d 523 (1995). The acquittal, in a *joint* trial, of the principal does not serve as an acquittal of the defendant charged as the aider and abettor of that principal. *See State v. Reid*, 335 N.C. 647, 657, 440 S.E.2d 776, 781 (1994) (in joint trial of two defendants charged with assault with a deadly weapon with intent to kill, acquittal of one defendant does not preclude guilty verdict of other defendant on basis of concerted action principle); *but cf. State v. Robey*, 91 N.C. App. 198, 207-08, 371 S.E.2d 711, 717 (in joint trial of one defendant charged with accessory after the fact and another defendant charged as principal, acquittal of the principal requires acquittal of the accessory), *disc. rev. denied*, 323 N.C. 479, 373 S.E.2d 874 (1988); *cf. State v. Raper*, 204 N.C. 503, 504, 168 S.E.2d 831, 831-32 (1933) (when three coconspirators tried in joint trial, the acquittal of two of them requires acquittal of the third).

In this case the indictment charging defendant with assaulting Allen specifically *named* McKinney as the person whom the defendant aided and abetted. McKinney was acquitted of assaulting Allen at a subsequent *separate* trial. Therefore, because the named principal was acquitted of assaulting Allen at a separate trial, defendant's conviction for aiding and abetting that assault must be vacated.

Although the robbery indictment was amended at the close of all the evidence to allege that defendant acted as an aider and abettor in the robbery of Allen, defendant does not argue on appeal that his conviction for aiding and abetting robbery with a dangerous weapon should be reversed on the basis that McKinney was acquitted of robbery at a subsequent trial, and therefore we do not address that issue. Defendant, however, has made three other arguments to reverse his robbery conviction. We have reviewed these arguments and determined that they do not require reversal of the robbery conviction.

Aiding and abetting robbery—No error.

Aiding and abetting assault—Vacated.

Judges JOHN and MARTIN, Mark D., concur.

JOHN L. IRVIN v. GEORGE G. EGERTON

No. COA95-945

(Filed 21 May 1996)

Contribution § 1 (NCI4th)— joint and several liability on note—less than half of entire obligation paid—right to contribution

A party jointly and severally liable on a note may seek contribution from the other party for payment made when the paying party has paid less than half of the entire obligation where the parties have a monthly obligation on a note, and each month one party pays more than one-half of the monthly obligation.

Am Jur 2d, Contribution § 10.

Appeal by defendant from judgment entered 24 May 1995 in Guilford County Superior Court by Judge Howard R. Greeson, Jr. Heard in the Court of Appeals 29 March 1996.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Natasha Rath Marcus, for plaintiff-appellee.

Dotson & Kirkman, by John W. Kirkman, Jr., for defendant-appellant.

GREENE, Judge.

George G. Egerton (defendant) appeals an order granting John L. Irvin's (plaintiff) motion for summary judgment. The trial court found no genuine issue as to any material fact and plaintiff was entitled to judgment as a matter of law against the defendant in the amount of $102,087.24, plus interest.

The undisputed facts are that plaintiff and defendant, both residents of Greensboro, North Carolina, co-signed a note in Richmond, Virginia, payable to Fidelity Federal Savings Bank (bank), to purchase a shopping center, which is owned by them as equal partners. The promissory note in the original amount of $1,900,000.00 is a joint and several obligation of the plaintiff and defendant and requires monthly payments. The note is secured by a deed of trust on the shopping center properties located in Virginia.

Since the purchase of the shopping center, the plaintiff has made, with one small exception, all the monthly payments on the note amounting to approximately $175,000.00. The note has not been paid in full and the plaintiff has not paid more than one half of the total amount due on the note. Additionally, the plaintiff paid other expenses of the shopping center, including insurance, electricity and garbage disposal. Plaintiff requested reimbursement from defendant for the money advanced and defendant has not reimbursed him. Plaintiff's action seeks contribution from defendant for monies paid by plaintiff on defendant's behalf.

The issue is whether a party jointly and severally liable on a note may seek contribution from the other party for payments made when the paying party has paid less than half of the entire obligation.

The parties dispute whether the law of Virginia or the law of North Carolina governs the resolution of this dispute. We need not

resolve this issue because we determine that with respect to contribution, the single issue presented, the law of both states is consistent. Contribution is generally defined as "the right of one who has discharged a common liability or burden to recover of another also liable [the fractional] portion which he ought to pay or bear." 18 C.J.S. *Contribution* § 2, at 4 (1990); *See Nebel v. Nebel*, 223 N.C. 676, 684, 28 S.E.2d 207, 213 (1943); *Sacks v. Tavss*, 375 S.E.2d 719, 720-21 (Va. 1989). The doctrine is "not founded on, nor does it arise from, contract or tort, but is founded on principles of equity, principles of natural justice." 18 C.J.S. *Contribution* § 3, at 5 (1990). It is a prerequisite to a claim for contribution that the party seeking contribution "satisf[y], by payment or otherwise, more than his just proportion of the common obligation or liability." 18 Am. Jur. 2d *Contribution* § 9, at 16 (1985); *see Nebel*, 223 N.C. at 684-85, 28 S.E.2d at 213; *Sacks*, 375 S.E.2d at 721; Va. Code Ann. § 8.01-249(5) (Michie 1992) (cause of action for contribution accrues "when the contributee . . . has paid or discharged the obligation").

In this case the defendant does not contest that the plaintiff and defendant are jointly and severally liable on the note and therefore have a common obligation to the bank. It is also not contested that as between the parties there is an equal obligation to pay the note. The defendant does, however, argue that the plaintiff is not entitled to contribution because he has not paid more than one-half of the total debt or at least $950,000. We disagree. The parties have a monthly obligation on the note and each month that the plaintiff paid more than one-half of the monthly obligation he satisfied more than his just proportion of that common obligation and is therefore entitled to contribution for that amount. The trial court thus correctly entered summary judgment for the plaintiff to the extent of one-half of the plaintiff's payments to the bank. Because we are unable to determine from this record the extent, if any, that the parties had a joint obligation to pay the other expenses of the shopping center, we cannot affirm summary judgment to the extent it may permit contribution by the plaintiff for one-half of those amounts. Furthermore, because the summary judgment does not delineate between the note payments and the other expenses, we must remand to the trial court for entry of a judgment with respect to the note only.

Affirmed in part and remanded.

Judges LEWIS and MARTIN, Mark D., concur.

PAVING EQUIPMENT OF THE CAROLINAS, INC. D/B/A MECKLENBURG PAVING, INC. v. WILLIAM H. WATERS

No. COA95-860

(Filed 21 May 1996)

Liens § 21 (NCI4th)— Chapter 44A lien—no attorney's fees as part of lien

N.C.G.S. § 44A-13(b) does not allow attorney's fees to be enforced as part of a Chapter 44A lien on defendant's property.

Am Jur 2d, Liens § 75; Mechanics' Liens §§ 432, 433.

Excessiveness or adequacy of attorneys' fees in matters involving real estate—modern cases. 10 ALR5th 448.

Appeal by defendant from judgment entered 21 April 1995 in Mecklenburg County Superior Court by Judge Robert M. Burroughs. Heard in the Court of Appeals 29 March 1996.

William G. Robinson, and Colombo and Robinson, by William C. Robinson, for plaintiff-appellee.

Goodman, Carr, Nixon, Laughrun & Levine, P.A., by Miles S. Levine, for defendant-appellant.

GREENE, Judge.

William H. Waters (defendant) appeals from a judgment entered after a jury verdict in favor of Paving Equipment of the Carolinas, Inc. d/b/a Mecklenburg Paving (plaintiff).

Pursuant to N.C. Gen. Stat. § 44A-12, plaintiff filed a claim of lien on defendant's property in the amount of $30,500, representing the amount plaintiff claimed it was owed for paving the defendant's parking lot. The plaintiff subsequently filed a complaint seeking a judgment in the amount of the $30,500 and enforcement of the lien. After a trial, the jury found for the plaintiff in the amount of $29,706.30. In addition to the jury award, the trial court awarded plaintiff attorney's fees of $5,700 and granted a lien on the defendant's property "pursuant to the provision of G.S. 44A" in an amount of the jury verdict and the attorney's fees.

The issue is whether an award of attorney's fees can be enforced as part of a Chapter 44A lien on defendant's property.

Defendant argues that N.C. Gen. Stat. § 44A-13(b) does not allow attorney's fees to be "enforced as part of the lien granted pursuant to North Carolina General Statute § 44A-7, et. seq." Plaintiff argues that "as long as the principal amount of the judgment . . . does not exceed that provided in the claim of lien, the additional sums of costs and [attorney's fees] . . . are enforceable as a part of the lien and judgment." We agree with the defendant.

N.C. Gen. Stat. § 44A-13(b) states that a "[j]udgment enforcing a lien . . . may be entered for the *principal* amount shown to be due, not exceeding the principal amount stated in the claim of lien enforced thereby." N.C.G.S. § 44A-13(b) (1995) (emphasis added). The "principal amount," although not defined by the statute, is an unambiguous term and must be given its plain meaning. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). The plain meaning of the term "principal amount" is that amount of debt owed exclusive of interest and attorney's fees. *See Black's Law Dictionary* 1192 (6th ed. 1990). If, however, there is an agreement between the parties with regard to interest, that interest due pursuant to the agreement will be included as part of the principal. *Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 78 N.C. App. 664, 667, 338 S.E.2d 135, 137 (in absence of agreement, trial court correctly refused to include prejudgment interest as part of lien), *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 398 (1986). Thus a judgment enforcing a lien under this statute cannot exceed the amount determined to be due from the defendant to the plaintiff, exclusive of attorney's fees.

In this case, the amount determined to be due the plaintiff was $29,706.30 and the trial court had no authority to direct enforcement of a lien in a greater amount. Therefore, that portion of the judgment ordering that the attorney's fees also be enforced as a part of the lien is reversed. We have carefully reviewed the other assignments of error asserted by the defendant and overrule them.

Affirmed in part, reversed in part.

Judges JOHN and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. KEITH WATERS

No. COA95-870

(Filed 21 May 1996)

Appeal and Error § 75 (NCI4th)— guilty plea—no petition for writ of certiorari—no valid appeal

Where defendant pled guilty to criminal charges in superior court and did not petition for a writ of certiorari, his notice of appeal was a nullity, and the Court had no jurisdiction over his appeal.

Am Jur 2d, Appellate Review § 621.

Plea of guilty in justice of the peace or similar inferior court as precluding appeal. 42 ALR2d 995.

Appeal by defendant from judgments entered 16 November 1994 by Judge Robert E. Gaines in Henderson County Superior Court. Heard in the Court of Appeals 16 April 1996.

Attorney General Michael F. Easley, by Assistant Attorney General D. David Steinbock, for the State.

Prince, Youngblood & Massagee, by Sharon Alexander, for defendant-appellant (original attorney James L. Epperson allowed to withdraw by order of this Court).

PER CURIAM

Defendant pled guilty to three counts of possession of cocaine with intent to sell and deliver, three counts of sale and delivery of cocaine, two counts of resisting a public officer, and one count each of stalking, assault on a female, and assault inflicting serious injury. The offenses were consolidated for judgment and defendant was sentenced to two consecutive ten-year prison terms. Defendant appealed to this Court on the ground of ineffective assistance of counsel. Subsequently, defendant filed with this Court a motion for appropriate relief on the same ground.

With certain exceptions, a defendant who has entered a plea of guilty to a criminal charge in the superior court is not entitled to appellate review as a matter of right but may petition the appellate court for a review by writ of certiorari. N.C. Gen. Stat. § 15A-1444(e) (1988 & Cum. Supp. 1995); *see also State v. Bolinger*, 320 N.C. 596,

601, 359 S.E.2d 459, 462 (1987). None of the exceptions stated in the statute applies to defendant here, and he has not petitioned for a writ of certiorari. Because defendant has no appeal as of right, his notice of appeal was a nullity and this Court has no jurisdiction over his appeal. Thus, the appeal must be dismissed. N.C. Gen. Stat. § 15A-1418(a) (1988) provides that a motion for appropriate relief based upon grounds set forth in N.C. Gen. Stat. § 15A-1415 must be made in the appellate division when a case is in that division for appellate review. Because we have determined that defendant's appeal is not properly before this Court, we are without jurisdiction to entertain his motion for appropriate relief, and the motion must be dismissed. This decision in no way prejudices defendant's right under N.C. Gen. Stat. § 15A-1415 (1988 & Cum. Supp. 1995) to file a motion for appropriate relief in the trial court, which is the preferred forum for addressing his claim. *See State v. Milano*, 297 N.C. 485, 496, 256 S.E.2d 154, 160 (1979) (ineffective representation claim is normally raised in post-conviction proceedings at trial level, where defendant may be granted a hearing on the matter with the opportunity to introduce evidence), *overruled on other grounds*, *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

Dismissed.

Panel consisting of: Johnson, Wynn, Walker

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

No. 9321SC269

(Filed 21 May 1996)

Insurance § 533 (NCI4th)— underinsured motorist coverage— owned vehicle exclusion—invalidity

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

Am Jur 2d, Automobile Insurance § 322.

What constitutes "automobile" for purposes of uninsured motorist provisions. 65 ALR3d 851.

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

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

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

PER CURIAM.

On 7 June 1994, this Court issued its opinion reversing the entry of summary judgment in favor of plaintiff in a declaratory judgment action. See *State Farm Mut. Auto Ins. Co. v. Young*, 115 N.C. App. 68, 443 S.E.2d 756 (1994). In so doing, we held invalid and unenforceable a provision in the underinsured motorist coverage clause of automobile liability insurance policies issued by plaintiff which attempted to exclude from such coverage a motor vehicle owned by the named insured.

On 9 February 1996, the North Carolina Supreme Court vacated our opinion and directed that we reconsider our decision in light of its decision in *Nationwide Mutual Ins. Co. v. Mabe*, 342 N.C. 482, 467 S.E.2d 34 (1996). *State Farm Mut. Auto Ins. Co. v. Young*, 342 N.C. 647, 466 S.E.2d 275 (1996). In *Nationwide v. Mabe*, the Supreme Court held an owned vehicle exclusion provision of the underinsured motorist insurance coverage at issue in that case to be violative of the North Carolina Motor Vehicle Safety and Responsibility Act. We have again considered the issue in the present case in light of *Nationwide v. Mabe*, and we again conclude that "an underinsured highway vehicle as defined in G.S. § 20-279.21(b)(4) can include a motor vehicle owned by the named insured, and the provisions in the policies issued by plaintiff attempting to exclude such coverage are invalid and unenforceable." *State Farm*, 115 N.C. App. at 74, 443 S.E.2d at 761. Accordingly, the trial court's order of summary judgment in favor of plaintiff on this issue is reversed and the case is remanded for further proceedings in accordance with our original opinion.

Panel consisting of:

Chief Judge ARNOLD, Judges WYNN and MARTIN, John C.

MEYER v. WALLS

[122 N.C. App. 507 (1996)]

PATRICIA M. MEYER, ADMINISTRATIX FOR THE ESTATE OF CLEARMAN I. FRISBEE, PLAINTIFF/APPELLANT, v. JO ANN WALLS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS LICENSE HOLDER AND ADMINISTRATOR OF COMMUNITY CARE OF HAYWOOD, NO. 3; GEORGE ANDREW BROWN, III, INDIVIDUALLY AND AS GEORGE ANDREW BROWN D/B/A A&B EXCAVATING, INC.; A&B EXCAVATING, INC.; COUNTY OF BUNCOMBE; BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES; CALVIN E. UNDERWOOD, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES; KAY BARROW, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SUPERVISOR AT THE BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES; MACKEY MILLER, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS A SOCIAL WORKER AT THE BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS/APPELLEES

No. COA95-423

(Filed 4 June 1996)

1. State §§ 26, 38 (NCI4th)— general waiver of immunity—jurisdiction in Industrial Commission—waiver of immunity by purchase of insurance—jurisdiction in superior court

Claims against the state pursuant to the general waiver of immunity provisions of N.C.G.S. § 143-291(a) are within the exclusive jurisdiction of the Industrial Commission, while claims brought in cases where immunity has been waived by the purchase of liability insurance are within the jurisdiction of the superior court. N.C.G.S. §§ 153A-435(b), 160A-485(d), 115C-42, 122C-152(f).

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 85, 648 et seq.

2. State §§ 26, 38 (NCI4th)— specific statute prevailing over general statute—jurisdictional question

The jurisdictional provisions of N.C.G.S. § 153A-435(b) control wherever they conflict with the jurisdictional provisions of N.C.G.S. § 143-291(a). The Tort Claims Act no longer controls with regard to jurisdiction once a governmental entity has procured liability insurance equal to or greater than the $100,000 cap provided for in § 143-291(a), and jurisdiction is then controlled by the statute authorizing the governmental entity to purchase liability insurance.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 85, 648 et seq.

3. State §§ 26, 38 (NCI4th)— action against DSS—jurisdiction in Industrial Commission or superior court—amount of liability insurance determinative

Where the record was silent as to the precise amount of liability insurance purchased by the Buncombe County DSS, the cause is remanded to determine whether the policy or policies in question have liability limits equal to or greater than $100,000. If the policy limits are less than $100,000, jurisdiction is in the Industrial Commission, and the superior court will dismiss the cause for lack of subject matter jurisdiction.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 85, 648 et seq.

4. Public Officers and Employees § 35 (NCI4th); State § 38 (NCI4th)— action against director of DSS—amount of liability insurance—determinant of proper forum

Plaintiff could proceed with her action against defendant director of the Buncombe County DSS in his official capacity pursuant to either N.C.G.S. § 143-291(a) or N.C.G.S. § 153A-435 depending upon the liability insurance policy limits maintained by the DSS, and a suit against the director must proceed in the same forum as plaintiff's suit against the DSS.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 137 et seq.; 648 et seq.

5. Public Officers and Employees § 35 (NCI4th)— director of DSS—public officer—mere negligence—action in individual capacity properly dismissed—willful and wanton negligence—action in individual capacity improperly dismissed

Defendant director of the Buncombe County DSS was a public officer since his position was created by statute, many of his duties were imposed by law, and he clearly exercised substantial discretionary authority; therefore, the trial court properly dismissed plaintiff's suit against the director in his individual capacity for mere negligence in the performance of his duties, but plaintiff could proceed with the portions of her suit against defendant in his individual capacity which were based on allegations of willful and wanton conduct.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 137 et seq.

6. Public Officers and Employees § 35 (NCI4th)— actions brought against state employees in individual capacity— dismissal error

The supervisor of the adult protective services unit of a county DSS and a social worker for DSS were public employees, not public officers, and the trial court erred in dismissing plaintiff's claims against them in their individual capacities, since they could be personally liable for negligent performance of their duties or personally liable for any injury proximately caused by their willful and wanton conduct; furthermore, because there was no issue of waiver of immunity with regard to these suits, jurisdiction was in the superior court.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 137 et seq.

Appeal by plaintiff from order entered 2 November 1994 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 25 January 1996.

On 9 February 1992, decedent Clearman I. Frisbee committed suicide allegedly by placing an explosive blasting cap in his mouth and detonating it with a battery. Over two years prior to Mr. Frisbee's death, the Buncombe County Department of Social Services ("DSS") petitioned the Buncombe County Clerk of Superior Court to declare Mr. Frisbee legally incompetent because his multiple medical and psychological problems rendered him "unable to manage his own affairs." On 28 November 1989, Mr. Frisbee was adjudicated legally incompetent and defendant DSS was appointed as Mr. Frisbee's legal guardian.

While under DSS' care, Mr. Frisbee was placed in and removed from several community care facilities because of his behavior. On 11 February 1991, Mr. Frisbee was admitted to Community Care of Haywood No. 3 ("Community Care #3") by defendant Jo Ann Walls, the administrator of Community Care #3. At that time, defendant Mackey Miller was the DSS social worker handling Mr. Frisbee's case, defendant Calvin E. Underwood was the Director of the Buncombe County DSS, and defendant Kay Barrow was the Supervisor of the Adult Protective Services Unit at the Buncombe County DSS. Because of their respective positions with DSS, both defendants Underwood and Barrow had general guardianship authority over Mr. Frisbee.

On 9 November 1993, plaintiff Patricia M. Meyer, as Administratrix for the Estate of Clearman I. Frisbee, filed a wrongful death action alleging that Mr. Frisbee's death was proximately caused by the negligence of the named defendants. Plaintiff alleged, *inter alia*, that defendants Underwood, Barrow and Miller, individually and in their official capacities as agents of defendant Buncombe County Department of Social Services, (1) failed to make proper provisions for Mr. Frisbee's care, comfort and maintenance, (2) failed to act in his best interest, and (3) failed to adequately respond to information provided by family members regarding Mr. Frisbee's condition and conditions at Community Care #3. Plaintiff also asserted multiple negligence claims against defendant Buncombe County DSS. Defendants Underwood, Barrow, Miller and Buncombe County DSS each filed motions to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6). After hearing, the trial court dismissed plaintiff's claim against defendant Buncombe County DSS for lack of subject matter jurisdiction, and dismissed plaintiff's claim against defendants Underwood, Barrow and Miller after determining that plaintiff had failed to state a claim upon which relief could be granted against those defendants.

Plaintiff appeals.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez for plaintiff-appellant.

Charlotte A. Wade for defendant-appellees.

EAGLES, Judge.

[1] Plaintiff first argues that the trial court erred in granting defendant Buncombe County DSS' motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. We agree and remand to the Superior Court because we conclude that the trial court erred in failing to make additional findings necessary to determine in what forum jurisdiction properly lies.

"[A] subordinate division of the state, or agency exercising statutory governmental functions . . . , may be sued only when and as authorized by statute." *Coleman v. Cooper*, 102 N.C. App. 650, 658, 403 S.E.2d 577, 581 (quoting *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952)), *disc. review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991). Over time, the General Assembly has enacted several different statutes which authorize suit against certain governmental entities and partially waive the defense of sovereign immunity with respect to

those entities. *E.g.*, G.S. 143-291 (1987 & Supp. 1993); G.S. 153A-435 (1985); G.S. 122C-152 (1985); G.S. 115C-42 (1985); G.S. 115D-24 (1979); G.S. 130A-37(k) (1995); G.S. 160A-485 (1985). In general, these statutes provide two methods by which the entity may waive sovereign immunity in certain instances.

First, G.S. 143-291(a) provides a general waiver of immunity for claims against "the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State . . ." where the claim "arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant . . . ." G.S. 143-291(a). The damages that may be recovered pursuant to G.S. 143-291(a) are capped at $100,000 "cumulatively to all claimants on account of injury and damage to any one person." *Id.* We note here that, for causes of action arising on or after 1 October 1994, the General Assembly has amended G.S. 143-291(a) so that damages are now capped at $150,000. The second method by which certain governmental entities may waive the defense of sovereign immunity is by their purchase of liability insurance. *E.g.*, G.S. 153A-435(a) (1985). Where immunity is waived in this manner, recoverable damages are capped at policy limits. *Id.*

The manner in which immunity is waived is also relevant to the issue of jurisdiction. For instance, when immunity is waived pursuant to the general provisions of G.S. 143-291(a)

> the North Carolina Industrial Commission (Commission) is "constituted a court for the purpose of hearing and passing upon tort claims against the . . . departments, institutions, and agencies of the State." G.S. 143-291. The Commission is authorized to determine "whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." *Id.*

Vaughn v. Dept. of Human Resources, 296 N.C. 683, 685, 252 S.E.2d 792, 794 (1979). The Industrial Commission's jurisdiction under G.S.

143-291(a) is exclusive. *Robinette v. Barriger*, 116 N.C. App. 197, 202, 447 S.E.2d 498, 501 (1994), *aff'd*, 342 N.C. 181, 463 S.E.2d 78 (1995).

Where immunity is waived by the purchase of liability insurance, however, we conclude that jurisdiction is statutorily vested in the superior court. G.S. 153A-435(b) (1985); G.S. 160A-485(d) (1985); G.S. 115C-42 (1985); G.S. 122C-152(f) (1985). We reach this conclusion because these statutes all contain language substantially similar to G.S. 153A-435(b), which provides in pertinent part that:

> [T]he liability of a county for acts or omissions occurring in the exercise of governmental functions does not attach unless the plaintiff waives the right to have all issues of law or fact relating to insurance in the action determined by a jury. The judge shall hear and determine these issues without resort to a jury, and the jury shall be absent during any motion, argument, testimony, or announcement of findings of fact or conclusions of law relating to these issues unless the defendant requests a jury trial on them.

G.S. 153A-435(b). This language cannot vest jurisdiction in the Industrial Commission because neither judges nor juries exist in proceedings before the Industrial Commission. Similarly, jurisdiction for claims pursuant to G.S. 143-291(a) is clearly vested in the Industrial Commission by the statute's plain language. Accordingly, we conclude that jurisdiction depends on the statutory authority for the waiver of immunity.

We recognize that many diverse factual situations exist where some degree of waiver is present based in part on G.S. 143-291(a) and also based in part on the governmental entity's purchase of liability insurance. Therefore, having found no reported decision of the Appellate Division which directly addresses the jurisdictional dichotomy in this context, our analysis is necessarily one of statutory construction.

"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). Interpretations that would create a conflict between two or more statutes are to be avoided, and "statutes should be reconciled with each other . . ." whenever possible. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). When a more generally applicable statute conflicts with a more specific, special statute, the "special statute is viewed as an exception to the provisions of the gen-

eral statute . . . ." *Domestic 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).

[2] G.S. 143-291(a), a part of Article 31 of Chapter 143 (often referred to as the Tort Claims Act), is a generally applicable statute that provides for a partial waiver of sovereign immunity on behalf of the State and many subordinate divisions of the State. G.S. 153A-435, on the other hand, is a more specific statute providing that a county or a local agency of the State waives its defense of sovereign immunity to the extent of any liability insurance purchased. *See McNeill v. Durham County ABC Bd.*, 87 N.C. App. 50, 57, 359 S.E.2d at 500, 504 (1987), *modified on other grounds*, 322 N.C. 425, 368 S.E.2d 619 (1988). As we have stated, where a more generally applicable statute such as G.S. 143-291(a) conflicts with a more specific, special statute such as G.S. 153A-435(b), the "special statute is viewed as an exception to the provisions of the general statute . . . ." *Domestic Electric Service*, 20 N.C. App. at 350, 201 S.E.2d at 510. Accordingly, to the extent that G.S. 153A-435(a) applies, we conclude that the jurisdictional provisions of G.S. 153A-435(b) control wherever they conflict with the jurisdictional provisions of G.S. 143-291(a).

Our construction is consistent with the plain language of the Tort Claims Act. G.S. 143-291(b) provides that "[i]f a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State's obligation for payment under this Article." G.S. 143-291(b) (1987). Under the plain language of G.S. 143-291(b), the Tort Claims Act no longer controls the payment of damages where a State agency has procured liability insurance with policy limits equal to or greater than the $100,000 cap provided for in G.S. 143-291(a). It follows logically that G.S. 143-291(b) requires that the Tort Claims Act is no longer controlling with regard to jurisdiction once a governmental entity has procured liability insurance with policy limits equal to or greater than $100,000. Jurisdiction is then controlled by the statute authorizing the governmental entity to purchase liability insurance.

Our construction is also consistent with the expectations of the parties to the liability insurance contract. When an insurer enters into an insurance contract with a county or local agency of the State pursuant to G.S. 153A-435(a), the parties to the policy expect to be able

to litigate any coverage questions before the Superior Court sitting without a jury as contemplated by G.S. 153A-435(b). To hold otherwise would not only run afoul of the statutory language itself but would also alter the risk undertaken by the insurer who contracted in reliance on the specific provisions of G.S. 153A-435(b).

[3] We turn now to the question of whether plaintiff's claim against defendant Buncombe County DSS properly should be brought in the Industrial Commission or the Superior Court. Defendant Buncombe County DSS correctly asserts that it is an agent of the Department of Human Resources and a subordinate division of the State and therefore within the purview of G.S. 143-291(a). *See Vaughn*, 296 N.C. at 690, 252 S.E.2d at 797; *EEE-ZZZ Lay Drain v. N.C. Dept. of Human Resources*, 108 N.C. App. 24, 28, 422 S.E.2d 338, 341 (1992); *Coleman*, 102 N.C. App. at 657-58, 403 S.E.2d at 581-82. However, defendant Buncombe County and defendant Buncombe County DSS are also alleged to have purchased liability insurance and accordingly to have waived the defense of immunity pursuant to G.S. 153A-435(a). *McNeill*, 87 N.C. App. at 57, 359 S.E.2d at 504. Where the county or local agancy of the State has purchased liability insurance equal to or in excess of $100,000, the waiver of immunity is effective pursuant to G.S. 153A-435(a), and the jurisdictional provisions of 153A-435(b) control. *See id.*; G.S. 143-291(b). The record is silent as to the precise amount of liability insurance coverage purchased here. Accordingly, we remand this cause to the Superior Court to make findings of fact as to whether the insurance policy or policies in question have liability limits equal to or greater than $100,000. If the liability limits are less than $100,000 in coverage, jurisdiction is in the Industrial Commission and the Superior Court shall dismiss the cause for lack of subject matter jurisdiction.

Plaintiff next argues that the trial court erred in dismissing plaintiff's claims against defendants Underwood, Barrow and Miller pursuant to Rule 12(b)(6). The trial court dismissed plaintiff's claim against defendant Underwood in his official capacity and against defendants Underwood, Barrow and Miller in their individual capacity. 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). A motion to dismiss is properly granted where a defendant is immune from suit under the alleged facts taken as true. *E.g., Harwood v. Johnson*, 326 N.C. 231, 237-38, 388 S.E.2d 439, 442-43 (1990).

[4] We first address whether suit may be maintained against defendant Underwood in his official capacity. It is well-established in North Carolina that the common law doctrine of sovereign immunity "prevents a claim for relief against the State except where the State has consented or waived its immunity." *Harwood*, 326 N.C. at 238, 388 S.E.2d at 443. This doctrine extends to suits against individual defendants in their official capacities because those suits are suits against the State. *Id.*

As we have recognized, counties may "waive the defense of immunity for negligent actions that occur in the performance of governmental functions through the purchase of liability insurance." *Hare v. Butler*, 99 N.C. App. 693, 699, 394 S.E.2d 231, 235-36, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). This waiver of immunity may apply to suits against the DSS and to suits against DSS officers acting in their official capacity. *See id.* Here, plaintiff alleges that both defendant Buncombe County and defendant Buncombe County DSS purchased liability insurance policies with coverage sufficient to act as a waiver of immunity. In reviewing the trial court's grant of defendant's Rule 12(b)(6) motion, we accept plaintiff's allegations as true. Accordingly, we conclude that the Buncombe County DSS has waived the defense of sovereign immunity and consented to suit against it for the negligent acts of its officers and employees.

We have further recognized that even in the absence of liability insurance, suit may be maintained against defendant Buncombe County DSS pursuant to G.S. 143-291(a). G.S. 143-291(a) also permits suits against officers of defendant Buncombe County DSS in their official capacity for actions within the scope of their duties. Accordingly, we conclude that plaintiff may proceed with her action against defendant Underwood in his official capacity pursuant to either G.S. 143-291(a) or G.S. 153A-435 depending on the liability insurance policy limits maintained by defendant Buncombe County DSS. A suit against defendant Underwood in his official capacity must proceed in the same forum as plaintiff's suit against defendant Buncombe County DSS. *Harwood*, 326 N.C. at 238, 388 S.E.2d at 443.

We now address plaintiff's claims against defendants Underwood, Barrow and Miller in their individual capacity. "When a governmental worker is sued in his individual capacity, our courts have distinguished between whether the worker is an officer or an employee when assessing liability." *EEE-ZZZ Lay Drain*, 108 N.C. App. at 28, 422 S.E.2d at 341.

> A public officer is shielded from liability unless he engaged in discretionary actions which were allegedly: (1) corrupt, *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985); (2) malicious, *id.*; (3) outside of and beyond the scope of his duties, *id.*; (4) in bad faith, *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236; or (5) willful and deliberate, *Harwood v. Johnson*, 92 N.C. App. 306, 310, 374 S.E.2d 401, 404 (1988).

Reid v. Roberts, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). A public employee, on the other hand, "is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236.

In categorizing a worker as either a public officer or a public employee, we have recognized several basic distinctions.

> A public officer is someone whose position is created by the constitution or statutes of the sovereign. *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power." *Id.* Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Jensen v. S.C. Dept. of Social Services*, 297 S.C. 323, 377 S.E.2d 102 (1988).

Hare, 99 N.C. App. at 700, 394 S.E.2d at 236.

[5] Applying this analysis, we conclude that Defendant Underwood, as director of the Buncombe County DSS, is a public officer. His position is created by statute, many of his duties are imposed by law and he clearly exercises substantial discretionary authority. *Id.* (citing G.S. 108A-12 (1981)). Normally, where a public officer's alleged negligence "is related solely to his or her official duties," the officer is immune from suit in his individual capacity, and any action must be brought against the officer in his official capacity. *Robinette v. Barriger*, 116 N.C. App. 197, 203, 447 S.E.2d 498, 502 (1994), *aff'd*, 342 N.C. 181, 463 S.E.2d 78 (1995). Here, plaintiff argues that defendant Underwood failed to properly train and supervise certain DSS

employees in the performance of their duties. We recognize that those activities are discretionary in nature and clearly within the scope of defendant's official duties. Therefore, we conclude the trial court properly dismissed plaintiff's suit against defendant Underwood in his individual capacity for mere negligence in the performance of his duties. *Hare*, 99 N.C. App. at 700-01, 394 S.E.2d at 236-37.

Defendant Underwood is not completely protected by the doctrine of governmental immunity, however, because plaintiff's complaint alleges that defendant Underwood's conduct was "willful, wanton and in reckless disregard of the rights of Clearman Frisbee." As we have stated, a public official is not shielded from liability for "willful and deliberate" conduct that proximately causes injury. *Reid*, 112 N.C. App. at 224-25, 435 S.E.2d at 119. Accordingly, we conclude that plaintiff's allegation is sufficient to withstand defendant's Rule 12(b)(6) motion and that plaintiff may proceed with the portions of her suit against defendant Underwood in his individual capacity which are based on allegations of willful and wanton conduct.

[6] As to defendants Barrow and Miller, defendant Barrow is the Supervisor of the Adult Protective Services Unit of the Buncombe County DSS and defendant Miller is a social worker for DSS. Neither position appears to have been created expressly by statute, and neither position appears to involve the exercise of sovereign power. The fact that each employee may exercise a certain amount of discretion does not change the analysis in light of the absence of other factors. Accordingly, we conclude that defendants Barrow and Miller are public employees, not public officers.

Having determined that defendants Barrow and Miller are public employees, we conclude that they may be personally liable "for the negligent performance of their duties that proximately caused foreseeable injury . . . ." *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. Defendants Barrow and Miller may also be liable in their individual capacity for any injury proximately caused by their willful and wanton conduct as alleged by plaintiff. *Reid*, 112 N.C. App. at 224-25, 435 S.E.2d at 119. Accordingly, we conclude that the trial court improperly dismissed plaintiff's claim against defendants Barrow and Miller in their individual capacity. We need not address plaintiff's remaining assignments of error.

We note here that, as there is no remaining issue of waiver of immunity with regard to these suits against defendants individually, jurisdiction is in the Superior Court as it would be in any other suit

seeking to hold a tortfeasor personally liable for his or her conduct. *See Epps v. Duke University*, 122 N.C. App. 198, 468 S.E.2d 846 (1996).

In summary, this cause must be remanded to the Superior Court for a determination as to the liability limits on the insurance policy or policies purchased by defendant Buncombe County and defendant Buncombe County DSS, and for a determination of defendants' motions to dismiss for lack of subject matter jurisdiction, consistent with this opinion. Contingent on the Superior Court being determined to have subject matter jurisdiction, we hold that the trial court erred in granting (1) defendant's Buncombe County DSS' motion to dismiss pursuant to Rule 12(b)(1), (2) defendant Underwood's Rule 12(b)(6) motion to dismiss suit against him in his official capacity, (3) defendant Underwood's Rule 12(b)(6) motion to dismiss suit against him in his individual capacity for allegations of willful and wanton conduct, and (4) defendants Barrow and Miller's Rule 12(b)(6) motion to dismiss suit against them in their individual capacity.

The trial court did not err in dismissing defendant Underwood's Rule 12(b)(6) motion to dismiss plaintiff's claim against him in his individual capacity for allegations of mere negligence.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN, JOHN C., and MARTIN, MARK D., concur.

EVELYN CAROL S. HANCOCK, Plaintiff, v. CARY GLENN HANCOCK, Defendant

No. COA94-1415

(Filed 4 June 1996)

1. Contempt of Court § 39 (NCI4th)— civil contempt—appeal properly before Court of Appeals

Since the contempt order in this case allowed plaintiff to purge the contempt by delivering the parties' child over to defendant for his scheduled visitation and by turning over a coin collection to defendant or otherwise consenting to a search of her home, the contempt order was actually civil in nature even though the order stated that the court found plaintiff in criminal

contempt, and the appeal was therefore properly before the Court of Appeals. N.C.G.S. §§ 5A-17, 5A-24.

Am Jur 2d, Appellate Review §§ 216-218.

Appealability of acquittal from or dismissal of charge of contempt of court. 24 ALR3d 650.

Appealability of contempt adjudication or conviction. 33 ALR3d 448.

Contempt adjudication or conviction as subject to review, other than by appeal or writ of error. 33 ALR3d 589.

2. Divorce and Separation § 384 (NCI4th)— willful refusal to allow visitation—insufficiency of evidence

The evidence was insufficient to support a finding that plaintiff willfully refused to allow defendant his visitation with the parties' child, and the trial court therefore erred in holding plaintiff in contempt, where there was no evidence that plaintiff acted purposefully and deliberately or with knowledge and stubborn resistance to prevent defendant's visitation with the child; she prepared the child to go, encouraged him to visit with his father, and told him he had to go; the child refused; and plaintiff did everything possible short of using physical force or a threat of punishment to make the child go with his father.

Am Jur 2d, Divorce and Separation §§ 999, 1011.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody. 28 ALR4th 9.

3. Divorce and Separation § 384 (NCI4th)— visitation not prevented but not forced by custodial parent—order of forced visitation—insufficiency of findings

Where the custodial parent did not prevent visitation but took no action to force visitation when the child refused to go, the proper method is for the noncustodial parent to ask the court to modify the order to compel visitation; however, the trial court's order in this case, though an attempt at an order of forced visitation because it sentenced plaintiff to jail but allowed her to purge herself of contempt by delivering the child over to defendant each and every time he was entitled to visitation, nevertheless failed

because there were no findings that the incarceration of plaintiff was reasonably necessary to promote and protect the best interests of the child.

Am Jur 2d, Divorce and Separation §§ 999, 1011.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody. 28 ALR4th 9.

4. Divorce and Separation § 41 (NCI4th)— failure to return coin collection—sufficiency of evidence to support finding of contempt

The trial court did not err in finding plaintiff in contempt for violating a consent judgment concerning property distribution by failing to return all of a coin collection to defendant where there was evidence to support the court's finding that plaintiff produced only bits and pieces of the collection.

Am Jur 2d, Divorce and Separation § 859.

Divorce: propriety of using contempt proceeding to enforce property settlement award or order. 72 ALR4th 298.

5. Judges, Justices, and Magistrates § 26 (NCI4th)— judge's statements to contemnor and child—no bias by judge

There was no merit to plaintiff's contention that the contempt order should be reversed because of bias on the part of the trial judge where, at the close of all the evidence, the judge ordered the minor child to return to the front of the courtroom and accused him of being a "spoiled brat" and of manipulating his parents and sisters, gave plaintiff a tongue lashing about the child's manipulation and her failure to punish him, accused plaintiff of beating "this man (defendant) out of his coin collection," and stated his belief that defendant, a Methodist minister, would not lie about a valued coin collection, since trial judges are not barred from expressing their opinions in trials conducted without a jury; and the record showed that the trial judge based his opinions and remarks upon the evidence presented at trial.

Am Jur 2d, Judges §§ 146-151, 170.

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

Waiver or loss of right to disqualify judge by participation in proceedings—modern state civil cases. 24 ALR4th 870.

Disqualification of federal judge, under 28 USC sec. 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved. 2 ALR Fed. 917.

Appeal by plaintiff from order entered 29 August 1994 by Judge William A. Christian in Lee County District Court. Heard in the Court of Appeals 28 September 1995.

As part of a divorce action, plaintiff-appellant Evelyn Hancock and defendant-appellee Cary Glenn Hancock entered into an agreement resolving all remaining matters in controversy concerning property distribution and custody of the couple's ten year-old minor son, Andrew. The trial court incorporated this agreement into a consent judgment filed 24 August 1993 in Lee County District Court. The judgment ordered, in part, that: "Defendant shall have as his sole and separate property the coin collection and computer;" and "Plaintiff shall have primary custody of their minor child, Andrew. Defendant shall have reasonable visitation privileges including specific visitations with his son, every other weekend, from 6:00 p.m. on Friday through 6:00 p.m. on Sunday . . . ."

When the defendant, who had relocated to Troy, North Carolina, arrived in Sanford on 18 March 1994 to take Andrew for his regularly scheduled visitation, the child refused to go with him. Instead, Andrew said he had plans to spend the weekend with his grandmother. Defendant testified he did not know whether plaintiff was home at the time. Two weeks later, on 1 April 1994, defendant again drove to Sanford to pick up his son for the weekend. Again, defendant was told Andrew did not wish to go with him.

Defendant also attempted to take Andrew for the weekend on Easter weekend, April 1994. Defendant was to be remarried on Easter Sunday and had planned for Andrew to be in the wedding. Andrew had been fitted for a tuxedo during his visitation with defendant the weekend of March 4th and his name was listed in the invitations, bulletins, *etc.* However, when defendant arrived to pick Andrew up on Good Friday, he was again told the child did not want to go. Defendant called the plaintiff before his next scheduled visitation on

15 April 1994 and was told by plaintiff Andrew did not want to go, and therefore, defendant did not drive to Sanford.

On 26 April 1994, defendant filed a motion in the cause to hold plaintiff in contempt for violation of the consent judgment. Defendant accused plaintiff of willfully failing and refusing to abide by the terms of the judgment by refusing to allow defendant his scheduled visitation with Andrew and by failing to turn over the complete coin collection. After a hearing on 29 August 1994, the court entered an order holding plaintiff in contempt for failure to abide by the terms of the consent judgment and sentenced her to thirty days in custody. From the judgment of contempt, plaintiff appeals.

Love & Love, P.A., by Jimmy L. Love, for plaintiff-appellant.

Staton, Perkinson, Doster, Post, Silverman & Adcock, by Norman C. Post, Jr., for defendant-appellee.

McGEE, Judge.

[1] We first note that the contempt order states the court "concludes that Plaintiff is in willful, *criminal* contempt of this court" (emphasis added). Criminal contempt orders are properly appealed from district court to the superior court, not to the Court of Appeals. N.C. Gen. Stat. § 5A-17 (1986). However, in civil contempt matters, appeal is from the district court to this Court. N.C. Gen. Stat. § 5A-24 (1986). In *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988), this Court held that the character of the relief is dispositive of the distinction between criminal and civil contempt, and where the relief is imprisonment, but the contemnor may avoid or terminate imprisonment by performing an act required by the court, then the contempt is civil in nature. *Bishop*, 90 N.C. App. at 505, 369 S.E.2d. at 109. Since the order in this case allows plaintiff to purge the contempt by delivering the child over to defendant for his scheduled visitation and by turning over the coin collection or otherwise consenting to a search of her home, the contempt order is actually civil in nature. Therefore, the appeal is properly before this Court.

I. Visitation

[2] Plaintiff first argues there was insufficient evidence to support a finding that she willfully refused to allow defendant his visitation with the child. Plaintiff contends there must be a showing that the custodial parent deliberately interfered with or frustrated the non-custodial parent's visitation before the custodial parent's actions can

be considered willful. We agree and reverse this portion of the contempt order.

"In contempt proceedings[,] the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978). Although the statute governing civil contempt, N.C. Gen. Stat. § 5A-21 (1986), does not expressly require that a contemnor's conduct be willful, case law has interpreted the statute to require an element of willfulness. *Smith v. Smith*, 121 N.C. App. 334, 336, 465 S.E.2d 52, 53-54 (1996). The trial court found as a fact that "Plaintiff has willfully failed and refused to abide by the terms of the [consent judgment] . . . [b]ecause of Plaintiff's willful refusal to allow the minor child to visit with the Defendant and/or the Plaintiff's inaction in not requiring the minor child to visit the Defendant . . . ." Since a willful failure by plaintiff to abide by the consent judgment would support a finding of contempt in this case, we must review the record to determine if it contains competent evidence to support a finding of willfulness.

"Willful" has been defined as "disobedience 'which imports knowledge and a stubborn resistance,' and as 'something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether [the contemnor] has the right or not—in violation of law . . . .' " *Jones v. Jones*, 52 N.C. App. 104, 110, 278 S.E.2d 260, 264 (1981) (citations omitted). Willfulness "involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616, 309 S.E.2d 729, 730 (1983). Evidence which does not show a person to be guilty of "purposeful and deliberate acts" or guilty of "knowledge and stubborn resistance" is insufficient to support a finding of willfulness. *In re Dinsmore*, 36 N.C App. 720, 726, 245 S.E.2d 386, 389 (1978). Here, the record contains no evidence plaintiff acted with a bad faith disregard for the law by committing purposeful and deliberate acts or acted with knowledge and stubborn resistance in order to violate defendant's visitation rights.

Plaintiff, her daughter, and the minor child all testified that plaintiff encouraged the child to go on his scheduled visitations with defendant. Plaintiff testified: "I have had Andrew ready, I've had Andrew's things ready, I've told Andrew he had to go, I've put Andrew

outside so that [defendant] could get Andrew. I've even tried to stay inside so he would have a chance to get Andrew." When asked whether she had told her son he had to go visit his father, plaintiff replied: "I had told him he had to go . . . I told him to get in the car." On direct examination, the child testified as follows:

Q. Okay. Has your mother, at any time, told you not to go and be with your father?

A. No.

Q. Has she always encouraged you to go see your father?

A. Yes.

Q. Has she physically restrained you or told you not to go visit your father?

A. No. . . .

Q. Has your mother done anything to try to discourage your love for your father or discourage you visiting your father?

A. No.

The child also testified he loved his father and wished to spend time with him, but only if his father's second wife and her children would not be there. Upon cross-examination the child testified as follows:

Q. If [plaintiff] tells you to go visit with your father, are you going to do that?

A. I don't know.

Q. Well[,] has she told you to get in the car with your father and go home?

A. Yes.

Q. And you refused to do that?

A. Yes.

Q. Does she make you do it?

A. No. She tried to.

Q. How does she try to do it?

A. By telling me that I had to go, it was his weekend.

Q. And you didn't do that?

A. No.

The child also testified on cross-examination that he did not visit with his father because he "didn't feel comfortable" with defendant's wife or at defendant's house, that defendant's wife had called him "a spoiled brat," and that the beds at defendant's house were "uncomfortable." Plaintiff's daughter testified she had never heard her mother discourage the child from visiting his father and had instead always encouraged him to go. She said her brother refused to go because he "hated it down there" at his father's home and because the child "hated" defendant's wife's son. Defendant testified he thought plaintiff should "at least make" the child go for his visitation in the same way she made the child attend school. He also testified he had never seen plaintiff tell the child he did not have to go, and on one occasion, he saw her encourage the boy and tell him he had to go. Defendant stated the child said his psychologist, Rodney Jones, had told him he did not have to go.

Nowhere in the record do we find evidence that plaintiff acted purposefully and deliberately or with knowledge and stubborn resistance to prevent defendant's visitation with the child. The evidence shows plaintiff prepared the child to go, encouraged him to visit with his father, and told him he had to go. The child simply refused. Plaintiff did everything possible short of using physical force or a threat of punishment to make the child go with his father. While perhaps the plaintiff could have used some method to physically force the child to visit his father, even if she improperly did not force the visitation, her actions do not rise to a willful contempt of the consent judgment.

Willfulness in a contempt action requires either a positive action (a "purposeful and deliberate act") in violation of a court order or a stubborn refusal to obey a court order (acting "with knowledge and stubborn resistance"). *See Dinsmore*, 36 N.C. App. at 726, 245 S.E.2d at 389. Neither are present in this case. We find no evidence that plaintiff willfully refused to allow the child to visit with the defendant. Nor do we agree with the trial court's finding that "Plaintiff's inaction in not requiring the minor child to visit with the Defendant" amounts to contempt because there is no evidence plaintiff resisted defendant's visitation or otherwise refused to obey the visitation order. She simply did not physically force the child to go. Absent any evidence she encouraged his refusal to go or attempted in any way to

prevent the visitation, her actions or inactions, even if improper, do not rise to the level of contempt.

[3] Defendant's frustration over not being able to have visitation with his child is certainly understandable. Where, as here, the custodial parent does not prevent visitation but takes no action to force visitation when the child refuses to go, the proper method is for the noncustodial parent to ask the court to modify the order to compel visitation. *See Mintz v. Mintz*, 64 N.C. App. 338, 307 S.E.2d 391 (1983) ("if a parent 'encounters unreasonable difficulty in exercising his visitation rights, he may apply to the trial judge, who can compel compliance with the order by making it more specific.' "). "[A] trial judge has the power to make an order forcing a child to visit the noncustodial parent." *Mintz*, 64 N.C. App. at 341, 307 S.E.2d at 394. In this case, the trial court attempted the functional equivalent of an order of forced visitation by sentencing plaintiff to jail but allowing her to purge herself of contempt by delivering the child over to defendant each and every time he was entitled to visitation. However, the order fails as an attempt at forced visitation.

> [A trial judge has the power to enter an order of forced visitation,] but only when the circumstances are so compelling and only after he has done the following: afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child.

Mintz, 64 N.C. App. at 341, 307 S.E.2d at 394. Neither the consent judgment nor the contempt order contains any findings that the incarceration of the plaintiff is reasonably necessary to promote and protect the best interests of the child. Because the record contains no evidence the plaintiff's actions were willful, and therefore contemptuous, and because the contempt order fails as an order compelling visitation, the trial court improperly sentenced plaintiff to thirty days in custody for violating the consent judgment by preventing visitation. This portion of the contempt order is reversed.

II. Coin Collection

[4] Plaintiff next argues the trial court improperly found her in contempt for failing to return all of the coin collection to defendant.

Plaintiff testified she turned over all of the coins she had to defendant. Both the minor child and plaintiff's daughter testified they had seen the coin collection prior to their parent's separation and that plaintiff had turned over all of the coins in the collection to defendant and had not disposed of any of the coins. Plaintiff contends the record fails to show she had the ability to return any more coins than she had already given the defendant, and therefore she cannot be held in contempt for failure to return the "complete" collection. We disagree.

The trial court found as a fact that: "The Plaintiff has failed to produce the complete coin collection as agreed in the [consent judgment]. In fact, Plaintiff produced only bits and pieces of said very valuable coin collection and has refused to produce the complete collection." As stated above, these findings of fact "are conclusive on appeal when supported by *any* competent evidence." *Clark*, 294 N.C. at 571, 243 S.E.2d at 139 (emphasis added). The record contains evidence to support this finding.

Defendant testified plaintiff gave him a paper sack which contained some, but not all, of the coins. He testified the value of the entire coin collection would be approximately two to three thousand dollars. However, defendant stated the value of the coins he received from plaintiff was only approximately ten to fifteen dollars. This evidence supports the trial court's finding of fact and is therefore binding on this Court. This is so even if the weight of the evidence might sustain findings to the contrary. *Monds v. Monds*, 46 N.C. App. 301, 304, 264 S.E.2d 750, 752 (1980). "Credibility of the witnesses is for the trial judge to determine, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary." *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) (citations omitted). Because the court's finding that plaintiff did not turn over the complete coin collection is based on competent evidence and supports the legal conclusion finding plaintiff in contempt of the consent judgment, under our standard of review we are bound to affirm this portion of the contempt order.[1]

1. We note that plaintiff has purged herself of this contempt. The order allowed plaintiff to purge the contempt by turning over the collection to defendant "or otherwise consent to a search of her residence." Plaintiff did in fact consent to this search in open court, thereby purging the contempt. Plaintiff points out in her brief that a search was conducted by deputies of the Lee County Sheriff's Department and the search found no coins. However, this information is not part of the official record and has no bearing upon our decision.

III. Bias

[5] Lastly, plaintiff contends the contempt order should be reversed because of bias on the part of the trial judge. Plaintiff argues the trial judge's comments at the end of the evidence shows the judge exhibited bias and prejudice against the plaintiff in such a way that it cannot be said she had a fair trial. We disagree and allow the portion of the order holding plaintiff in contempt for failure to return the complete coin collection to stand.

After all witnesses had testified, the trial judge ordered the minor child to return to the front of the courtroom, accusing him of being "a spoiled brat" and of manipulating his mother, father, and sisters. To the plaintiff the court said:

> [Manipulation] is exactly what's going on and you don't have the common sense to see what's going on and [your daughters] probably don't have the wisdom to see. But that little boy right there, eleven and a half years old, he got [sic] all of you jumping around like a puppet on a string. No punishment when he disobeys you in terms of going. You've not punished him one bit. You've not grounded him, you've not curtailed any of his privileges and I think you've beat this man out of his coin collection . . . . I don't know what's going on in your warped mind, but it ain't right. I don't think this Methodist Minister [the defendant] would come in here and swear on the bible, get up here and tell about a valued coin collection . . . and it not be in existence.

These and other statements made by the trial judge expressed his personal opinion as well as his decision in the matter. Trial judges are not barred from expressing their opinions in trials conducted without a jury, especially where the comments are consistent with the court's role as finder of fact. *Smithwick v. Frame*, 62 N.C. App. 387, 395, 303 S.E.2d 217, 222-23 (1983). The judge's comments here, while extremely pointed, do not show a preexisting bias against plaintiff or a prejudging of her case.

The judge's comments came at the end of all of the evidence. After announcement of the order holding plaintiff in contempt, plaintiff's attorney remarked that the trial judge had "heard something I haven't heard." In reply the judge said:

> I've heard the evidence and I've watched the demeanor of the witnesses. . . . I heard [the plaintiff] from the first three questions she was asked, she wouldn't answer that question. It was a con-

> tentiousness in her voice, contentiousness in her answers and it set the theme for the whole thing . . . .

Counsel then stated the judge had "drawn a lot of conclusions from evidence not before you." The court replied: "I didn't manufacture it, I saw it. I heard it. . . . I synthesized it, I must admit." The record shows the trial judge based his opinions and remarks upon the evidence presented at trial. Therefore, plaintiff has failed to show a personal bias or a prejudging of her case by the trial judge. *See Koufman v. Koufman*, 97 N.C. App. 227, 234, 388 S.E.2d 207, 211 (1990) *rev'd on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991) (trial judge did not "pre-judge" plaintiff's case when stating in chambers what child support would be appropriate since he had already heard some evidence in the matter).

For the reasons stated, the portion of the order holding plaintiff in contempt for failure to comply with the visitation provisions of the consent judgment is reversed. The portion of the order holding plaintiff in contempt for failure to turn over the entire coin collection is affirmed.

Reversed in part, Affirmed in part.

Judges MARTIN, John C., and JOHN concur.

PRESBYTERIAN-ORTHOPAEDIC HOSPITAL, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE, AND MERCY HOSPITAL, INC., INTERVENOR-RESPONDENT-APPELLEE, AND STANLY MEMORIAL HOSPITAL, INC., INTERVENOR-RESPONDENT-APPELLEE

No. COA94-1358

(Filed 4 June 1996)

1. Hospitals and Medical Facilities or Institutions § 14 (NCI4th)— new construction instead of utilization of old space—genuine issue of fact—mandatory staffing criteria—denial of certificate of need not error

In a proceeding for a certificate of need to develop rehabilitation beds, there was a genuine issue of material fact as to

whether petitioner's application demonstrated why its proposal for new construction was more cost efficient than conversion of existing underutilized space; however, petitioner's application failed to show that it satisfied the mandatory staffing criteria, and the Director of the Division of Facility Services thus did not err in concluding as a matter of law that petitioner should be denied a certificate of need.

Am Jur 2d, Hospitals and Asylums § 4.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Licensing and regulation of nursing or rest homes. 53 ALR4th 689.

2. **Hospital and Medical Facilities or Institutions § 14 (NCI4th)— application for certificate of need downsized—award of certificate error**

The Director of the Division of Facility Services inappropriately granted summary judgment in favor of respondent Mercy Hospital where Mercy submitted an application to develop twenty additional rehabilitation beds; the application was conditionally approved by downsizing the application from twenty to ten beds; and a genuine issue of material fact existed as to the financial feasibility of the downsized project.

Am Jur 2d, Hospitals and Asylums § 4.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Licensing and regulation of nursing or rest homes. 53 ALR4th 689.

3. **Hospital and Medical Facilities or Institutions § 14 (NCI4th)— certificate of need—change of management companies after application filed—award improper**

The Director of the Division of Facility Services erred in granting summary judgment in favor of respondent Stanly where Stanly unlawfully amended its application by dismissing its man-

agement company, since all of the information in Stanly's application listed one particular company as Stanly's prospective management company and the project analyst relied on Stanly's representations in its application in deciding to award a certificate of need to Stanly.

Am Jur 2d, Hospitals and Asylums § 4.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Licensing and regulation of nursing or rest homes. 53 ALR4th 689.

Appeal by petitioner from final decision entered 6 June 1994 by Director John M. Syria of the North Carolina Department of Human Resources Division of Facility Services. Heard in the Court of Appeals 13 September 1995.

The 1993 State Medical Facilities Plan identified a need for twenty rehabilitation beds in Health Service Area III, an eight county area in western North Carolina including Mecklenburg and Stanly Counties. Petitioner Presbyterian-Orthopaedic Hospital (hereinafter Presbyterian) and intervenor-respondents Mercy Hospital, Inc. (hereinafter Mercy) and Stanly Memorial Hospital, Inc. (hereinafter Stanly) applied to the Certificate of Need Section of the North Carolina Department of Human Resources (hereinafter respondent) for certificates of need to develop rehabilitation beds at their respective hospitals. Presbyterian and Mercy each submitted applications to develop twenty additional rehabilitation beds and Stanly submitted an application to develop a ten bed rehabilitation unit. Respondent denied Presbyterian's application, approved Stanly's application, and conditionally approved Mercy's application, downsizing Mercy's application from twenty beds to ten beds.

On 30 July 1993, Presbyterian filed a petition for a contested case hearing with the Office of Administrative Hearings (hereinafter OAH) challenging the denial of its application and the approval of Mercy's and Stanly's applications. The Administrative Law Judge (hereinafter ALJ) allowed Mercy's and Stanly's motions to intervene. Presbyterian subsequently moved for summary disposition, arguing that respondent materially changed Mercy's application in violation

of G.S. 150B-23 and that Stanly unlawfully amended its application after filing. Presbyterian argued that respondent exceeded its statutory authority by downsizing Mercy's project from twenty beds to ten beds because Mercy could not demonstrate that a ten bed project would conform with the review criteria set out in G.S. 131E-183. Presbyterian argued that Stanly unlawfully amended its application "by dismissing its management company, which was the cornerstone of its application, and by changing plans regarding its psychiatric bed conversion and construction."

Respondent, Mercy, and Stanly all filed motions with the OAH for partial summary judgment arguing that respondent properly denied Presbyterian's certificate of need. Respondent, Mercy, and Stanly all argued that Presbyterian's application failed to meet mandatory statutory and regulatory criteria because Presbyterian's application proposed insufficient staff for the rehabilitation unit and Presbyterian's application failed to justify the proposed new construction in light of its historical underutilization of its acute care beds.

In his recommended decision, the ALJ granted all parties' motions for summary judgment, concluding that none of the hospital applicants should receive certificates of need. The Director of the Division of Facility Services entered a final agency decision in which he adopted the ALJ's recommended decision that Presbyterian should be denied a certificate of need, but ordered that Mercy and Stanly be granted certificates of need, in effect granting summary judgment in favor of Mercy and Stanly.

Presbyterian appeals.

Parker, Poe, Adams & Bernstein L.L.P., by Renee J. Montgomery and James C. Thornton, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Sherry L. Cornett, for respondent-appellee.

Petree Stockton, L.L.P., by Noah H. Huffstetler, III and Sharon L. McConnell, for intervenor-respondent-appellee Mercy Hospital, Inc.

Maupin Taylor Ellis & Adams, P.A., by Robert L. Wilson, Jr. and James E. Gates, for intervenor-respondent-appellee Stanly Memorial Hospital, Inc.

EAGLES, Judge.

I.

[1] Our review of final agency decisions is governed by G.S. 150B-51(b). Pursuant to G.S. 150B-51(b):

> [T]he court reviewing a final decision [of an administrative agency] may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S.150(b)-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Here, Presbyterian argues that the ALJ in his recommended decision and the Director of the Division of Facility Services in his final agency decision erred in determining that Presbyterian should be denied a certificate of need. Presbyterian argues that there are genuine issues of material fact regarding: (1) the utility of Presbyterian's proposal for new construction versus conversion of underutilized existing space and (2) the adequacy of staffing proposed for Presbyterian's project. We first address the construction issue.

In its recommended decision, the ALJ found that Presbyterian's application failed to demonstrate why its proposal for new construction was more cost-efficient than conversion of existing underutilized space. At the time of Presbyterian's application, the State Medical Facilities Plan provided that "[c]onversion of underutilized hospital space to other needed purposes shall be considered to be more cost-efficient than new construction, unless shown otherwise." N.C. Admin. Code. tit. 10, r. 3R.3050(a)(2) (Jan. 1993). Based on this language, the ALJ determined that if a hospital had underutilized space,

yet it proposed new construction, the hospital was required to justify the new construction. Based on the utilization targets in place at the time of Presbyterian's application, the ALJ determined that the target occupancy rate for Presbyterian was 75% but that Presbyterian's "occupancy was no more than 18% in the 12 months preceding the review and no more than 31% since 1989." Having concluded from its statistics that Presbyterian had underutilized space, the ALJ determined that Presbyterian was required to show that its new construction was more cost-efficient than conversion of existing space and that Presbyterian had failed to justify its proposal for new construction in its application.

An application for a certificate of need for a proposed project must comply with "applicable policies and need determinations in the State Medical Facilities Plan." G.S. 131E-183(a)(1). The application also must comply with the review criteria set out in G.S. 131E-183(a). G.S. 131E-183(a)(12) provides in part that "[a]pplications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative." The ALJ granted summary judgment, concluding that Presbyterian had also failed to present any evidence that would create a genuine issue of material fact as to Presbyterian's conformity with these criteria.

Summary judgment is only appropriate when no genuine issues of material fact exist. G.S. 1A-1, Rule 56(c). Here, Presbyterian presented the deposition testimony of Richard E. Salerno, Administrator and CEO of Presbyterian. Mr. Salerno testified that Presbyterian was not able to structure the rehabilitation unit within existing space without new construction because all of the space in the hospital was dedicated to other health care purposes and moving weight-bearing walls prohibited construction in existing space. Mr. Salerno also testified that the new construction would better meet patient needs. This deposition testimony creates a genuine issue of material fact as to whether Presbyterian showed that its proposal for new construction was the most reasonable alternative for developing its rehabilitation unit.

We note, however, that an application must comply with *all* review criteria. Accordingly, we must now determine whether a genuine issue of material fact exists regarding the adequacy of staffing for Presbyterian's proposed project. In its recommended decision, the ALJ found that Presbyterian's application failed to show that its pro-

posed staffing for the rehabilitation unit conformed to applicable criteria. To operate a rehabilitation facility in North Carolina and to satisfy the review criteria of G.S. 131E-183(a), including G.S. 131E-183(a)(5) and G.S. 131E-183(a)(7), Presbyterian had to show that it would dedicate sufficient staff to provide three hours of therapy per patient per day in the rehabilitation unit. The ALJ found that Presbyterian's application only showed that there would be sufficient staff to provide 1.27 hours of therapy per patient per day. Presbyterian argues that it presented a forecast of evidence which demonstrated that its proposed staff would be able to provide 3.2 hours of therapy per patient per day. However, several witnesses for Presbyterian testified conceding that Presbyterian's application did not demonstrate on its face that it could provide three hours per patient per day. Presbyterian's completed and filed application failed to show that Presbyterian intended to combine therapists from its acute care unit and the proposed rehabilitation unit to reach the required hours of therapy, in effect "pooling" resources. After careful review of the record, we agree with the ALJ and the final agency decision that Presbyterian's application fails to show that it satisfies the mandatory staffing criteria. Accordingly, we conclude that the ALJ did not err in recommending summary judgment against Presbyterian and that the Director of the Division of Facility Services did not err in the final agency decision by concluding as a matter of law that Presbyterian should be denied a certificate of need.

II.

Presbyterian argues that the Director of Facility Services erred by granting summary judgment in favor of Mercy and Stanly after the ALJ had recommended summary judgment against Mercy and Stanly. Presbyterian contends there were genuine issues of material fact regarding Mercy's and Stanly's applications and that there should have been a contested case hearing where the parties could present evidence and cross-examine witnesses regarding these genuine issues of material fact. Here, the parties merely presented a forecast of evidence through deposition testimony and affidavits.

A "contested case hearing" is a full adjudicatory hearing. *Charlotte-Mecklenburg Hosp. Authority v. N.C. Dept. of Human Resources*, 83 N.C. App. 122, 125, 349 S.E.2d 291, 292-93 (1986). During a contested case hearing, parties have "an opportunity to present arguments on issues of law and policy and . . . to present evidence on issues of fact." G.S. 150B-25(c); *Britthaven Inc. v. N.C.*

Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). The parties also have an opportunity to cross-examine witnesses. G.S. 150B-25(d).

[2] We first address Presbyterian's argument as it relates to Mercy. In the ALJ's recommended decision denying Mercy's application for a certificate of need, the ALJ found that all of the information in Mercy's application was based on the financial feasibility of adding twenty beds, not ten beds. The ALJ also made a finding that Samuel H. Robinson, the project analyst for respondent who reviewed the applications of Presbyterian, Mercy, and Stanly, was:

> unsure about the adjustments that would be made in Mercy's staffing with the development of 10 beds, instead of 20 beds. The project analyst also was uncertain about the impact of the Agency decision on some of Mercy's projected expenses, and admitted that some of the assumptions that he used in attempting to determine the financial feasibility of a 10 bed Mercy proposal may have been invalid.

In contrast, in the final agency decision, the Director of the Division of Facility Services found that respondent "reasonably and properly determined that the 39 bed unit which would result from the Agency's conditional approval of Mercy's application . . . would be financially feasible."

Before issuing a certificate of need to an applicant, the Department of Human Resources must determine that the application is consistent with criteria set out in G.S. 131E-183, including the financial feasibility of the project. G.S. 131E-183(a)(5). From our review of the record before us here, it is clear that the parties forecast evidence to support both the ALJ's recommended decision and the final agency decision on the issue of the financial feasibility of the Mercy application. On this record, we conclude that there is a genuine issue of material fact as to whether respondent's grant of a certificate of need for ten beds to Mercy instead of the twenty beds originally applied for is financially feasible. Because we have determined that a genuine issue of material fact exists as to the financial feasibility of Mercy's project, we hold that the final agency inappropriately granted summary judgment in favor of Mercy. This case must be remanded for a contested case hearing regarding Mercy's application.

[3] Presbyterian next argues that the Director of Facility Services erred in granting summary judgment in favor of Stanly. Presbyterian argues that after Stanly's application was complete and while the review of the competing applications was in progress, Stanly began discussions with a different management company, the Charlotte Institute of Rehabilitation, (hereinafter CIR) for CIR to become its management company and that Stanly subsequently informed Milestone that Milestone would not be the managing company for the rehabilitation unit. Presbyterian contends that Stanly's actions constituted an impermissible material amendment of its application because all of the information in Stanly's application listed Milestone as Stanly's prospective management company and the project analyst relied on Stanly's representations in its application in deciding to award a certificate of need to Stanly. We agree.

An applicant may not amend an application for a certificate of need once the application is deemed complete. N.C. Admin. Code tit. 10, r. 3R.0306 (Dec. 1994); *In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 790-91, *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987). Here, all of Stanly's logistical and financial data in its completed certificate of need application was based on having Milestone as Stanly's management company. Yet, the record contains a letter dated 14 July 1993 from the president of Milestone expressing his disappointment in Milestone not being chosen by Stanly as its management company for the ten bed rehabilitation project. John Sullivan, Stanly's President and Chief Operating Officer, testified that he telephoned Milestone's president before 14 July 1993 and told him that Stanly would probably be working with a management company closer to Stanly "if and when [Stanly was] allowed to develop the beds." We conclude that the combination of the 14 July 1993 letter and Mr. Sullivan's telephone conversation with Milestone's president that occurred prior to the 14 July 1993 letter, taken in context, is sufficient evidence to show that Stanly had decided not to use Milestone as its management company before Stanly's certificate of need application was approved and that Stanly's actions constituted a material amendment to its application.

The final agency decision concluded that Stanly could present data to the Agency if Stanly decided to change management companies. We disagree. Stanly cannot be awarded a certificate of need contingent on CIR's management proposal data conforming to Milestone's data because in a certificate of need case, the hearing officer may only consider the evidence contained in an applicant's cer-

tificate of need application which was before the Certificate of Need Section when it made its initial decision. *In re Application of Wake Kidney Clinic*, 85 N.C. App. at 643, 355 S.E.2d at 791. The ALJ properly came to this conclusion in its recommended decision. Accordingly, we conclude that the Director of Facility Services erred in its final agency decision by concluding that Stanly should be granted a certificate of need.

In summary, this case is remanded to respondent for remand to the OAH for an ALJ to conduct a contested case hearing regarding Mercy's certificate of need application. We reverse the portion of the final agency decision that awarded Stanly a certificate of need because Stanly materially changed its application after its application was completed in violation of the North Carolina Administrative Code, N.C. Admin. Code tit. 10, r. 3R.0306 (Dec. 1994). We affirm the portion of the final agency decision that denied Presbyterian a certificate of need because Presbyterian failed to meet mandatory staffing criteria in its certificate of need application.

Reversed and remanded in part; affirmed in part.

Judges LEWIS and JOHN concur.

STATE OF NORTH CAROLINA v. MARY CLARA ADAMS

No. 9412SC559

(Filed 4 June 1996)

Constitutional Law § 264 (NCI4th); Infants or Minors § 15 (NCI4th)— filing of civil juvenile abuse petition—attachment of right to counsel in criminal abuse proceeding

Defendant mother's Sixth Amendment right to counsel attached in a criminal juvenile abuse proceeding after the filing of a civil abuse petition, even though there had been no formal criminal charge, preliminary hearing, indictment, information or arraignment; therefore, where counsel had been appointed to represent defendant in the civil abuse proceeding pursuant to N.C.G.S. § 7A-587, a statement given without defendant's attorney

being present or without an express waiver of the right to counsel must be suppressed in the criminal abuse prosecution.

Am Jur 2d, Criminal Law §§ 746, 972; Infants § 16.

Accused's right to assistance of counsel at or prior to arraignment. 5 ALR3d 1269.

Validity and construction of penal statute prohibiting child abuse. 1 ALR4th 38.

Appeal by the State from order entered 21 April 1994 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 21 February 1995.

On 27 November 1992, defendant Mary Clara Adams and her fiancé, Joseph Gullick, took their five-month-old daughter to Cape Fear Valley Medical Center for treatment for anal fissures. Cape Fear Valley Medical Center referred the infant to Duke University Hospital for evaluation of possible physical and sexual abuse. Based upon this evaluation, Cumberland County Department of Social Services (DSS) filed a petition on 9 December 1992 in Cumberland County District Court alleging abuse and neglect. Pursuant to N.C. Gen. Stat. § 7A-587, the court appointed an attorney to represent the defendant regarding the abuse petition on 14 December 1992.

As required by N.C. Gen. Stat. § 7A-548(a), DSS reported the suspected abuse to local law enforcement agents. On 7 December 1992, DSS contacted Detective Jo Autry of the Cumberland County Sheriff's Department. As part of her investigation, Detective Autry telephoned the defendant's mother on December 22nd. Defendant's mother stated that defendant had an attorney who had advised defendant not to talk to law enforcement. Autry then contacted defendant's attorney and requested she bring in the defendant for an interview. The attorney indicated that she represented the defendant only for the civil charges, but would speak with defendant about an interview.

On 30 December 1992, defendant, accompanied by her attorney, submitted to a taped interview with Detective Autry at the law enforcement center. Defendant also submitted to a polygraph examination the next day. Autry contacted defendant on 2 February 1993 and told her she needed to discuss the results of the polygraph. Autry testified she had no further direct or indirect contact with defendant until 4 March 1993. Detective Autry also testified that early in the

investigation she suspected defendant's fiancé, but by February 2nd she had focused on defendant as the primary suspect.

Defendant testified she informed Detective Autry during the February 2nd phone call that she did not wish to speak with Autry without her attorney, but Autry told her the attorney "had nothing to do" with what she was investigating. Defendant also testified that Detective Autry or others from the police department telephoned and left approximately twenty-two messages for her. She stated the tone of the messages changed over time from "you need to come to you better come." Defendant testified she received a call at work on Wednesday March 3rd relaying a message from Detective Autry. Defendant was told that if she did not come to the law enforcement center by 5:00 p.m. on Friday March 5th, she would be arrested at work. On 4 March 1993, defendant left a note at the law enforcement center for Detective Autry stating she would be back "as my part of our agreement." Defendant testified she left the note "[t]o let her know that I was trying to be there before Friday at five o'clock so she would know that I was doing what she asked of me so she wouldn't come and arrest me at my job." Defendant testified she attempted to contact her attorney, but was told her attorney was ill and not in the office. Defendant then left a message for her saying "please call me at work," but her attorney did not receive the message until she returned to the office on March 7th.

Defendant returned to the law enforcement center at 4:00 p.m. on March 5th. After taking a second polygraph examination, defendant was questioned by Detective Autry, Sergeant Terri Putman, and Detective Nancy Cressler. Defendant claims she asked to call her attorney, but was told she had already been called. Defendant testified that Detective Autry screamed at her that defendant was not a good mother, that she did not love her child, and that Autry would have the child removed so that defendant would never see her again. Both Detective Autry and Sergeant Putman testified they did not yell at defendant, and that defendant never asked for her attorney.

At one point during the questioning, Detective Autry left the room. During this time, defendant made allegedly inculpatory statements to Sergeant Putman. When Detective Autry returned, defendant repeated these statements to her. Detective Autry informed defendant she would be criminally charged with abuse, but allowed defendant to leave the law enforcement center to get something to eat. When defendant returned an hour later, she was arrested.

Defendant filed a motion to suppress her statements made during the March 5th questioning. After a hearing on 11 March 1994, the trial court entered an order dated 21 April 1994 granting defendant's motion to suppress. The court found as a matter of law that defendant's Sixth Amendment right to counsel had attached, and because defendant was represented by counsel, statements made without her attorney present should be suppressed. From this order the State appeals.

Michael F. Easley, Attorney General, by Thomas B. Murphy, Associate Attorney General, for the State.

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

McGEE, Judge.

The determining issue on appeal is whether a defendant's Sixth Amendment right to counsel attaches in a criminal juvenile abuse proceeding after the filing of a civil abuse petition, even though there has been no formal criminal charge, preliminary hearing, indictment, information, or arraignment. Because of the parallel nature of the civil petition and the criminal charge and because both are based upon the same facts, we affirm the trial court's order that where, as here, a defendant is represented by counsel in the civil abuse proceedings, defendant's Sixth Amendment right to counsel attaches upon filing of the abuse petition, and any statement given without the defendant's attorney being present or without an express waiver of the right to counsel must be suppressed.

The Sixth Amendment of the United States Constitution provides that: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. This right attaches "at or after the time that adversary judicial proceedings have been initiated against [the defendant]." *Kirby v. Illinois*, 406 U.S. 682, 688, 32 L. Ed. 2d 411, 417 (1972). Such proceedings as a preliminary hearing, indictment, information, arraignment, or the filing of formal charges have been held to trigger the Sixth Amendment right to counsel. *Kirby*, 406 U.S. at 689, 32 L. Ed. 2d at 417. When judicial proceedings have been initiated, "the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society . . . ." *Kirby*, 406 U.S. at 689, 32 L. Ed. 2d at 418.

The State argues the Sixth Amendment has no application absent an initiation of a criminal prosecution against the accused. While we agree that the presence of one of the formal criminal proceedings listed in *Kirby* is almost always required before a defendant's Sixth Amendment right to counsel will attach, we hold that when a civil juvenile abuse petition has been filed, "the adverse positions of government and defendant have solidified" and the parent faces "the prosecutorial forces of organized society" in such a way as to trigger the defendant's right to counsel. This is so because of the unique nature of the juvenile proceedings.

Whenever DSS discovers evidence that a juvenile may have been abused as defined under N.C. Gen. Stat. § 7A-517(1), it must immediately report the suspected abuse to the district attorney's office and must notify local law enforcement within forty-eight hours. N.C. Gen. Stat § 7A-548(a). Also, DSS may request the assistance of state or local law enforcement officers to help with the investigation and evaluation of the seriousness of the alleged abuse. N.C. Gen. Stat § 7A-544. Likewise, if a law enforcement agency or any other person or institution suspects a juvenile has been abused, they must report this information to DSS. N.C. Gen. Stat. § 7A-543. Within forty-eight hours of DSS' notification of suspected abuse, the local law enforcement agency shall "initiate and coordinate a criminal investigation with the protective services investigation being conducted by [DSS]." G.S. 7A-548(a). Therefore, whenever abuse has been alleged, DSS and law enforcement coordinate their respective investigations from the beginning.

If an investigation indicates abuse has occurred, DSS must determine what actions are needed to protect the juvenile and whether a petition will be filed. G.S. 7A-544. Once a civil abuse petition is filed, the parent faces the prosecutorial forces of organized society. *See New Jersey v. P.Z.*, 666 A.2d 1000 (N.J. Super. Ct. App. Div. 1995) (holding that the state and defendant are adversaries in a civil juvenile abuse action, thereby triggering Sixth Amendment right to counsel in criminal abuse action upon filing of civil petition). To protect the rights of a parent facing such civil abuse charges, the parent has a right to counsel, or to appointed counsel in cases of indigency, unless the parent waives the right. N.C. Gen. Stat. § 7A-587.

Because of the reciprocal duty for DSS and law enforcement to inform each other of evidence of abuse, and because of the dual nature of the civil and criminal abuse investigations, parallel civil and

criminal systems both operate against the defendant once proceedings have begun in either civil or criminal court. The dangers protected against by the right to counsel granted under G.S. 7A-587 in a civil abuse proceeding are equally inherent in criminal proceedings based upon the same facts. Since the civil and criminal aspects of juvenile abuse proceedings are so intertwined, upon the filing of a civil juvenile abuse petition a parent faces the "prosecutorial forces" of organized society and judicial proceedings have been initiated so as to trigger the Sixth Amendment right to counsel.

Further, in the case of *In re Maynard*, 116 N.C. App. 616, 448 S.E.2d 871 (1994), *disc. review denied*, 339 N.C. 613, 454 S.E.2d 254 (1995), this Court held that where the respondent had counsel appointed pursuant to G.S. 7A-587, the situation was "analogous to the situation where a defendant in a criminal case has counsel. Once a defendant invokes his right to counsel and counsel is retained or appointed, the defendant has the right to have counsel present during any questioning." *Maynard*, 116 N.C. App. at 620, 448 S.E.2d at 874. In *Maynard*, DSS filed a petition accusing respondent of neglect. The court appointed an attorney for respondent pursuant to G.S. 7A-587. After respondent stipulated that because of her mental illness the children were dependent as defined by N.C. Gen. Stat. § 7A-517(13), DSS, during respondent's scheduled visitations with the children, continually attempted to convince her to sign a consent to adoption. DSS conducted these discussions without respondent's counsel being present or without notifying her counsel, even though respondent had previously refused to sign the consent after conferring with her attorney and had stated in court that she wished to have her children returned. Respondent eventually signed the consent after yet another discussion with DSS without her attorney present. Respondent's attorney later filed a motion to set aside the consent to adoption.

This Court, in affirming the trial court's grant of respondent's motion, held respondent had a right to counsel when signing the consent forms since the signing occurred following and as a consequence of the neglect proceeding for which counsel had been appointed. *Maynard*, 116 N.C. App. at 619-20, 448 S.E.2d at 873. In finding that respondent had been denied the right to counsel, this Court said:

> Just as custodial interrogation of a criminal defendant in the absence of his appointed or retained counsel without a waiver is impermissible, petitioner's continuing discussions . . . urging the reluctant respondent to sign the [consent to adoption] without

her counsel being present or at least having any knowledge of the discussions violated respondent's right to counsel.

Maynard, 116 N.C. App. at 620-21, 448 S.E.2d at 874.

Not only did defendant's Sixth Amendment right to counsel attach upon filing of the civil petition, but also defendant was denied her right to counsel under *Maynard*. Here, as in *Maynard*, defendant had an attorney appointed pursuant to G.S. 7A-587. Once counsel was appointed, defendant had the right to have her attorney present for questioning. This right extends to all contacts which occur "following and as a consequence of" and are "directly related to" the proceedings for which counsel has been appointed. *Maynard*, 116 N.C. App. at 619-20, 448 S.E.2d at 873. Because *Maynard* prevents DSS from contacting a represented party in a juvenile action without notifying the attorney, and since the criminal and civil investigations are so intertwined, law enforcement officers are equally prohibited from questioning a represented parent regarding a juvenile abuse proceeding without the presence or notification of counsel unless the right is waived.

While civil and criminal juvenile abuse proceedings have different aims, namely protection of the child versus punishment of the abuser, the distinctions between the two actions often become blurred. As this Court has recognized, investigators involved on one side of civil/criminal abuse proceedings can become involved on the other side. *See State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147, *motion to dismiss allowed, disc. review denied, and cert. denied*, 333 N.C. 465, 427 S.E.2d 626 (1993) (holding that a social worker representing abused child acted as a law enforcement agent where worker had contact with law enforcement regarding the case prior to questioning defendant, thereby rendering defendant's custodial statements made to worker inadmissible). Because of the blurring of the two actions, it is particularly important to protect the rights of a defendant entangled in the intricacies of both civil and criminal law. This protection is best provided by counsel.

In this case, defendant had appointed counsel for the civil abuse petition. The police investigators knew defendant had an attorney and set up defendant's first questioning through her attorney. Her attorney accompanied her for this questioning. Later, the police contacted defendant's attorney asking to speak with defendant again. The trial court judge found the defendant's attorney informed defendant that she did not have to talk to the police if she did not want to.

Defendant then indicated that she did not want to talk to the police again. The court further found that Detective Autry advised the defendant's father "if the defendant did not come in and talk with her at the Law Enforcement Center, that the Officers would have to have [the defendant] arrested." Defendant's father advised his daughter that she should go to the Law Enforcement Center and talk to the officers, as the defendant "could not afford to be arrested on her job." Because defendant feared she would be arrested at work if she did not go to the police station at the officer's request, defendant felt she had no choice but to go to the station without her attorney on 5 March 1993. Although the defendant's attorney was appointed for representation in the civil action, defendant cannot be expected to recognize the blurred distinctions between the civil and criminal actions. She only knew that she had an attorney and wished to have that attorney present for questioning. Under the Sixth Amendment and the decision of this Court in *Maynard*, defendant had a right to have counsel present. Since defendant never waived this right, her statements obtained without counsel cannot be used against her. The order of the trial court suppressing defendant's statements is affirmed.

Affirmed.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. EDNA HINES

No. COA95-733

(Filed 4 June 1996)

1. Elections § 13 (NCI4th)— county board of election member—election officer

Members of county boards of elections are "election officers" for the purpose of applying the statute prohibiting the intimidation of such officers, N.C.G.S. § 163-275(11).

Am Jur 2d, Elections §§ 374-376.

2. Indictment, Information, and Criminal Pleadings § 43 (NCI4th)— bill of particulars—denial no abuse of discretion

The trial court did not err by denying defendant's motion for a bill of particulars in a prosecution for intimidating an election officer in the discharge of his duties where defendant was provided through discovery with enough of the requested information to prepare her case.

Am Jur 2d, Indictments and Informations §§ 154-164.

Right of accused to bill of particulars. 5 ALR2d 444.

3. Elections § 13 (NCI4th)— intimidating election official—interference with performance of duty of election official—instruction on lesser offense not required

Even if N.C.G.S. § 163-274(3), which makes it a misdemeanor to interfere with the performance of any legal duty of any election officer or member of any board of elections, is a lesser included offense of N.C.G.S. § 163-275(11), which makes it a felony to threaten or intimidate an election officer in the discharge of his duties, the trial court did not err in failing to so instruct, since the State's evidence was such that if the jury found defendant guilty at all, it was because she intimidated a member of the board of elections by threats.

Am Jur 2d, Elections §§ 374-376.

4. Elections § 13 (NCI4th)— prohibition against intimidating election official—statute not unconstitutional

The statute which prohibits anyone from intimidating or attempting to intimidate in any manner someone who is conducting an election, N.C.G.S. § 163-275(11), is not unconstitutionally vague or overbroad, since the statute is specific enough to warn individuals of common intelligence of the conduct which is proscribed and is capable of uniform judicial interpretation, is tailored as narrowly as possible to serve the state's compelling interest in ensuring electoral integrity, is generally applicable, and its regulations are even-handed.

Am Jur 2d, Elections §§ 374-376.

Appeal by defendant from judgment entered 5 January 1995 by Judge W. Russell Duke, Jr. in Hertford County Superior Court. Heard in the Court of Appeals 19 March 1996.

Attorney General Michael F. Easley, by Associate Attorney General Sharon C. Wilson, for the State.

Howard C. McGlohon for defendant-appellant.

LEWIS, Judge.

Defendant Edna Hines, chairperson of the Hertford County Board of Elections, was convicted by a jury of willfully intimidating or attempting to intimidate an election officer in the discharge of his duties and of willfully communicating threats. The offenses were consolidated for judgment and defendant was given a thirty day sentence, which was suspended on the condition that she pay a $250.00 fine and $185.00 in court costs. Defendant made a motion for appropriate relief asking the court to set aside the verdict, dismiss the charges or grant a new trial. The trial court denied this motion. Defendant appeals.

At trial, the State's evidence tended to show that at the time of the alleged incident, the Hertford County Board of Elections consisted of two democratic members, defendant and Sally Moore, and one Republican member, Doug Askew. Mr. Askew testified that around 5 p.m. on 2 November 1993 he and Ms. Moore counted the absentee ballots, as previously arranged. Later that evening Ms. Hines took the absentee ballots into a back room at the Board of Elections to recount them. Since one member of each party must be present while ballots are counted, Mr. Askew followed her. Once Mr. Askew entered the room, Ms. Hines told him that he needed to be a "team player." When Mr. Askew asked her to explain her comment, defendant began to scream at him and accuse him of undermining her authority as chairperson. According to Mr. Askew's testimony, Ms. Hines told him he "didn't know who [he] was messing with" and threatened to "kill [him]" and "choke the shit out of [him]." While she was yelling at Mr. Askew, Ms. Hines had him backed up against a desk. Mr. Askew testified that Ms. Hines was mad and upset and that he was scared to move.

Sheriff Winfred Hardy, another witness for the State, testified that he was sitting in the outer room of the Board of Elections during the evening of 2 November 1993. From the back room, he heard a woman's voice very loudly say, "I'll kill you." He jumped out of his chair and went into the back room where Ms. Hines was shaking her finger in Mr. Askew's face, saying "I'll kill you" and "I'll choke the shit out of you." Sheriff Hardy approached Ms. Hines and pulled her arm

down to her side because he thought she was going to hit Mr. Askew. The sheriff told Ms. Hines to calm down. Ms. Hines replied by telling the sheriff to get Mr. Askew's "damn ass" out of the room.

Mr. Gary Bartlette, Executive Secretary Director of the State Board of Elections, testified that Chapter 163-234(3) of the North Carolina General Statutes requires a member of each party to be present for the counting and recounting of absentee ballots.

Defendant testified that on the day in question she began to recount the absentee ballots in the front room but moved to the back room to get away from Mr. Askew, who was talking to her and distracting her. He then followed her into the back room, standing behind her and "breath[ing] down [her] neck." She testified that she asked him to sit down, but he refused. Instead, he stood over her, telling her that she did not know what she was doing. After Mr. Askew did something Ms. Hines described as "outrageous," although she could not remember what it was, she told him he should be more respectful and leave her alone. Ms. Hines testified that Sheriff Hardy removed Mr. Askew from the room. Ms. Hines stated that she never intended to harm Mr. Askew or try to intimidate him.

Defendant's witness, Shirley Thompson, an employee of the Hertford County Board of Elections in November 1993, testified that she was in the back room when the confrontation happened on 2 November 1993. She stated that she saw Mr. Askew standing over Ms. Hines' shoulder as defendant counted the votes. Ms. Thompson testified that Ms. Hines rose from her chair and that both Ms. Hines and Mr. Askew were speaking very loudly at one another. Ms. Thompson heard Ms. Hines call the sheriff and tell him to get Mr. Askew out of the room before she killed him. Sometime after the sheriff came in, Mr. Askew left the room, but returned ten or fifteen minutes later to apologize to Ms. Hines. It was Ms. Thompson's testimony that Mr. Askew had a propensity to "flare up."

After defendant presented her evidence, the State recalled Sheriff Hardy who testified that Ms. Hines did not call for him to remove Mr. Askew. He repeated his prior testimony that he entered the back room after hearing Ms. Hines threaten to kill Mr. Askew. Sheriff Hardy further testified that he did not hear Mr. Askew raise his voice.

Mr. Askew also returned to the stand and testified that he was not breathing down Ms. Hines' neck, but was leaning up against a desk behind her. He denied telling Ms. Hines that she did not know what

she was doing and stated that Ms. Moore and Ms. Thompson were in the room yelling at him as well.

Defendant makes eight assignments of error but only argues six in her brief. Therefore, assignments of error numbers one and seven are deemed abandoned. N.C.R. App. P. 28(a) (1996).

[1] Defendant first contends that the trial court should have dismissed the claim that she violated N.C. Gen. Stat. section 163-275(11) because there was insufficient evidence that Mr. Askew was an "election officer" as mentioned in the statute and additionally because members of county board of elections are not protected by the statute. We disagree.

G.S. 163-275(11) provides:

> Any person who shall, in connection with any primary, general or special election held in this State, do any of the acts or things declared in this section to be unlawful, shall be guilty of a Class I felony. It shall be unlawful:
>
> * * *
>
> (11) For any person, by threats, menaces or in any other manner, to intimidate any chief judge, judge of election or other *election officer* in the discharge of his duties in the registration of voters or in conducting any primary or election.

G.S. § 163-275(11) (1995) (emphasis added). The term "election officer" is not defined in the statute.

In support of her argument that a board of elections member is not an election officer under the statute, defendant points to N.C. Gen. Stat. section 163-274(3) which makes it a misdemeanor "to interfere in any manner with the performance of any duty imposed by law upon any election officer *or member of any board of elections.*" G.S. § 163-274(3) (1995) (emphasis added). Defendant argues that since the legislature made a distinction between an election officer and a board of elections member in this statute, it intended the two to be distinct. Furthermore, defendant argues, if the legislature intended to include a member of the board of elections in G.S. 163-275(11), it would have done so, as it did in G.S. 163-274(3).

In construing a statute, undefined words should be given their plain meaning if it is reasonable to do so. *Woodson v. Rowland*, 329

N.C. 330, 338, 407 S.E.2d 222, 227 (1991). An "officer" is "one who is appointed or elected to serve in a position of trust . . . ." Webster's Third New International Dictionary (1968). Trust is defined as "a charge or duty imposed in faith or confidence . . . ." *Id.* Therefore, an "election officer" is anyone charged with an election duty. Additionally, statutes should be construed to ensure that the purpose of the legislature is accomplished. *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227. G.S. 163-275(11) is part of Article 22, entitled "Corrupt Practices and Other Offenses against the Elective Franchise," which the North Carolina Supreme Court has determined was "designed to prohibit various kinds of practices thought to be inimical to fair elections." *State v. Petersilie*, 334 N.C. 169, 179-80, 432 S.E.2d 832, 838 (1993).

County boards of elections, and their members, have clearly been delegated election duties by our legislature. *See* N.C. Gen. Stat. § 163-33 (1995); N.C. Gen. Stat. § 163-234 (1995). As a result, according to the plain meaning of the term, we hold that members of county boards of elections are "election officers" for the purpose of applying G.S. 163-275(11). To conclude otherwise would also frustrate the obvious intent of the legislature in passing G.S. 163-275(11): to promote fair elections and to ensure that threats and intimidation do not interfere with the duties of any person charged with running an election.

Defendant also argues that Mr. Askew had no duties in conducting the election because any duties in conducting an election are given to the board as an entity and not to the individual board members. As defendant points out, the board is an entity. Therefore, it is incapable of performing any duties independent of its individual members. We hold that as a member of the board, Mr. Askew is charged with all duties imposed on the board itself. This assignment of error is overruled.

[2] Defendant also assigns error to the trial court's denial of her Motion for a Bill of Particulars. She contends that the indictment was not sufficient to allow adequate preparation of her defense. In her motion, defendant asked for various information including the exact time, date and location of the alleged conduct, the specific language or conduct alleged and the specific duties in the election Mr. Askew was conducting. Subsequently, during discovery, the State provided defendant with the statements of three witnesses and a list of over twenty statements allegedly made by defendant on the evening in

question. Immediately prior to trial, defendant requested a ruling on her motion for a bill of particulars; the court denied the motion.

An appellate court should reverse the denial of a motion for a bill of particulars only if it clearly appears that the "lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case." *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980). Since we find no evidence in the record that a lack of information "significantly impaired" Ms. Hines' preparation of her defense, we find no abuse of discretion by the trial court in denying her motion for a bill of particulars. Through discovery, Ms. Hines was provided with enough of the requested information to adequately prepare her case. This assignment of error is overruled.

[3] Defendant also contends that the trial court erred by denying her Motion for Appropriate Relief. She provides two grounds for this proposition. First, Ms. Hines argues that the trial court erred by not instructing the jury on G.S. 163-274(3), which she contends is a lesser included offense.

A trial court is obligated to instruct on a lesser included offense "when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954). As stated above, G.S. 163-274(3) makes it a misdemeanor to "interfere in any manner with the performance of any duty imposed by law upon any election officer or member of any board of elections." We hold that even if this is a lesser included offense of G.S. 163-275(11), the trial court did not err in failing to include it in the instructions. The State's evidence was such that if the jury found defendant guilty at all, it was because she intimidated Mr. Askew by threats. There was no evidence presented which showed that Ms. Hines interfered with his election duties in any other way. This assignment of error is overruled.

[4] Defendant also argues that her motion for appropriate relief should have been granted because G.S. 163-275(11) is unconstitutional on its face and as applied. We find no merit in these contentions.

Defendant argues that the statute is unconstitutionally vague. A statute is unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L.Ed. 322,

328 (1926). However, "[w]hen the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *In Re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *aff'd, McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971). Defendant has the burden of proving that there is inadequate warning or that the statute is incapable of uniform judicial interpretation and administration. *Caswell County v. Hanks*, 120 N.C. App. 489, 493, 462 S.E.2d 841, 844 (1995).

Defendant has failed to meet this burden. G.S. 163-275(11) prohibits anyone from 1) intimidating or attempting to intimidate 2) in any manner 3) someone who is conducting an election. Only the term "intimidate" could possibly be considered vague and we find no legal problem.

Undefined words in a statute should be given their plain meaning if it is reasonable to do so. *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227. "Intimidate" is commonly defined as "to make timid or fearful: inspire or affect with fear: frighten." Websters Third New International Dictionary (1968). Clearly, in G.S. 163-275(11) the legislature intended to prohibit anyone from frightening an individual while conducting election duties. We conclude that this statute is specific enough to warn individuals of common intelligence of the conduct which is proscribed and is certainly capable of uniform judicial interpretation.

Defendant also contends that the statute is overbroad so as to violate the free speech guarantees of the United States and North Carolina Constitutions. She argues that it unnecessarily sweeps into areas of protected speech. Again, we disagree.

"The overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right." *Treants Enterprises, Inc. v. Onslow County*, 94 N.C. App. 453, 458, 380 S.E.2d 602, 604 (1989) (citing *Clark v. City of Los Angeles*, 650 F.2d 1033 (9th Cir. 1981), *cert. denied*, 456 U.S. 927, 72 L. Ed. 2d 443 (1982)). It is undisputed that each state has "a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Democratic Com.*, 489 U.S. 214, 231, 103 L. Ed. 2d 271, 287 (1989). The United States Supreme Court has " 'upheld generally-applicable and evenhanded restrictions that pro-

tect the integrity and reliability of the electoral process itself.' " *Petersilie*, 334 N.C. at 185, 432 S.E.2d at 841 (citing *Burson v. Freeman*, 504 U.S. 191, 199, 119 L. Ed. 2d 5, 15 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9, 75 L. Ed. 2d 547, 557 n.9 (1983)).

G.S. 163-275(11) is not overbroad, but rather is tailored as narrowly as possible to serve North Carolina's compelling interest in ensuring electoral integrity. The statute is generally-applicable and its regulations are even-handed. We conclude that G.S. 163-275(11) is not unconstitutionally broad.

Ms. Hines also argues that the statute is unconstitutional as applied and that it impermissibly burdens her freedom of conscience. After reviewing these arguments, we find them to be without merit. We rule that G.S. 163-275(11) is constitutional, both on its face and as applied.

Defendant also assigns error to the trial court's failure to dismiss count two of the indictment. She argues that since the felony statute is unconstitutional, the misdemeanor charge was not properly consolidated with a felony as required by N.C. Gen. Stat. section 7A-271(3). Since we have found the statute to be constitutional, we see no reason to address this assignment of error.

We conclude that Ms. Hines received a fair trial, free from prejudicial error.

No error.

Judges GREENE and SMITH concur.

JAMIL QURNEH, PLAINTIFF v. LORRI-ANN GAIL COLIE, DEFENDANT; JEAN BOOTH PROCTOR AND JAMES BERNICE PROCTOR, SR., INTERVENORS-DEFENDANTS

No. COA95-876

(Filed 4 June 1996)

1. Divorce and Separation § 350 (NCI4th); Parent and Child § 24 (NCI4th)— parent's drug involvement—pleading Fifth Amendment privilege—dismissal of custody claim appropriate

Dismissal of the father's claim for child custody is an appropriate remedy where the father exercised his Fifth Amendment

right against self-incrimination in response to questions concerning his alleged involvement with illegal drug activity, since to allow the father to take advantage of the presumption that a natural parent should have custody while curtailing the opposing party's ability to prove him unfit would not promote the interest and welfare of the child, and the withholding of such information prevents the court from determining the party's fitness.

Am Jur 2d, Divorce and Separation §§ 974, 979, 980; Parent and Child § 26.

Parent's use of drugs as factor in award of custody of children, visitation rights, or termination of parental rights. 20 ALR5th 534.

2. Divorce and Separation § 357 (NCI4th)— plaintiff's custody claim dismissed—subsequent findings of unfitness not irrelevant

Though plaintiff's claim for custody had been dismissed at the time the trial court entered an order awarding custody to the intervenor grandparents, it was entirely appropriate for the court to make findings related to plaintiff's fitness for custody, since the trial court did not strike plaintiff's testimony when he dismissed plaintiff's claim; plaintiff remained a party with regard to defendant's counterclaim; and to support an order of custody, the trial court was required to make findings of fact as to the characteristics of the competing parties.

Am Jur 2d, Divorce and Separation § 980.

Award of custody of child where contest is between child's parents and grandparents. 31 ALR3d 1187.

3. Pleadings § 374 (NCI4th)— amendment of pleadings—allegation of unfitness—no abuse of discretion

The trial court did not abuse its discretion by allowing defendant to amend her pleadings in a child custody action to allege plaintiff's unfitness. N.C.G.S. § 1A-1, Rule 15(a).

Am Jur 2d, Pleading § 323.

4. Evidence and Witnesses § 2403 (NCI4th)— witness added to defendant's list—opportunity for plaintiff to prepare for trial

There was no merit to plaintiff's contention that the addition of a police detective as a potential witness less than a week before trial denied plaintiff a meaningful opportunity to depose the witness or adequately prepare for cross-examination since plaintiff was given the detective's name and a summary of his potential testimony prior to trial; plaintiff's counsel communicated with the witness and the information obtained formed the basis of some cross-examination; and plaintiff did not attempt further discovery.

Am Jur 2d, Witnesses §§ 60 et seq.

Identity of witnesses whom adverse party plans to call to testify at civil trial, as subject of pretrial discovery. 19 ALR3d 1114.

Appeal by plaintiff from orders entered 10 April and 25 April 1995 by Judge Sol G. Cherry in Orange County District Court. Heard in the Court of Appeals 18 April 1996.

Plaintiff and defendant are the biological parents of Lacy Alexandra Proctor-Qurneh, born November 25, 1987. The child's maternal grandparents, Jean Booth Proctor and James Bernice Proctor intervened in this action.

Plaintiff is a legal alien who first came to the United States in 1980 from Israel to attend college at Shaw University. Later, he transferred to North Carolina State University where he received a degree in civil engineering. Following graduation in the fall of 1986, plaintiff began seeing defendant and on 25 November 1987 she gave birth to a child. After a paternity test, plaintiff obtained an order legitimizing the child and signed a custody agreement granting plaintiff sole custody. In the fall of 1989, both plaintiff and defendant consented to the child living with the intervenors.

In the summer of 1993, plaintiff communicated with the intervenors regarding his desire to spend more time with the child. When intervenors rejected this suggestion, plaintiff filed his complaint for custody. The defendants filed an answer and counterclaim requesting custody of the child. Later, defendants were granted leave to amend their answer to allege plaintiff's unfitness.

During the trial, intervenors' counsel questioned plaintiff regarding illegal drug use, trafficking and other drug involvement. Plaintiff invoked his fifth amendment privilege against self-incrimination a total of nineteen times in response to these questions.

Defendant called Detective Richard Johnson of the Wake County Sheriff's Department as a witness. He testified that the plaintiff was under surveillance for several months prior to his arrest for multiple drug charges including possession and trafficking of cocaine. Detective Johnson stated that the investigation of the plaintiff confirmed his opinion that plaintiff was a mid to upper level dealer and trafficker in cocaine. Later, all charges were dismissed when plaintiff agreed to cooperate with law enforcement as an informant. Detective Johnson testified that plaintiff's ability to be an effective informant was dependent upon his ability to negotiate drug buys and his continued involvement in the drug world.

At the close of the evidence, the court granted intervenors' motion to dismiss plaintiff's claim for custody. Then the court considered the defendant's counterclaim and awarded custody to the intervenors with the plaintiff having visitation rights with the child.

Lewis & Anderson, P.C., by Susan H. Lewis and Christina L. Goshaw, for plaintiff-appellant.

Lunsford Long for defendant-appellee.

Foil Law Offices, by N. Joanne Foil and Susannah P. Holloway, for intervenors-defendants-appellees.

WALKER, Judge.

In his brief, plaintiff presents numerous arguments relating to the trial court's dismissal of his claim for custody. Due to the overlapping nature of these arguments, we will address these issues together. Plaintiff's arguments, regarding amendment of defendant's pleading, admission of Detective Johnson's testimony, and the denial of plaintiff's motion for a new trial, will be addressed in Sections II, III, and IV respectively. We note that the remaining assignments of error which plaintiff failed to argue in his brief have been deemed abandoned. *State v. Davis*, 68 N.C. App. 238, 245, 314 S.E.2d 828, 833 (1984); N.C. App. R. 28(b)(5) (1995).

I.

[1] We now turn to the question of whether the trial court erred by dismissing plaintiff's claim for custody where he asserted his fifth amendment privilege in response to questions concerning his alleged involvement with illegal drug activity. Plaintiff contends that he had the right to exercise the privilege against self-incrimination and that the trial court's action violated his constitutional right to due process. Further, plaintiff argues that the trial court abused its discretion when it dismissed plaintiff's claim because there were less drastic measures available which would have accommodated the parties' interests and protected plaintiff's constitutional privilege against self-incrimination.

The fifth amendment privilege against self-incrimination protects an individual from being compelled to give testimony which may incriminate him/her or which might subject him/her to fines, penalties, or forfeiture. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964). We agree that the plaintiff had a right to exercise this privilege, but disagree that the trial court's action violated his constitutional rights.

The precise question presented by this appeal is whether dismissal of a party's claim for custody is an appropriate remedy where the party exercises his/her fifth amendment right. A related issue was addressed by our Court in the case of *Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129 (1993).

In *Cantwell*, the defendant-wife filed a counterclaim for alimony on the grounds of abandonment. The plaintiff-husband denied the allegations and further argued that the defendant-wife was barred from receiving alimony because she committed adultery. The defendant-wife asserted her fifth amendment privilege and refused to answer any questions regarding her alleged adultery. This Court dismissed defendant-wife's counterclaim for alimony stating:

> the defendant in the present case was properly given the choice to either shield herself from criminal charges by refusing to answer questions regarding her alleged adultery, and in so doing abandon her alimony claim, or waive her privilege and pursue her claim. As such, an equitable balance was created between the defendant's right to assert her privilege and the plaintiff's right to defend himself from the defendant's counterclaim.

Cantwell, 109 N.C. App. at 398, 427 S.E.2d at 131. Thus, the language of *Cantwell* suggests that a balancing test should be employed to determine the appropriate remedy where a party has asserted his/her fifth amendment privilege.

Plaintiff argues that the trial court failed to properly balance the interests of the parties. Specifically, plaintiff contends that the remedy used by the trial court in *Cantwell* is inappropriate in the present case because the nature of the interests involved are substantially different from those involved in *Cantwell*. Plaintiff maintains that, unlike *Cantwell*, his refusal to testify did not preclude the opposing party from presenting a defense to his claim. According to the plaintiff, his alleged drug activity is only one of many factors which the court could consider in determining his fitness.

The privilege against self-incrimination is intended to be a shield and not a sword. *Christenson v. Christenson*, 162 N.W.2d 194, 200 (Minn. 1968). Here, the plaintiff attempted to assert the privilege as both a shield and a sword.

In an initial custody hearing, it is presumed that it is in the best interest of the child to be in the custody of the natural parent if the natural parent is fit and has not neglected the welfare of the child. *Peterson v. Rogers*, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994). Plaintiff sought to take advantage of this presumption by introducing evidence of his fitness. *See Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967) (holding that in order to be entitled to this presumption, the natural parent must make a showing that he or she is fit). However, when the defendant sought to rebut this presumption by questioning the plaintiff regarding his illegal drug activity, the plaintiff asserted his fifth amendment privilege. To allow plaintiff to take advantage of this presumption while curtailing the opposing party's ability to prove him unfit would not promote the interest and welfare of the child. N.C. Gen. Stat. § 50-13.2(a) (1995).

In a related argument, plaintiff contends that the trial court improperly concluded that it could not determine plaintiff's fitness. A trial court's inability to determine the fitness of a parent is an adequate basis for not awarding custody to that parent. *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971). In this State, evidence of a parent's prior criminal misconduct is relevant to the question of the parent's fitness. *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983). Due to the plaintiff's refusal to

answer questions regarding illegal drug use, trafficking and other drug involvement, the trial court was unable to consider pertinent information in determining plaintiff's fitness. As a policy matter, issues such as custody should only be decided after careful consideration of all pertinent evidence in order to ensure the best interests of the child are protected. Plaintiff's decision not to answer certain questions relating to his past illegal drug activity by invoking his fifth amendment privilege prevented the court from determining his fitness and necessitated the dismissal of his claim.

[2] Plaintiff also assigns error to numerous findings and conclusions contained in the court's order awarding custody to the defendants-intervenors. At the time the court entered this order, the plaintiff's claim for custody had been dismissed. As such, plaintiff contends that the findings and conclusions relating to his fitness were irrelevant. We disagree.

While the trial judge dismissed plaintiff's claim for custody, he did not strike plaintiff's testimony and plaintiff remained a party with regard to defendant's counterclaim. Furthermore, to support an order of custody

> [f]indings of fact as to the characteristics of the competing parties must be made to support the necessary conclusion of law. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

Steele v. Steele, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978). Thus, it was entirely appropriate for the court to make findings related to the plaintiff's fitness for custody.

Plaintiff also argues that the trial court's order improperly shifts the burden of proof to the plaintiff with regard to the issue of fitness. In dismissing plaintiff's complaint, the court concluded that "by reason of Plaintiff's exercise of his Fifth Amendment privilege, the Court is not able to determine that the Plaintiff is a fit and proper person to have custody of the minor child." Then the court considered the defendant's counterclaim and awarded custody to the defendants-intervenors finding that the plaintiff failed to prove that he is a fit and proper person to have custody.

While plaintiff is correct that there is a presumption that it is in the best interests of the child to be in the custody of the natural par-

ent, the natural parent must make a *prima facie* showing of fitness to be entitled to this presumption. *Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967). We interpret the second order to mean that the plaintiff failed to make a *prima facie* showing that he was fit when he declined to answer questions on cross-examination relating to his fitness. Thus, where the defendant has failed to make such showing and the court cannot determine plaintiff's fitness because of his assertion of the fifth amendment, the court acted properly in dismissing plaintiff's claim for custody and awarding custody to the intervenors. Accordingly, these assignments of error are overruled.

II.

[3] Next, we address plaintiff's argument that the trial court erred by allowing defendant to amend her pleadings to allege unfitness. 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).

Here, defendant moved to amend her answer pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). Rule 15(a) provides that "leave shall be freely given when justice so requires." Upon careful consideration, we find that the trial court did not abuse its discretion by allowing defendant to amend her pleadings.

III.

[4] In his brief plaintiff also argues that the court erred by admitting the testimony of Detective Johnson which was the only evidence regarding plaintiff's alleged prior drug activity. Plaintiff contends that the addition of Detective Johnson as a potential witness less than a week before trial denied plaintiff a meaningful opportunity to depose Detective Johnson or adequately prepare for cross-examination.

The record shows that immediately upon discovering that Detective Johnson was one of the arresting officers, defendants-intervenors supplemented their answers to plaintiff's interrogatories. Thus, plaintiff was given Detective Johnson's name and a summary of his potential testimony prior to trial regarding plaintiff's involvement in illegal drug activity. Plaintiff's counsel then communicated with Detective Johnson and the information obtained formed the basis of some of the cross-examination of Detective Johnson. Plaintiff did not attempt further discovery regarding Detective Johnson's testimony. In sum, we find no abuse of discretion by the trial court.

IV.

In his last argument, plaintiff contends that the trial court erred by denying his motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (1990). Specifically, plaintiff argues that he was entitled to a new trial because the judgment was based on erroneous facts. According to the plaintiff, the court believed that plaintiff had actually been convicted of drug trafficking charges when in fact all charges had been dismissed.

A motion for a new trial under this rule is addressed to the trial judge whose ruling will not be reversed absent an abuse of discretion. *Yeargin v. Spurr*, 78 N.C. App. 243, 246, 336 S.E.2d 680, 681-682 (1985). Upon careful review of the judge's findings in this case, we see no evidence indicating that the judge believed plaintiff was convicted for trafficking charges. To the contrary, the record shows only that the plaintiff was arrested for drug trafficking and that the charges were later dismissed. In sum, the trial court did not abuse its discretion by denying plaintiff's motion for a new trial. Accordingly, the trial court's orders are

Affirmed.

Judges JOHNSON and WYNN concur.

IN THE MATTER OF: CHRISTIAN DIANE ALLRED, DOB: 10-10-88

No. COA94-1160

(Filed 4 June 1996)

1. Evidence and Witnesses § 569 (NCI4th); Parent and Child § 99— termination of parental rights—evidence of neglect of other children—admissibility

In a proceeding for termination of parental rights, respondent was not prejudiced by the admission of evidence of prior court orders in which respondent's four older children had been adjudicated to be neglected, since the situation with regard to the child in question was similar to the situations with the other children; the prior orders were evidence of relevant circumstances

and events prior to this order of adjudication which had a bearing upon the probability of a repetition of neglect; and the trial court made an independent determination of whether neglect authorizing termination of parental rights existed at the time of the termination hearing and did not treat the prior orders and adjudications of neglect as determinative of the ultimate issue.

Am Jur 2d, Parent and Child §§ 34, 35.

Validity of state statute providing for termination of parental rights. 22 ALR4th 774.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.

2. Parent and Child § 101 (NCI4th)— neglected child—sufficiency of evidence—termination of parental rights proper

The evidence was sufficient to support the trial court's findings that a child was neglected, and the trial court did not err in terminating respondent's parental rights, where the evidence tended to show that the child in question had multiple handicaps and special needs; respondent failed to attend many of the important medical appointments scheduled to help her provide for the child's needs; she did not pay adequate attention to the child or handle the child appropriately during supervised visits; respondent failed to accept the advice of social workers and others for the proper care of the child; and psychological testing showed that respondent was highly unlikely to significantly change her behavior.

Am Jur 2d, Parent and Child §§ 34, 35.

Validity of state statute providing for termination of parental rights. 22 ALR4th 774.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.

Appeal by respondent from order entered 2 December 1993 by Judge Michael A. Sabiston in Randolph County District Court. Heard in the Court of Appeals 17 October 1995.

Respondent Bonnie Marie Styles Allred is the mother of Christian Diane Allred, born 10 October 1988. Christian was born prematurely

and with myotonic dystrophy. She remained hospitalized until 9 December 1988. Christian was readmitted to the hospital on 28 December 1988 after suffering from a fever and not eating properly. She was released to her mother on 31 December 1988.

On 2 January 1989, aged two and one-half months, Christian was again admitted to the hospital, this time suffering from a spiral fracture of her right arm. According to later expert testimony at the abuse and neglect hearing, the arm could only have been broken in that manner by an external twisting motion. Christian was placed in the custody of the Department of Social Services of Randolph County (DSS) on 3 January 1989 and has remained in foster care since that date.

After a hearing on 23 January 1989, the court entered an order determining Christian to be an abused child as defined by N.C. Gen. Stat. § 7A-517(1)(a) and a neglected child as defined by N.C. Gen. Stat. § 7A-517(21). The court held periodic review hearings from July 1989 through November 1992. DSS filed a petition to terminate the parental rights of respondent and the child's father on 16 October 1990, and filed an amended petition to terminate on 14 January 1991. The court declared a mistrial in the hearings on the petition. DSS filed a second petition to terminate the parental rights of the father alone, and after a hearing, his rights were terminated on 13 May 1993. DSS filed a second petition to terminate respondent's rights on 24 September 1992. After a series of hearings from February to April 1993, the court entered an order dated 2 December 1993 terminating respondent's parental rights. From this order, respondent appeals *in forma pauperis.*

Theresa A. Boucher for petitioner-appellee.

J. Jane Adams for respondent-appellant.

William Mathers for Guardian ad Litem appellee.

McGEE, Judge.

[1] Respondent first argues the trial court erred by admitting into evidence numerous court orders concerning her four older children. These orders reflect that all four children had been adjudicated to be neglected and give the facts surrounding the adjudications. Respondent never regained custody of these children. Respondent's first husband gained custody of two of the children, one child was legally emancipated, and the fourth child died in a nursing home

while in the custody of DSS. Respondent contends this evidence should have been excluded under N.C.R. Evid. 404(b). We disagree.

Our Supreme Court held, in *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227 (1984), that "evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights." *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

> As the answer to [whether parental rights should be terminated] must be based upon the then existing best interests of the child and fitness of the parent(s) to care for it *in light of any evidence of neglect and the probability of a repetition of neglect*, the trial court must admit and consider *all evidence* of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect.

Ballard, 311 N.C. at 716, 319 S.E.2d at 232-33 (emphasis added). Although some of the orders were dated as far back as 1979, many of the prior orders admitted in this case described events and circumstances immediately before and after Christian's birth. All of the orders detailed various conditions which were also present in the order adjudicating Christian to be neglected and in the orders of her subsequent review hearings, including filthy living conditions, improper care and supervision, leaving medicines and poisons within the children's reach, failure to properly administer medicines, involvement in unstable relationships with men, etc. Also, one of the older children, like Christian, suffered physical handicaps. Because of the similarities to Christian's situation, we find these prior orders to be evidence of relevant circumstances and events prior to the order of adjudication which bear upon the probability of a repetition of neglect, thereby making the orders admissible.

We recognize that *Ballard* and the cases which followed it, *see, eg., In re Beck*, 109 N.C. App. 539, 428 S.E.2d 232 (1993); *In re Parker*, 90 N.C. App. 423, 368 S.E.2d 879 (1988), dealt with prior acts of abuse of the same child involved in the termination proceeding. However, for the same reasons stated in *Ballard*, a respondent will not be prejudiced in a properly conducted hearing by the admission of evidence of the prior abuse of another of respondent's children. *See Ballard*, 311 N.C. at 715-16, 319 S.E.2d at 232. The trial court must make an independent determination of whether neglect authorizing termination of parental rights exists *at the time of the termination hearing*

and may not treat a prior adjudication of neglect as determinative of the ultimate issue. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 233.

When admitting evidence of prior neglect, the court must also consider any evidence of changed conditions since the prior neglect. *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. Therefore, since parents have a full opportunity to present all evidence favorable to them relating to all relevant periods before or after the prior neglect, the admission of evidence of the prior neglect is not unfairly prejudicial. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 233. Here, respondent did in fact present evidence of some changes made since the adjudication of neglect, and these changes are noted in the termination order. The trial court properly admitted the evidence of prior neglect. Further, the court did not rely solely upon this evidence as being determinative of the issue. We find no prejudice to the respondent.

[2] Respondent's remaining arguments contend the trial court's conclusions are not supported by the facts and the court erred as a matter of law in terminating her parental rights. The trial court found that: 1) Christian was an abused or neglected child; and 2) that respondent had left Christian in foster care for more than eighteen months (now twelve) without showing reasonable progress under the circumstances to the diligent efforts of DSS to strengthen the parental relationship or to make or follow through with constructive planning for the child's future. Both are grounds for termination of parental rights under N.C. Gen. Stat. § 7A-289.32(2) and N.C. Gen. Stat. § 7A-289.32(3) respectively. While the record supports both findings, since the existence of only one of the statutory grounds is enough to enable the court to terminate parental rights, *In re Tyson*, 76 N.C. App. 411, 415, 333 S.E.2d 554, 557 (1985), we only address the issue of neglect.

In a termination proceeding, the appellate court should affirm the trial court where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983). To support its conclusion that Christian is an abused or neglected child, the trial court made, among others, the following findings of fact:

> 7. The juvenile, Christian Diane Allred, was adjudicated to be an abused and neglected juvenile on January 23, 1989. The Court's findings in the adjudication hearing details [sic] that the infant juvenile was allowed to live in "filthy and intolerable" conditions,

the respondent parents failed to provide that degree of care required for the special medical needs for this juvenile resulting in decreased weight gain and the infant juvenile sustained a spiral fracture of her arm which was caused by someone forcefully twisting her arm. The Court found that respondent mother, Mrs. Bonnie Allred was on guard and present at the time the juvenile's arm was broken.

8. Since the adjudication hearing on January 23, 1989, Mrs. Allred has made some changes in her living circumstances. Mrs. Allred moved from the home which she lived at the time of the removal of the juvenile. Mrs. Allred moved into 3 different homes all of which were approved by [DSS] for limited visitation with the juvenile. Mrs. Allred's most recent home was observed to be generally acceptable; however, in 1992 roaches and maggots were observed in Mrs. Allred's home during periods of visitation with the juvenile.

9. Mrs. Allred had weekly 5 hour supervised visits with the child in her home from April 1992, to the date of this hearing. Mrs. Allred has been observed during periods of visitation with the juvenile, Christian Allred. Mrs. Allred displays very little patience with the child, has failed to watch the child closely enough, and exhibited some rough handling of the child during meal time. Mrs. Allred has also been unsteady while handling and carrying Christian Allred, [and] has been seen to drop the child on the couch or bed while attempting to change her diaper. On one occasion, Mrs. Allred failed to remove medication which was left in the reach of the juvenile.

10. Mrs. Allred entered into several service agreements with [DSS] which provided that she would attend all medical appointments for the juvenile, Christian Allred. Mrs. Allred was given a calendar to list all regularly scheduled appointments and called about all other appointments scheduled in the event of the child's illness. The purpose of this provision was to provide Mrs. Allred every opportunity to learn about the special needs of the child and how to care for her. Mrs. Allred was never able to arrange transportation in order to attend appointments which were scheduled for the child's illness. Mrs. Allred did attend approximately 6 of 11 scheduled appointments from August 1992 to February 1993.

11. Ms. Elaine Garner, social worker, with [DSS] has been assigned to the case of Christian Diane Allred since February 20, 1989, but had been working with Ms. Bonnie Allred regarding the return of her son, David Styles since 1988. Since 1988, Ms. Garner has seen no significant change in Mrs. Allred's parenting skills. Mrs. Allred does not pay adequate attention to her child's needs, is unwilling to accept advice regarding Christian and is very self-centered.

16. Dr. John Edwards, Clinical Psychologist, conducted a psychological evaluation of Mrs. Bonnie Allred in February 1993. The test data clearly suggests the probability that she has a Borderline Personality Disorder. The test data clearly suggests the prognosis for a significant change in Mrs. Allred to be very poor.

17. Based on Dr. Edwards' evaluations, reports and testimony the Court finds as a fact that . . . Mrs. Allred possesses many of the characteristics of a borderline personality disorder and also has characteristics of a dependent personality disorder. Mrs. Allred is a very dependent individual but she resents being dependent on others and, therefore, will not cooperate with those she needs to give her help. Mrs. Allred is very self-centered. Mrs. Allred finds it exceedingly difficult when extreme demands are made on her by needful people; and it is likely that she will become highly frustrated, very angry and either withdraw or act out in some fashion. The test data clearly suggest the prognosis for a significant change in Ms. Allred to be very poor . . . .

18. It is very unlikely that Mrs. Bonnie Allred would be able to comfortably anticipate and respond to the emotional, health and safety needs of Christian Allred.

19. Dr. Edwards opined that based on his evaluation and interviews with Mrs. Allred and his review of her history of neglecting this child and her other children, that the probability that she would neglect Christian Allred, a multi-handicapped child, again would be very high.

Respondent did not except to any of these findings, and they are presumed to be correct and supported by the evidence. *Moore*, 306 N.C. at 404, 293 S.E.2d at 133. Also, a review of the record and transcript shows each of these findings are supported by clear, cogent and convincing evidence. They are based upon the orders filed in the case, along with the testimony of: 1) two social workers who worked with

respondent; 2) Christian's foster mother; and 3) a psychologist who interviewed and tested the respondent. Respondent contends there was also contrary evidence, such as the overall improvement in respondent's living conditions. While respondent did provide some contrary evidence, the trial court's findings are adequately supported by the evidence and are binding on this Court.

We must next determine whether the findings of fact support a conclusion that Christian was a neglected child at the time of the hearing. As our Supreme Court has said:

> Where the evidence shows that a parent has failed or is unable to adequately provide for [her] child's physical and economic needs, whether it be by reason of mental infirmity or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected.

In re Montgomery, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). In this case, the evidence shows that over the four year period of time between DSS' taking custody of Christian and the termination hearing, even though she made some improvements, respondent failed to improve her parenting skills to a level of appropriate care. This supports a finding of neglect. *See Smith v. Alleghany County Dept. of Social Services*, 114 N.C. App. 727, 443 S.E.2d 101, *disc. review denied*, 337 N.C. 696, 448 S.E.2d 533 (1994) (even though the mother showed improvements in her psychological condition and living conditions, finding of neglect and termination of parental rights held proper where probability of repetition of neglect was great).

Although Christian is a multi-handicapped child with special needs, respondent failed to attend many of the important medical appointments scheduled to help respondent provide for the child's needs. Respondent did not pay adequate attention to the child or handle the child appropriately during supervised visitations. Respondent failed to accept the advice of social workers and others for the proper care of Christian. Because of this, respondent was unable to care for the child's special needs. Psychological testing also showed respondent is highly unlikely to significantly change her behavior. The psychologist who interviewed and tested respondent testified the likelihood respondent would neglect Christian again would be very high. This evidence showed respondent was not able to properly provide for Christian's physical needs and both failed, and appeared unable,

to correct these problems within a reasonable time. Therefore, the court properly found Christian to be a neglected child.

Once DSS has met its burden of proof in showing the existence of one of the grounds for termination, as it did in this case, the decision of whether to terminate parental rights is within the trial court's discretion. *In re Parker*, 90 N.C. App. 423, 430, 368 S.E.2d 879, 884 (1988). Based upon the facts, we find no abuse of that discretion. Therefore, the order terminating the parental rights of respondent to Christian Diane Allred is affirmed.

Affirmed.

Judges MARTIN, John C. and JOHN concur.

BRENDA T. ADDISON, PLAINTIFF v. JAMES R. MOSS AND HOWARD A. TYSON, DEFENDANTS

No. COA94-1412

(Filed 4 June 1996)

Evidence and Witnesses § 1767(NCI4th)— burlap bundles falling from truck—expert's experimental evidence on inertia—exclusion prejudicial error

In an action to recover for personal injuries sustained by plaintiff when her car collided with bundles of empty burlap tobacco sheets which fell off defendant's truck, the trial court erroneously excluded testimony from an accident reconstruction expert regarding experiments he performed to illustrate that, in conformity with the law of inertia, the bundles continued to move forward when they fell from the truck, that is, away from plaintiff's vehicle, because the experiments were conducted in Nash County rather than in Wilson County where the accident occurred, since such evidence was relevant to show that the greater the distance plaintiff was able to travel before reaching the bundles, the greater likelihood she was contributorily negligent in failing to apply her brakes and stop before striking them; the evidence established that the conditions under which the experiments were performed were substantially similar to those

at the accident site; and it appears that any discrepancies between the witness's experiments and the accident could have been brought out on cross-examination and that the witness had the ability to explain how certain differences might have affected the data he gathered.

Am Jur 2d, Evidence §§ 1003, 1004.

Appeal by defendants from judgment entered 21 July 1994 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 28 September 1995.

Perry, Brown & Levin, by Cedric R. Perry, for plaintiff-appellee.

Battle, Winslow, Scott & Wiley, P.A., by W. Dudley Whitley, III, for defendant-appellants.

JOHN, Judge.

Defendants appeal judgment in the amount of $3,500, plus attorney's fees of $6,000. Defendants' primary contention is that the trial court erred by excluding certain testimony from their accident reconstruction expert. We agree.

Pertinent procedural and background information is as follows: As plaintiff drove her automobile in a northerly direction on Highway 301 in Wilson County on the afternoon of 24 July 1992, one or two bundles of empty burlap tobacco sheets fell from the bed of a truck travelling in front of her. Plaintiff testified that she hit the sheets, lost control of her vehicle, swerved to her left into the median, and executed a 360 degree turn within the median before coming to a stop.

Plaintiff subsequently filed suit 3 December 1992 against James R. Moss (Moss), the driver of the truck, and Howard A. Tyson (Tyson), the truck's owner, alleging injuries as a result of the collision. Defendants' answer denied Moss was negligent in the operation of the truck, and further asserted plaintiff was contributorily negligent in "fail[ing] to keep a proper lookout," "fail[ing] to keep her vehicle under proper control," and "fail[ing] to reduce speed upon approaching a special hazard." Following a jury trial and the judgment in favor of plaintiff, defendants timely appealed to this Court.

Defendants first contend the trial court erroneously precluded testimony from David S. Brown (Brown), an accident reconstruction expert, regarding experiments he performed to determine how

tobacco bundles behave after falling from the back of a truck. The purport of Brown's experiments, according to defendants, was to illustrate the law of inertia, the physical principle that objects in motion tend to stay in motion. Defendants wished Brown to testify that, in conformity with the law of inertia, when the bundles fell from the back of the truck in the accident at issue, they kept moving forward in a northerly direction—significantly, *away* from plaintiff's automobile—for some distance before the friction of the road brought them to a stop. Brown's experiments attempted to determine just how far forward the bundles travelled after falling from defendants' truck. Defendants contend this information would have been extremely relevant at trial because the greater the distance plaintiff was able to travel before reaching the bundles, the greater likelihood she was contributorily negligent in failing to apply her brakes and stop before striking them.

Initially, we note a court may take judicial notice, whether requested or not and at any stage of the proceeding, of facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. N.C.G.S. § 8C-1, Rule 201 (1992). Inertia is reliably defined as "a property of matter by which it remains at rest or in uniform motion in the same straight line unless acted upon by some external force." Webster's Third New International Dictionary 1156 (1966). We therefore take judicial notice that the bundles were subject to the property of inertia when they fell from the back of Tyson's truck.

Concerning the admission of experimental evidence, our Supreme Court has held:

> Experimental evidence is competent when the experiment is carried out under circumstances *substantially similar* to those existing at the time of the occurrence in question and tends to shed light on it. It is not required that the conditions be precisely similar, the want of exact similarity going to the weight of the evidence with the jury.

State v. Brown, 280 N.C. 588, 597, 187 S.E.2d 85, 91, *cert. denied*, 409 U.S. 870, 34 L. Ed. 2d 121 (1972) (emphasis added). Exact reproduction of the original occurrence is not required, particularly when an expert is available to explain relevant differences between conditions of the experiment and the original occurrence and their possible effects on results. *Short v. General Motors Corp.*, 70 N.C. App. 454, 455, 320 S.E.2d 19, 20, *disc. review denied*, 312 N.C. 623, 323 S.E.2d

924 (1984). Whether substantial similarity exists is a question of law reviewable as any other question of law by the appellate courts, *id.*; however, a trial court's ruling on this issue will normally be upheld unless found to be "too wide of the mark." *State v. Jones*, 287 N.C. 84, 91, 214 S.E.2d 24, 29 (1975) (citation omitted).

On *voir dire*, Brown testified he met with defendants near Tyson's farm in Nash County and performed experiments by dropping bundles of tobacco sheets off the back of a truck and measuring the distances they traveled after falling. Plaintiff's counsel interposed the following objection:

> [Brown's] presentation is flawed because he testified that he did tests in Nash County trying to see what reaction a bundle of sheets would have upon being pushed out of a truck. And he testified that he did not duplicate that on Highway 301, and of course I would hope that he didn't go out there and do it on Highway 301. But it is well known that with regard to experiments that the circumstances basically have to be the same. You can't take results out of Nash county where we don't know the terrain and that kind of thing, and try to transfer that to Wilson County.

Brown thereafter explained the similarities between the conditions of the experiment and those of the actual accident. He testified that the bed of the truck used to conduct the experiment was the same distance from the ground as the trailer involved in the accident, that the truck traveled during the experiment at the same speed traveled by Moss at the time of the accident, that the bundles he used duplicated those which had originally fallen from the truck in shape and size, and that the terrain of the road involved was the same as that of Highway 301. Brown further stated:

> Every effort was made to have everything the same in Nash County that it would be in Wilson County, based on everything I had to work with as to the terrain. Terrain, of course, is not a matter, it's simply a roadway, because all of my tests were done in the roadway. There's not a question of whether it was a ditch or whether it sloped this way or that, even off of the edge of the pavement. Everything was as near the same as it could possibly be done, which is what you do in a test. . . . I would say that just literally hundreds and thousands of tests that have been done by the standards writers and the other technical organizations such as [the Society of Automotive Engineers] to establish how the different pavement surfaces will perform not only with tires but

with other things that hit them or gouge them or slide on them or anything else, would indicate to me that unequivocally that the difference between what we did in terms of the tests and what actually happened is identical.

Upon thorough review of the record, we conclude the trial court was "too wide of the mark" in sustaining plaintiff's objection grounded upon the experiments having been conducted in Nash County while the accident took place in Wilson County. The evidence adequately established that the conditions under which the experiments were performed in Nash County were "substantially similar," *Brown*, 280 N.C. at 597, 187 S.E.2d at 91, to those in neighboring Wilson County. Further, plaintiff's assertions notwithstanding, Brown's testimony regarding the similarity between the relevant roads in Nash and Wilson counties is not inherently incredible simply because he visited the accident site at 301 *after* performing the experiments. All evidence showed that the road at the accident site on Highway 301 was unremarkable—flat, straight, and made of asphalt—and therefore easily capable of replication. Indeed, plaintiff's counsel essentially admitted at trial that defendants would have been unable to reenact the accident on Highway 301 itself due to heavy traffic. *See State v. Wright*, 52 N.C. App. 166, 174, 278 S.E.2d 579, 586, *disc. review denied*, 303 N.C. 319 (1981) (not reasonable or possible to perform test under precise conditions existing when collision occurred). The record reflects that Brown's experiments were conducted upon a similar, acceptable, and safer alternative road.

Plaintiff's counsel also relied at trial upon Brown's testimony that "you wouldn't expect the bundle to fall the same way every time" to argue that the measurements taken by Brown were a poor reflection of the actual behavior of the bundles at the time of the accident. However, Brown thereafter explained that in his experiment the bundles tended to either roll or slide once they hit the pavement and that "because of the difference between rolling and sliding, you would get some variation in the total distance it would go before it stopped." Brown further indicated that he performed the experiment a sufficient number of times to develop a range of values for the distance traveled by the bundles, that this range of distances was narrow, and that in fairness to plaintiff he utilized the shortest distance recorded, fifty feet, in developing a chart of the accident for demonstration to the jury. Earlier, Brown also testified he was able, with separate physics calculations, to corroborate as accurate the distances observed during his experiment.

Finally, it appears that any discrepancies between Brown's experiments and the original accident could have been brought out on cross-examination and that Brown had the ability to explain how certain differences might have affected the data he gathered. *See Short*, 70 N.C. App. at 455, 320 S.E.2d at 20. It would then have been for the jury to determine the weight and credibility of Brown's testimony. *Id.*

We next consider whether the exclusion of Brown's testimony was prejudicial to defendants. *See* N.C.G.S. § 1A-1, Rule 61 (error in exclusion of evidence must amount to denial of substantial right to warrant new trial). Absent the excluded evidence, the jury at trial lacked a basis for considering the role played by inertia in the accident at issue. Without the expert testimony and the option of determining its weight and credibility, the jury was left to its own devices and may well have assumed the bundle or bundles would naturally remain in the spot where they landed after falling, or, more damaging to defendants, that the bundles in falling from the truck would have rolled *towards* plaintiff's oncoming vehicle, thereby *reducing* the amount of time within which she might have avoided striking them. We therefore hold the exclusion of Brown's testimony constituted error prejudicial to defendants and grant them a new trial.

We decline to address defendants' remaining assignments of error as they may not occur upon retrial.

New trial.

Judges MARTIN, John C., and MCGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 MAY 1996

A.A.C.-FRANKLIN SQUARE v. OFFICE AMERICA No. 95-778	Mecklenburg (94CVS10278)	Affirmed in Part; Reversed in Part and Remanded
AMERICAN CONSTRUCTION, INC. v. REAVES No. 95-363	Guilford (93CVS6032)	Appeal Dismissed
ATLANTIC VENEER CORP. v. ROBBINS No. 95-906	Carteret (95CVS093)	Affirmed
AULTMAN v. TAYLOR No. 95-1140	Duplin (93CVS214)	Affirmed
AUSTIN v. LARGE ANIMAL MEDICINE No. 95-1276	Rowan (94CVS2358)	Appeal Dismissed
GLOSSON v. DURHAM HOUSING AUTH. No. 95-1266	Ind. Comm. (055034)	Affirmed
HAMIE v. VANCE COUNTY BD. OF EDUC. No. 95-953	Ind. Comm. (TA-12100)	Appeal Dismissed
HOOKS v. EVERETT No. 95-1161	Wayne (93CVS1208)	Affirmed
IN RE DILLARD DEPT. STORES No. 94-57-2	Property Tax Commission (91PTC398)	Reversed and Remanded
IN RE LEE No. 95-374	Ind. Comm. (204110)	Affirmed
IN RE McCOMBS No. 94-788	Catawba (84J30) (92J231)	Modified and Affirmed
IN RE SCOTT v. BUNCOMBE COUNTY DSS No. 95-922	Buncombe (94J350)	Vacated and Remanded
ISBANIOLY v. LANMARK FINANCIAL SERVICES No. 95-850	Stanly (93CVS192)	Affirmed

JACKSON v. ROSES DEPT. STORES No. 95-1138	Ind. Comm. (325546)	Affirmed
MALARICK v. WEST No. 95-1008	Haywood (94CVS155)	Reversed and Remanded
NATIONSBANK v. EUBANKS No. 95-342	Mecklenburg (92CVS7478)	Affirmed
SALTEN v. SALTEN No. 95-1148	New Hanover (94CVD1055)	Dismissed
STATE v. ARMIJO No. 95-1066	Onslow (94CRS4204)	No Error
STATE v. BRAWNER No. 95-943	Pamlico (93CRS1012) (94CRS1190)	Affirmed in Part, Vacated in Part
STATE v. CAGLE No. 95-1287	Randolph (94CRS10506)	No Error
STATE v. COLEY No. 95-1242	Wayne (95CRS1673)	No Error
STATE v. CUMBER No. 95-1157	New Hanover (93CRS3534) (93CRS3535)	No Error
STATE v. EVANS No. 95-1131	Franklin (93CRS2261) (93CVS2262) (93CVS2263)	No Error in Part, Vacated and Remanded in Part
STATE v. HARLEY No. 95-1215	Mecklenburg (94CRS73130) (95CRS26814) (95CRS26815) (95CRS26816) (95CRS26817)	Appeal Dismissed
STATE v. HAWLEY No. 95-1120	Mecklenburg (94CRS86567)	Affirmed
STATE v. HRIBOVSEK No. 95-871	Beaufort (94CRS6913)	Reversed
STATE v. HUGHES No. 95-110	Guilford (94CRS21088)	No Error
STATE v. MOORE No. 94-866	Onslow (93CRS7813)	New Trial
STATE v. OWENS No. 95-1244	Mecklenburg (93CRS20222)	No Error

STATE V. SWEENEY No. 95-819	Guilford (94CRS25698)	Affirmed
STATE v. TEAGUE No. 95-1338	Alamance (95CRS2516) (95CRS3847)	Remanded for Resentencing
STATE v. TRIBBLE No. 95-1153	Catawba (94CRS7751)	No Error
WAKE COUNTY ex rel. MITCHELL v. JENKINS No. 95-565	Wake (92CVD12562)	Affirmed in Part; Reversed in Part
WALTON v. McRAE No. 95-547	Anson (93CVS92)	Affirmed in Part; Reversed in Part and Remanded

FILED 4 JUNE 1996

BOLICK v. BOLICK No. 95-426	Guilford (90CVD9844)	Affirmed
CRABTREE v. JONES No. 95-711	Mecklenburg (92CVS5639)	Affirmed
DAVIS v. RAYMARK FRICTION CO. No. 95-965	Anson (94CVS429)	Affirmed
DODDER v. YATES CONSTRUCTION CO. No. 95-666	Forsyth (94CVS6219)	Affirmed
HALL v. NEW SOUTH INS. CO. No. 95-779	Cumberland (94CVS6926)	Affirmed
HARVEY v. RICKENBACKER & TAYLOR, LTD. No. 95-905	Brunswick (93CVS871)	Reversed and Remanded
HAZEL v. HAZEL No. 95-1386	Surry (95CVS608)	Affirmed
HENDRIX v. SWIVL-EZE MARINE PRODUCTS No. 95-767	Mecklenburg (92CVS11084)	Affirmed
IN RE FORECLOSURE OF STURDIVANT DEV. CO. No. 95-822	Wilkes (94SP124)	Affirmed

JOHNSON v. MOORE No. 95-708	Durham (92CVS04801)	Affirmed
KINCAID v. FOOD LION, INC. No. 95-672	Ind. Comm. (258510)	Affirmed
LANIER v. MEWBORN No. 95-559	Alamance (89CVD1708)	Affirmed
McANNALLY v. CORNATZER No. 95-857	Davie (92CVS520)	Affirmed
MURRAY v. TAMER No. 95-774	Rockingham (93CVS1691)	Appeal Dismissed
NEW HANOVER RENT A CAR v. SOUTHARD No. 95-719	New Hanover (94CVD2243)	Dismissed
PENNINGTON v. PADGETT No. 95-1289	Durham (93CVS1824)	Affirmed
PERKINS v. DUKE POWER CO. No. 95-1016	Ind. Comm. (267581)	Affirmed
PORTERS NECK QUAL. OF LIFE ASSN. v. PORTERS NECK HOMEOWNERS ASSN. No. 95-1004	New Hanover (92CVS2567)	Affirmed
ROBERSON v. BYRNE No. 95-1406	Durham (95CVD1352)	Dismissed
RUMLEY v. RUMLEY No. 95-1332	Guilford (93CVD10393)	No Error
SMITH v. CONSOLIDATED PERSONNEL CORP. No. 95-1233	Ind. Comm. (267776)	Appeal Dismissed
STATE v. BRASWELL No. 95-583	Pitt (94CRS21819)	Reversed
STATE v. BURTON No. 95-869	Wake (93CRS53835) (93CRS53836) (93CRS43614)	No Error
STATE v. CAROLINA No. 95-1436	Davidson (94CRS18033) (94CRS18034) (94CRS18035) (94CRS18036)	No Error
STATE v. EMMETT No. 95-715	Catawba (93CRS17701)	No Error

STATE v. EVERETT No. 95-1403	Mecklenburg (94CRS77235) (94CRS77561)	No Error
STATE v. FIELDS No. 95-1318	Forsyth (95CRS13244)	Vacated and Remanded
STATE v. FULLER No. 95-971	Lenoir (93CRS5949) (93CRS5950) (93CRS5951) (93CRS5952) (93CRS5953)	No Error
STATE v. GRUBB No. 95-1345	Davidson (94CRS19928) (94CRS19929) (94CRS19930) (94CRS19931)	No Error
STATE v. HALL No. 95-1248	Mecklenburg (95CRS23699)	No Error
STATE v. HATCH No. 95-942	Guilford (94CRS20372) (94CRS20373) (94CRS20374)	No Error
STATE v. HINTON No. 95-724	Wake (94CRS40216) (94CRS53191)	No Error
STATE v. HODGE No. 95-1234	Guilford (95CRS20332) (95CRS20334) (95CRS20335) (95CRS22884) (95CRS22885) (95CRS22887) (95CRS23029) (95CRS23030) (95CRS23031) (95CRS23032)	No Prejudicial Error
STATE v. HOLMAN No. 95-1269	Granville (90CRS1848)	No Error
STATE v. IGBO No. 95-1251	Sampson (93CRS6634)	No Error
STATE v. JOHNSON No. 96-60	Mecklenburg (95CRS34903)	No Error
STATE v. KEY No. 95-954	Surry (94CRS8888)	No Error

STATE v. KOONCE No. 95-1351	Lenoir (94CRS11285)	No Error
STATE v. MABRY No. 95-1050	Forsyth (94CRS30970)	Remanded for Resentencing
STATE v. McMILLAN No. 95-1099	Wake (94CRS53079) (94CRS53080) (94CRS53085) (94CRS53086) (94CRS53087) (94CRS53088) (94CRS53089) (94CRS53076) (94CRS53077)	No Error
STATE v. McNEIL No. 95-1241	Cumberland (93CRS31302)	No Error
STATE v. McNEILL No. 95-1114	Wake (93CRS67077) (93CRS67078)	No Error
STATE v. MOBLEY No. 95-578	Mecklenburg (94CRS2284) (94CRS2285) (94CRS2290) (94CRS2291) (94CRS2292)	No Error
STATE v. PRICE No. 95-1010	Wake (93CRS63646) (94CRS11028)	No Error
STATE v. RAINEY No. 95-1413	Cumberland (94CRS26722)	No Error
STATE v. SHIPP No. 95-1261	Mecklenburg (94CRS11586)	No Error
STATE v. SMITH No. 95-530	Orange (93CRS12910)	No prejudicial error in trial; remanded for resentening
STATE v. STRICKLAND No. 95-1348	Richmond (93CRS4575)	No Error
STATE v. WAMBACH No. 96-31	Cabarrus (94CRS16202) (94CRS16205)	No Error

STATE v. WEDDINGTON No. 95-1429	Mecklenburg (94CRS15249) (94CRS15251) (94CRS15253) (94CRS15254) (94CRS15257) (94CRS15267) (94CRS15268) (94CRS15269)	No Error
STATE v. WILLIAMS No. 95-1280	Cumberland (94CRS30595)	No Error
TEAGUE v. CUMBERLAND COUNTY HOSPITAL SYSTEMS No. 96-51	Cumberland (95CVS3253)	Affirmed
THOMPSON v. PILSON No. 95-798	Surry (94CVS1117)	Affirmed
WALSER v. CROWN FINANCIAL, LTD. No. 95-552	Guilford (93CVS6439)	Affirmed
WEBSTER v. NICKERSON No. 95-828	Dare (94CVS584)	Appeal Dismissed
WRIGHT v. HAWKSBY No. 95-1083	Lee (93CVD597)	Affirmed in Part; Dismissed in Part

TANYA M. TISE, EXECUTRIX OF THE ESTATE OF AARON G. TISE, JR., PLAINTIFF v. YATES CONSTRUCTION COMPANY, INC., DEFENDANT

No. COA95-664

(Filed 4 June 1996)

Sheriffs, Police, and Other Law Enforcement Officers § 22 (NCI4th); Workers' Compensation § 80 (NCI4th)— no duty owed by city to deceased police officer—no actionable negligence—negligence of defendant and City employer not concurrent

Where police officers responded to a call at a construction site that someone was tampering with defendant's heavy equipment, the officers apprehended no one but attempted to disable a grader's ignition to prevent its theft, the officers failed to contact defendant about trespassers at the site, and sometime later a trespasser drove the grader onto a public street and then onto deceased's patrol car, crushing him, there was no merit to defendant's contention that its allegations were sufficient to allege that the negligence of the City of Winston-Salem, through the actions of its officers, joined and concurred with defendant's negligence to cause deceased's death so as to bar the City's subrogation rights and to require a reduction of damages under N.C.G.S. § 97-10.2(e) for workers' compensation benefits paid to deceased's estate, since defendant did not sufficiently allege facts disclosing that a duty was owed by the City to deceased police officer, which was an essential element of actionable negligence. There was no merit to defendant's contention that N.C.G.S. § 97-10.2(e) and the requirement of N.C.G.S. § 95-129(1) that the City furnish to each of its employees "a place of employment free from recognized hazards that are causing or likely to cause death or serious injury or serious physical harm to [its] employees" created a special relationship between the City and the officer which gave rise to a duty of protection owed to him by the City, since those statutes created no greater duty on the part of the city to protect the officer from the criminal acts of others while he was executing his duties than the duty owed to the general public.

Am Jur 2d, Sheriffs, Police, and Constables §§ 90-180; Workers' Compensation § 446.

Modern status of effect of state workmen's compensation act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman. 100 ALR3d 350.

Appeal by defendant from order entered 15 March 1995 by Judge Forrest D. Bridges in Forsyth County Superior Court. Heard in the Court of Appeals 29 February 1996.

Womble Carlyle Sandridge & Rice, PLLC, by Gusti W. Frankel, and Assistant City Attorney Lynda S. Abramovitz, for appellee City of Winston-Salem.

Bennett & Blancato, LLP, by William A. Blancato for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff, as executrix of the estate of Aaron G. Tise, Jr., deceased, brought this action to recover damages for Tise's wrongful death, which plaintiff alleged was proximately caused by the negligence of defendant, Yates Construction, Inc. ("Yates"). In her complaint, plaintiff alleged the following: At the time of his death on 26 June 1992, Tise was employed as a lieutenant with the Winston-Salem Police Department. Defendant Yates was engaged in a construction project in the vicinity of New Walkertown Road in Winston-Salem, North Carolina, and had several pieces of heavy grading equipment on the site. In the early morning hours of 26 June, Winston-Salem police responded to a call that unknown persons were tampering with the equipment at the construction site. The officers were unable to locate any suspects and were also unable to locate any information regarding who should be contacted about the security of the equipment. The officers left the scene.

Sometime later, four individuals went to the construction site and began tampering with the grading equipment. One of the individuals, later identified as Conrad Crews, climbed onto a grader, started it, and drove it onto the roadway and proceeded toward East Drive. The disturbance was reported to the Winston-Salem Police Department and Lieutenant Tise, along with other officers, responded. As Lieutenant Tise was parked in his patrol car on East Drive, Crews drove the grader up onto the patrol car crushing Tise, who died as a result of his injuries. Plaintiff alleged that Yates was negligent in various respects, including, *inter alia*, that it knew or should have

known that there was a substantial risk that its construction equipment would be subject to tampering or attempted operation by unauthorized persons and that it failed to provide safety devices or other appropriate security to prevent the unauthorized operation of the equipment.

Yates denied plaintiff's allegations of negligence. Pursuant to G.S. § 97-10.2(e), Yates also asserted, as a bar to any subrogation rights of the City of Winston-Salem ("City") for workers' compensation benefits paid to Lieutenant Tise's estate and in reduction of damages recoverable by plaintiff, that actionable negligence on the part of the City had joined and concurred with any negligence on the part of Yates in causing Lieutenant Tise's death. Specifically, Yates alleged that the Winston-Salem police officers who had responded to the initial complaint at the construction site (1) had failed to take all reasonable precautions to prevent the further tampering and theft of the grading equipment, (2) had ineffectively attempted to disable the equipment, and (3) had failed to contact any representative of Yates about trespassers at the site and/or tampering with the equipment until after the fatal incident. Defendant Yates also alleged that the City had waived its governmental immunity pursuant to G.S. § 160A-485.

The City filed a notice of appearance and answer denying negligence on the part of its officers and asserting North Carolina's public duty doctrine as a defense. The City also moved to dismiss, pursuant to G.S. § 1A-1, Rule 12(b)(6), Yates' allegations against it. Yates appeals from the trial court's order granting the City's motion to dismiss.

I.

As noted by the City in its brief, Yates' appeal is from an interlocutory order, since the order "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). As a general rule, a party has no right to immediate appellate review of an interlocutory order. *Id.* However, where the order affects a substantial right of a party which will be prejudiced by a delay in appellate review until after final judgment, immediate review is authorized. N.C. Gen. Stat. § 1-277(a) (1983); N.C. Gen. Stat. § 7A-27(d)(1) (1995); *Davidson v. Knauff Ins. Agency*, 93 N.C. App.

20, 376 S.E.2d 488, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). The substantial rights 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). Therefore, Yates' appeal is properly before us.

II.

Yates' sole assignment of error is directed to the dismissal, pursuant to G.S. § 1A-1, Rule 12(b)(6), of its claim in bar of the City's subrogation rights and for a credit pursuant to G.S. § 97-10.2(e). "The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed." *Azzolino v. Dingfelder*, 71 N.C. App. 289, 295, 322 S.E.2d 567, 573 (1984), *affirmed in part, reversed in part*, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 93 L.Ed.2d 75 (1986) (citations omitted). The question presented to the court by a Rule 12(b)(6) motion is whether, as a matter of law, the allegations of the pleading, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). The court should liberally construe the challenged pleading, and the court should not dismiss it "*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.*" *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979), (*quoting* 2A Moore's Federal Practice, § 12.08, pp. 2271-74 (2d ed. 1975) (emphasis in original)).

G.S. § 97-10.2(e) provides, in pertinent part, that when an employee, or the personal representative of a deceased employee, having received workers' compensation benefits for a work-related injury or death, files suit against a third party for negligently causing the injury or death, the third party may, in defending such proceeding, allege in his answer that actionable negligence of the employer joined and concurred with his negligence. Upon service of the answer upon the employer, the employer has the right to appear and participate in the suit as fully as though joined as a party. N.C. Gen. Stat. § 97-10.2(e) (1991). If the third party "sufficiently alleges actionable negligence" on the part of the employer, the trial court must submit an issue to the jury as to whether actionable negligence of the employer joined and concurred with the negligence of the third party. *Id.* If the jury finds that the employer's actionable negligence joined

and concurred with the negligence of the third party in producing the injury or death of the employee, the court must reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation. *Id.*

In this case, Yates alleged that the City, through its police department, negligently handled the initial call to the construction site and that such negligence was a proximate cause of Lieutenant Tise's death. Specifically, Yates pleaded as negligence, the failure of the City's police officers to contact Yates about trespassers at the site and/or the tampering with Yates' equipment by unauthorized individuals, and the ineffective actions taken by the officers in attempting to disable the grader's ignition and prevent the theft of the equipment. Yates argues that these allegations, when taken as true, sufficiently allege that the City's negligence joined and concurred with its negligence to cause Lieutenant Tise's death so as to bar the City's subrogation rights under G.S. § 97-10.2(e), and therefore, were sufficient to withstand the City's Rule 12(b)(6) motion. We disagree.

"Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent man would exercise under similar conditions and which proximately causes injury or damage to another." *Martin v. Mondie*, 94 N.C. App. 750, 752, 381 S.E.2d 481, 483 (1989), *(quoting Williams v. Trust Co.*, 292 N.C. 416, 233 S.E.2d 589 (1977)). Actionable negligence "presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law." *Id.*, *(quoting Vickery v. Construction Co.*, 47 N.C. App. 98, 266 S.E.2d 711, *disc. review denied*, 301 N.C. 106 (1980)). Under the general common law rule known as the public duty doctrine, specifically adopted by the North Carolina Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992), a municipality and its agents are deemed to act for the benefit of the general public and not for a specific individual when exercising its statutory police powers, and thus, ordinarily, no duty is owed, and there can be no liability to specific individuals. *Id.* Explaining the rationale for the general prohibition against municipal liability under the public duty doctrine, the *Braswell* Court stated:

> This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act . . . .

> "The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how these resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits . . . ."

Id. at 370-71, 410 S.E.2d at 901 (citations omitted).

Yates argues, however, that G.S. § 97-10.2(e) makes no exception for municipalities based on the public duty doctrine and therefore, the City cannot employ the doctrine to avoid the consequences of its alleged negligence here. However, in construing the provisions of this State's Workers' Compensation Act, common law rules such as the public duty doctrine remain in full force and continue to apply in North Carolina, unless specifically abrogated or repealed by our General Assembly or Supreme Court. *See* N.C. Gen. Stat. § 4-1 (1986). We find nothing in the statutory language of either the Workers' Compensation Act or the Occupational Safety and Health Act of North Carolina to clearly indicate that the public duty doctrine, as relied upon by the City in this case, has been rendered inapplicable to the situation before us here.

Yates also asserts that the public duty doctrine was not developed to shield municipalities from their *affirmative* acts of negligence; therefore, it argues, the doctrine cannot be applied to the facts of this case because it has alleged active misconduct, i.e., misfeasance, on the part of the City's police officers, rather than nonfeasance. This argument must also fail. The breach of duty required for actionable negligence "may be by negligent act or a negligent failure to act", *Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), and the public duty doctrine has been applied to bar claims of negligence by misfeasance as well as nonfeasance. *See Hedrick v. Rains*, 121 N.C. App. 466, 466 S.E.2d 281 (1996) (action barred by public duty doctrine in negligent release of parole violator by municipal police department); *Sinning v. Clark*, 119 N.C. App. 515, 459 S.E.2d 71, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995) (action barred by public duty doctrine in negligent inspection of home by municipal building inspectors); *Clark v. Red Bird Cab. Co.*, 114 N.C. App. 400, 442 S.E.2d 75, (action barred by public duty doctrine in negligent issuance of

taxicab permit by municipal police department); *Prevette v. Forsyth County*, 110 N.C. App. 754, 431 S.E.2d 216, *disc. review denied*, 334 N.C. 622, 435 S.E.2d 338 (1993) (action barred by public duty doctrine in negligent release of dogs by municipal animal control department and shelter).

In adopting the public duty doctrine, the Supreme Court in *Braswell*, 330 N.C. 363, 410 S.E.2d 897, also adopted two generally recognized exceptions to the general prohibition against municipal liability. Liability may be imposed upon the municipality (1) where there is a special relationship between the injured party and the municipality, and (2) where the "municipality . . . creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered." *Id.* at 371, 410 S.E.2d at 902, (*quoting Coleman*, 89 N.C. App. 188, 366 S.E.2d 2). These two exceptions have been narrowly applied, *Sinning*, 119 N.C. App. 515, 459 S.E.2d 71, and neither is applicable here.

Yates does not allege any facts which would bring the case within the second exception noted above. Yates contends, however, that the first exception applies in this case because, according to its argument, G.S. § 97-10.2(e) and provisions of the Occupational Safety and Health Act of North Carolina created a special relationship between the City and Lieutenant Tise which gave rise to a special duty of protection owed to him by the City.

Our Courts have indeed recognized that a special relationship between parties, creating a special duty owed by one to the other, may be imposed by statute. *See Coleman*, 89 N.C. App. 188, 366 S.E.2d 2. In *Coleman*, this Court held that G.S. § 7A-517 *et seq.*, which deals with the treatment of juveniles who had been adjudicated abused or neglected, was intended to protect a specific class of individuals, i.e., abused children, from harm. Therefore, we held the Wake County Department of Social Services and a Department of Social Services employee owed a special duty of protection to such persons, a breach of which could support a suit for negligence. However, the statutory provisions relied upon by Yates, i.e., G.S. § 97-10.2(e), and the requirement imposed by G.S. § 95-129(1) that the City furnish to each of its employees "a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to [its] employees," create no greater duty on the part of the City to protect Lieutenant Tise from the criminal acts of others

while he was executing his duties than the duty owed to the general public. Such an interpretation would be absurd; it is precisely because an area is not always safe for its citizens that law enforcement is necessary, and police officers are often necessarily confronted with danger.

Defendant Yates has not sufficiently alleged facts disclosing that a duty was owed by the City to Lieutenant Tise, an essential element of actionable negligence. Therefore, its claims attempting to bar the City's subrogation rights pursuant to G.S. § 97-10.2(e) must fail. The order of the trial court must be affirmed.

Affirmed.

Judges JOHNSON and McGEE concur.

WILLIAMSON PRODUCE, INC., PLAINTIFF v. J.H. SATCHER, JR., D/B/A J.H. SATCHER, JR. FARMS AND WEYERHAUSER PAPER COMPANY, DEFENDANTS

No. COA95-476

(Filed 4 June 1996)

1. Courts § 16 (NCI4th)— financing and marketing of South Carolina grower's peach crop in North Carolina—applicability of long-arm statute

Defendant South Carolina peach grower made a promise for plaintiff's benefit to pay for services to be performed in the State by plaintiff within the purview of the long-arm statute, N.C.G.S. § 1-75.4(5)(a), where a contract between the parties provided that plaintiff would advance operating capital to defendant and gave plaintiff the sole right to market defendant's peaches, and plaintiff marketed and sold defendant's peaches in North Carolina.

Am Jur 2d, Courts § 80.

2. Courts § 16 (NCI4th)— personal jurisdiction of nonresident defendant—sufficient minimum contacts

Defendant, a South Carolina peach grower, had sufficient minimum contacts to permit North Carolina to exercise personal jurisdiction over him consistent with the due process clause where plaintiff, a North Carolina corporation, initiated the original contact in South Carolina with defendant and secured the

original agreement following negotiations taking place entirely in South Carolina; the original contract between the parties provided that plaintiff would have the sole right to market defendant's crop for a percentage of the profits and would advance defendant operating capital up to a specified limit; on at least three occasions defendant contacted plaintiff requesting additional sums of money beyond that promised in the original contract; defendant also contacted plaintiff to secure assistance in procuring the necessary boxes for the crop; plaintiff agreed to pay a North Carolina manufacturer to make and ship boxes, on defendant's order, to defendant's farm in South Carolina; the parties installed a dedicated phone line to facilitate their communication; plaintiff's marketing and sales efforts took place almost entirely in North Carolina; and pursuant to the parties' agreement, plaintiff sent a representative to South Carolina to monitor packaging operations and sent trucks to South Carolina to pick up the peaches.

Am Jur 2d, Courts § 80.

Appeal by defendant from order entered 15 February 1995 by Judge G.K. Butterfield in Wilson County Superior Court. Heard in the Court of Appeals 31 January 1996.

Defendant Satcher owned and operated between 1,000 and 1,100 acres of peach orchards in and around Johnston, Edgefield County, South Carolina. Defendant Satcher did business with his son David S. Satcher under the name of J.H. Satcher, Jr. Farms (hereinafter "Satcher Farms"). In January 1994, plaintiff contacted defendant Satcher and offered to sell Satcher Farms' 1994 peach crop. William R. Williamson, representing himself as the owner and operator of plaintiff corporation, travelled to South Carolina to negotiate with defendant Satcher. The parties reached an agreement under which plaintiff would advance funds to defendant Satcher to cover production of the 1994 peach crop and plaintiff would then market Satcher Farms' crop, acting in the nature of a commission merchant for the sale of the peach crop. Plaintiff ultimately loaned defendant Satcher a total of $292,000.00. In addition, a special telephone line was installed between plaintiff and defendant Satcher to facilitate communication between the parties.

As of January 1994, defendant Satcher maintained an outstanding balance with defendant Weyerhauser stemming from previous pur-

chases of wooden boxes necessary to ship Satcher Farms' peaches. Because of this outstanding debt, defendant Weyerhauser would no longer allow defendant Satcher to purchase boxes on credit. Plaintiff then agreed to purchase boxes for defendant Satcher and recover the additional advance over the course of the contract. This arrangement allowed defendant Satcher to directly call defendant Weyerhauser's North Carolina production facility and order needed boxes, the invoice for which would be sent directly to plaintiff by defendant Weyerhauser.

During the course of performance of the contract, a dispute developed between the parties regarding the quality of peaches produced by defendant Satcher and the sale price plaintiff was able to obtain for the peaches it sold. Attempts to resolve this dispute resulted in plaintiff travelling to South Carolina to negotiate further with defendant Satcher. These attempts to resolve the problem ultimately failed and on 12 October 1994 plaintiff filed suit in the Superior Court of Wilson County, North Carolina. Defendant Satcher then filed a motion to dismiss pursuant to Rule 12(b)(2) alleging that the Wilson County Superior Court could not statutorily or constitutionally assert personal jurisdiction over him and his business, Satcher Farms. After hearing, the trial court denied defendant Satcher's motion to dismiss.

Defendant appeals.

Connor, Bunn, Rogerson & Woodard, P.A., by C. Timothy Williford, for plaintiff-appellee.

Lee, Reece & Weaver by Cyrus F. Lee and Rachel V. Lee, for defendant-appellant.

EAGLES, Judge.

The issue before us is whether the trial court erred in denying defendant Satcher's motion to dismiss for lack of personal jurisdiction. Defendant Satcher argues that under these facts the courts of North Carolina cannot assert personal jurisdiction over him consistent with the due process clause of the Fourteenth Amendment to the United States Constitution. We disagree. Because it is based on due process concerns, defendant Satcher's appeal is properly before us pursuant to G.S. 1-277(b). *E.g., Patrum v. Anderson*, 75 N.C. App. 165, 167, 330 S.E.2d 55, 56 (1985).

When determining whether a non-resident defendant is subject to the personal jurisdiction of our courts, we apply a two-pronged analysis. *CFA Medical, Inc. v. Burkhalter*, 95 N.C. App. 391, 393-94, 383 S.E.2d 214, 215 (1989). We must determine first whether the exercise of jurisdiction over the defendant falls within the language of North Carolina's long-arm statute, and second "whether the defendant has sufficient minimum contacts with North Carolina such that the exercise of jurisdiction is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution." *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995).

[1] Defendant Satcher first argues that he is not covered by the broad language of G.S. 1-75.4, often referred to as North Carolina's long-arm statute. We disagree. G.S. 1-75.4 establishes the relevant jurisdictional authority here and provides in pertinent part that:

> A court of this State having jurisdiction over the subject matter has jurisdiction over a person . . . under any of the following circumstances:
>
> . . . .
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
>
> b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
>
> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
>
> d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

> e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

G.S. 1-75.4 (1983 & Supp. 1995). If there is competent evidence in the record to support "a finding which comports with one of the above provisions, jurisdiction will follow under the long-arm statute." *Dataflow Companies v. Hutto*, 114 N.C. App. 209, 212, 441 S.E.2d 580, 582 (1994).

Generally speaking, the language of the long-arm statute is sufficiently broad that the limits of personal jurisdiction are defined by due process rather than by statute. *E.g., Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C 361, 365, 348 S.E.2d 782, 785 (1986). The provisions of G.S. 1-75.4(5) are to be "liberally construed in favor of finding personal jurisdiction, subject only to due process considerations." *Dataflow*, 114 N.C. App. at 212, 441 S.E.2d at 582. Here, we conclude that the due process analysis is indeed controlling because no fewer than three subsections of G.S. 1-75.4(5) are applicable to the facts of this case.

Specifically, defendant Satcher fulfills the requirements of G.S. 1-75.4(5)(a) in that he made "a promise . . . for the plaintiff's benefit . . . to pay for services to be performed in this State by plaintiff . . . ." The promise was the contract between the parties and the services performed were plaintiff's marketing and sale here in North Carolina of defendant's peaches grown in South Carolina. Accordingly, having determined that G.S. 1-75.4(5)(a) is applicable here, we point out in passing that the provisions of G.S. 1-75.4(5)(b) and (d) also would suffice to bring defendant within the reach of our "long-arm" statute.

[2] Turning now to the dispositive question of whether the exercise of jurisdiction comports with due process, we recognize that our State courts may not exercise jurisdiction "unless defendants have had 'certain minimum contacts' with the forum state such that the 'maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Dataflow*, 114 N.C. App. at 213, 441 S.E.2d at 582 (quoting *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786). In determining whether the requisite minimum contacts are present, "it is essential that there be some act by which the defendant purposefully availed [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350

S.E.2d 111, 114 (1986). It is well settled, however, "that a defendant need not physically enter North Carolina in order for personal jurisdiction to arise." *Better Business Forms*, 120 N.C. App. at 501, 462 S.E.2d at 834.

A contract alone may establish the necessary minimum contacts where it is shown that the contract was voluntarily entered into and has a "substantial connection" with this State. *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E.2d at 786. When a contract bears a substantial connection to the forum state, a defendant who enters into that contract "can reasonably anticipate being haled into court . . ." in the forum state. *CFA Medical*, 95 N.C. App. at 394-95, 383 S.E.2d at 216 (quoting *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)). Here, the evidence is clear that defendant Satcher's contract with plaintiff bears a "substantial connection" to North Carolina and that defendant Satcher "should not be surprised with being haled into a North Carolina court." *Chapman v. Janko, U.S.A.*, 120 N.C. App. 371 376, 462 S.E.2d 534, 538 (1995).

Defendant Satcher contests this conclusion arguing that the assertion of jurisdiction is improper since plaintiff approached defendant Satcher in South Carolina and then travelled to South Carolina to negotiate the contract. Defendant Satcher's argument, however, would have us consider this factor to the virtual exclusion of all others, and that is not the law. Our analysis is not accomplished by using "a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances." *Better Business Forms*, 120 N.C. App. at 500, 462 S.E.2d at 833.

It is true that plaintiff initiated the original contact in South Carolina with defendant Satcher and secured the original agreement following negotiations taking place entirely in South Carolina. The original contract between the parties provided that plaintiff would have the sole right to market and sell defendant Satcher's peach crop, that plaintiff would receive 8% of the sales price for its efforts, and that plaintiff would advance operating capital to defendant Satcher up to a total of $100,000.00. Were this the only contact, defendant Satcher's due process argument would be considerably more persuasive.

Here, however, the parties made several additional agreements and modifications thereto at defendant Satcher's prompting. On at least three occasions, defendant Satcher contacted plaintiff request-

ing additional sums of money beyond the $100,000.00 promised as part of the original contract. Defendant Satcher also contacted plaintiff to secure assistance in procuring the necessary packaging boxes for the peach crop. Following this contact, plaintiff agreed to pay Weyerhauser to produce the necessary boxes at its plant in North Carolina and to ship them, on defendant Satcher's order, to defendant's farm in South Carolina. Plaintiff even agreed to pay a surcharge on the cost of each box to help retire a debt owed by defendant Satcher to Weyerhauser that was incurred prior to defendant Satcher's original agreement with plaintiff. At its height, defendant Satcher's indebtedness to plaintiff, including that authorized in the original agreement, totalled $292,000.00.

Additional facts relevant in determining the quantity and quality of defendant Satcher's contacts with North Carolina include the following: that defendant Satcher directly contacted Weyerhauser in North Carolina and ordered the necessary boxes; that the parties installed a dedicated phone line to facilitate communication between plaintiff and defendant Satcher; that plaintiff's marketing and sales efforts took place almost entirely in Wilson, North Carolina, and; that, pursuant to the parties' agreement, plaintiff sent a representative to South Carolina to monitor packaging operations, and sent trucks to South Carolina to pick up the peaches.

Based on this evidence, we conclude that defendant Satcher had sufficient minimum contacts to permit this State to exercise personal jurisdiction over him consistent with the due process clause. *E.g.*, *Dataflow*, 114 N.C. App. at 209, 441 S.E.2d at 580; *Chapman*, 120 N.C. App. at 376, 462 S.E.2d at 538. Accordingly, we conclude that the decision of the trial court denying defendant Satcher's motion to dismiss must be affirmed.

Affirmed.

Judges MARTIN, JOHN C., and MARTIN, MARK D., concur.

STATE OF NORTH CAROLINA v. KEITH A. WATSON, DEFENDANT

No. COA95-352

(Filed 4 June 1996)

1. **Automobiles and Other Vehicles § 833 (NCI4th)— driving while impaired—reasonable and articulable suspicion for stop**

A highway patrolman had a reasonable and articulable suspicion for stopping defendant's vehicle where he observed defendant driving on the center line and weaving back and forth within his lane for 15 seconds at 2:00 a.m. on a road near a nightclub. Looking at the totality of the circumstances, the evidence is sufficient to form a suspicion of impaired driving in the mind of a reasonable and cautious officer.

Am Jur 2d, Automobiles and Highway Traffic §§ 296-311.

What amounts to violation of drunken-driving statute in officer's "presence" or "view" so as to permit warrantless arrest. 74 ALR3d 1138.

2. **Evidence and Witnesses § 1832 (NCI4th)— driving while impaired—notification of rights**

A defendant stopped for driving while impaired was adequately notified of his rights as required by N.C.G.S. § 20-16.2(a) where defendant was informed of his rights, signed a form containing those rights, submitted to chemical analysis, and the record contains no evidence that defendant refused to submit to the test.

Am Jur 2d, Automobiles and Highway Traffic § 304.

3. **Evidence and Witnesses § 1812 (NCI4th)— driving while impaired—printed results of test—record produced by machine**

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress the results of his chemical analysis where defendant argued that the trooper did not record the printed results of the test or provide defendant with a copy prior to trial as mandated by N.C.G.S. § 20-139.1(e) but the required information was supplied on the test card printed by the machine after the test was performed, which the

trooper gave to defendant. The reliability and accuracy of current blood alcohol testing methods was recognized by *State v. Smith*, 312 N.C. 361, and the record produced by the machine is sufficient to meet the statutory requirements.

Am Jur 2d, Automobiles and Highway Traffic §§ 122-132, 305-308, 375, 377-380, 384.

4. Evidence and Witnesses § 1812 (NCI4th)— driving while impaired—breathalyzer results—copy furnished to defendant

The trial court did not err in a prosecution for driving while impaired by admitting breathalyzer results where defendant argued that the trooper failed to provide him with a copy of his breathalyzer results but the trooper testified that he gave defendant a copy of the rights and read them to him.

Am Jur 2d, Automobiles and Highway Traffic §§ 307, 377.

5. Evidence and Witnesses § 1830 (NCI4th)— driving while impaired—calibration of breathalyzer

The trial court did not err in a driving while impaired prosecution by admitting breathalyzer results where defendant argued that the State did not present sufficient evidence of instrument calibration, but the trooper testified that as part of his preparation of the machine he "insured that the instrument calibration checked out accurately" and defendant failed to cross-examine the trooper regarding the specifics of his instrument calibration.

Am Jur 2d, Automobiles and Highway Traffic §§ 307, 377.

6. Automobiles and Other Vehicles § 843 (NCI4th)— driving while impaired—date of offense—variance in testimony

There was not a fatal variance in a driving while impaired prosecution concerning events on the 5th of June which the trooper testified occurred on the 25th. Defendant testified that the events occurred on the 5th.

Am Jur 2d, Automobiles and Highway Traffic §§ 375-380.

Cough medicine as "intoxicating liquor" under DUI statute. 65 ALR4th 1238.

Appeal by defendant from judgment entered 29 July 1994 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 22 January 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

James Hite Avery Clark & Robinson, by Leslie S. Robinson, for defendant-appellant.

LEWIS, Judge.

Defendant was charged with and found guilty of impaired driving in Pitt County District Court. He appealed to Superior Court, where a jury again convicted him. Defendant appeals. For the reasons stated below, we find that defendant received a fair trial free of prejudicial error.

At trial the State's evidence tended to show that one morning in June 1993 at approximately 2:30 a.m. Trooper Everett Lee Deans, a highway patrolman, observed a 1971 Ford pickup truck driving on the dividing line on State Road 1534, a two-lane highway, near a nightclub called Hard Times. After Trooper Deans turned to follow the vehicle, he noticed it weaving back and forth in its lane. After observing this behavior for approximately 15 seconds, the officer pulled the vehicle over.

Trooper Deans testified that defendant was driving the vehicle. After smelling a strong odor of alcohol as he approached the truck, Trooper Deans requested that defendant join him in his patrol car. In the car, the officer noticed a strong odor of alcohol coming from defendant and that his eyes were red and glassy. Trooper Deans arrested defendant for impaired driving.

Trooper Deans, a certified chemical analyst, then transported defendant to the intoxilyzer room where he examined and prepared the machine. Prior to administering the test, he informed defendant of his intoxilyzer rights and gave him a copy of those rights. After the test, the results showed a .13 alcohol concentration. Trooper Deans provided a copy of the results to defendant.

Next, defendant consented to a series of psychophysical tests including a one-legged stand, walking a line, a sway test, and a finger-to-nose test. The officer's testimony revealed that defendant performed only the sway test satisfactorily. After receiving his Miranda

rights, defendant told Trooper Deans that he had drunk three or four beers that evening but did not think he was under the influence of alcohol.

The trooper testified that in his opinion after observing the defendant for approximately two hours, he believed defendant "had consumed enough alcoholic beverage to appreciably impair both his mental and physical faculties that he should not have been operating that vehicle on that night." On cross-examination, Trooper Deans agreed that there was nothing unusual about defendant's speech or ability to walk.

Defendant's evidence consisted of testimony from himself and a Ms. Brinkley, a passenger in his truck that evening. Defendant testified that he had about four beers that evening but was not impaired. Ms. Brinkley, who at the time had known defendant for a year and a half, stated that she noticed nothing different about defendant and that she had no concerns about riding with him that evening.

Defendant made fifteen assignments of error. However, because he only argued five in his brief, the rest are deemed abandoned. N.C.R. App. P. 28(a) (1996).

[1] Defendant first argues that Trooper Deans did not have a reasonable and articulable suspicion when he stopped the defendant's vehicle. We disagree.

Since the Fourth Amendment applies to brief investigatory stops such as this one, an "investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 628 (1981). It is our job to consider the totality of the circumstances to determine whether there was a reasonable suspicion to make the investigatory stop. *See State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)). All that is required is a "minimal level of objective justification." *Id.* at 442, 446 S.E.2d at 70.

In this case, Trooper Deans testified that he observed defendant driving on the center line and weaving back and forth within his lane for 15 seconds. This observation occurred at 2:30 a.m. on a road near a nightclub. Looking at the totality of the circumstances, we hold that

this evidence is sufficient to form a suspicion of impaired driving in the mind of a reasonable and cautious officer. We therefore overrule this assignment of error.

[2] Defendant next argues that the trial court erred in not granting his motion to suppress the results of his chemical analysis. The first basis for his argument is that he was not properly advised of his rights under N.C. Gen. Stat. 20-16.2(a) because Trooper Deans did not take him before another officer to have his rights read. Defendant argues that *Nicholson v. Killens*, 116 N.C. App. 473, 448 S.E.2d 542 (1994), controls. We disagree.

In *Nicholson*, the charging officer requested that the defendant submit to a chemical analysis, but the defendant refused. *Id.* at 474, 448 S.E.2d at 542. The defendant was not taken before another officer to be advised of his rights under G.S. section 20-16.2(a). *Id.* The defendant's driver's license was revoked. The trial court subsequently entered an order rescinding the revocation on the ground that the defendant had not been notified of his rights in accordance with G.S. section 20-16.2(a). *Id.* at 475, 448 S.E.2d at 542. This Court affirmed, holding that a second officer should have advised the defendant of his rights. *Id.* at 478, 448 S.E.2d at 544. However, the Court stated: "[O]ur decision here has no adverse effect whatever on the admissibility of the results of the breath analysis using an automated breath instrument that prints the results of its analysis, where the driver has agreed to submit to the breath analysis." *Id.* Its holding was limited to cases in which a driver refuses to submit to a breath analysis.

In this case, the record contains no evidence that defendant refused to submit to the test. In fact, the evidence is clearly to the contrary. Defendant was informed of his rights, signed a form containing those rights and submitted to the chemical analysis. Therefore, *Nicholson* is inapplicable. We hold that defendant was adequately notified of his rights as required by G.S. section 20-16.2(a).

[3] The second basis defendant uses to support his suppression motion is that Trooper Deans did not record the printed results of the test nor did he provide defendant with a copy prior to trial as mandated by N.C. Gen. Stat. section 20-139.1(e). We find no merit in this argument.

N.C. Gen. Stat. section 20-139.1(e) (1993) requires the chemical analyst to record the results of the test and the time of collection of the breath samples. It also requires that a copy of this information be

given to the person submitting to the test. However, in this case the required information was supplied on the test card printed by the machine after the test was performed. Trooper Deans testified that he gave this card to the defendant. That is sufficient.

Defendant relies on *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316 (1984), to support his contention that a separate recording is required. We do not find this case persuasive or controlling here. The issue in *Smith* is whether N. C. Gen. Stat. section 20-139.1(e1), which allows an affidavit by a chemical analyst to be admissible without further authentication, violates an accused's confrontation rights. *Smith* makes no mention of G.S. section 20-139.1(e), which is at issue in this case. The *Smith* court did, however, recognize the reliability and accuracy of current blood alcohol testing methods, which is the basis for our determination that the record produced by the machine is sufficient to meet the requirements set out in G.S. section 20-139.1(e). *Smith*, 312 N.C. at 372-73, 323 S.E.2d at 322-23.

[4] Defendant also argues that the breathalyzer results should have been suppressed because Trooper Deans failed to provide him with a copy of his breathalyzer rights as required by N.C. Gen. Stat. section 20-16.2(a). This argument has no merit because the record contains evidence that the officer did provide defendant with a copy of his rights prior to reading them. On direct examination Officer Deans testified:

> Q: Okay. Would you explain and demonstrate to the jury how you informed the defendant of those rights?
>
> A: I give the defendant a copy of the rights before reading, reading him his rights, and I tell him if he wants to read along with me that's fine, but I am going to read his rights out loud to him.

On cross examination, he confirmed:

> Q: And you also gave him a copy to read along with you while you were reading those to him, correct?
>
> A: That's correct.

[5] Finally in support of his motion to suppress, defendant argues that the State did not present sufficient evidence of instrument calibration under N.C. Admin. Code tit. 15A, r. 19B.0320(5) (April 1993) and N.C. Admin. Code tit. 15A, r. 19B.0101(9) (January 1990). We disagree.

N.C.A.C. 19B.0320(5) provides that when using the Intoxilyzer Model 5000 the person administering the test must "verify instrument calibration." At trial, Trooper Deans testified that as part of his preparation of the machine he "insured that the instrument calibration checked out accurately." Defendant argues that this testimony is insufficient because it does not provide the details set forth in the definition of "verify instrument calibration" found in N.C.A.C. 19B.0101(9).

We hold that because Trooper Deans' testimony demonstrated that calibration was verified, it showed that he sufficiently complied with the requirements set forth in N.C.A.C. 19B.0320. On cross-examination the defendant had an opportunity to question Trooper Deans regarding the specifics of his instrument calibration, which defendant failed to do. This argument is meritless and defendant's motion to suppress the results of the chemical analysis was properly denied.

Finally, defendant contends that the trial court erred in denying his motions to dismiss at the close of the State's evidence and at the close of all evidence. He bases this contention on two grounds. First, he argues that absent the chemical analysis results, the State failed to produce substantial evidence of his impairment. However, since we have found the results of defendant's intoxilyzer test properly admitted, we see no need to address this argument.

[6] Second, defendant argues that since Trooper Deans testified that the events in question happened on the 25th of June when they really happened on the 5th of June, there is a fatal variance which should result in granting his motion to dismiss. We disagree. Although Trooper Deans did testify that the events in question happened on a different day, defendant testified that the events described by Trooper Deans occurred on 5 June 1993. We therefore hold that this mistake on the part of the officer was just that and not a fatal variance as alleged by defendant. Defendant's motions to dismiss were properly denied.

No error.

Chief Judge ARNOLD and Judge WALKER concur.

LUIS A. SANHUEZA, EMPLOYEE, PLAINTIFF v. LIBERTY STEEL ERECTORS, EMPLOYER; MICHIGAN MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA95-468

(Filed 4 June 1996)

1. Workers' Compensation § 296 (NCI4th)— employee's refusal to cooperate with rehabilitation efforts—sufficiency of evidence

There was competent evidence in the record to support the Industrial Commission's determination that plaintiff employee unjustifiably refused to cooperate with defendants' rehabilitation efforts where it tended to show that plaintiff was belligerent toward a vocational counselor hired by defendant to assist plaintiff in finding employment; on interview days plaintiff wore old clothes and nearly always wore his back brace, although he did not wear it often otherwise; plaintiff exaggerated and accentuated his symptoms during interviews and became disruptive and abusive when speaking with his vocational counselor and prospective employers; plaintiff failed to attend scheduled meetings and interviews; plaintiff argued that his English skills were inadequate in spite of the fact that he communicated well with the counselor in English and refused to attend English classes arranged by the counselor; and a videotape of plaintiff shows him performing a variety of physical activities for substantial periods of time without the appearance of pain.

Am Jur 2d, Workers' Compensation §§ 389, 390.

Workers' compensation: reasonableness of employee's refusal of medical services tendered by employer. 72 ALR4th 905.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of workers' compensation. 3 ALR5th 907.

2. Workers' Compensation § 296 (NCI4th)— employee's refusal to cooperate with rehabilitation efforts—suspension of benefits

The employer's provision of vocational rehabilitation services to plaintiff employee in an attempt to assist him in finding suitable employment is an appropriate attempt to "lessen the period of disability" and comes within the purview of N.C.G.S. § 97-25.

Therefore, plaintiff's unjustified refusal to cooperate with the employer's rehabilitation efforts supported the suspension of, but not the termination of, plaintiff's right to receive future disability benefits. Plaintiff may again be entitled to weekly compensation benefits upon showing that he is willing to cooperate with the employer's rehabilitation efforts.

Am Jur 2d, Workers' Compensation §§ 389, 390.

Workers' compensation: reasonableness of employee's refusal of medical services tendered by employer. 72 ALR4th 905.

What amounts to failure or refusal to submit to medical treatment sufficient to bar recovery of workers' compensation. 3 ALR5th 907.

Appeal by plaintiff from an opinion and award entered 1 December 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 31 January 1996.

Plaintiff, Luis Sanhueza, was born in Chile on 21 June 1953. In Chile, plaintiff completed two years of college level electronics training and served as a navigator in the Chilean Navy and for various shipping companies after his naval service ended. In 1980, plaintiff moved to America where he married an American citizen and found employment as a steel worker. Plaintiff worked as a steel worker for several different employers until 1986 when plaintiff took a similar position with defendant-employer, Liberty Steel Erectors.

On 13 July 1989, plaintiff sustained a compensable injury by accident when he injured his back helping a fellow employee move a piece of steel. Plaintiff entered into a Form 21 agreement for the payment of compensation which was approved by the Industrial Commission. Following his injury, plaintiff came under the primary care of Dr. Stephen H. Sims and Dr. Bruce Darden. These doctors supervised plaintiff's treatment which included spinal fusion surgery, medication, rest and physical therapy.

As time progressed, plaintiff continued to complain that his condition was not improving. An extensive battery of tests performed by Dr. Darden revealed no identifiable abnormalities. The doctor-patient relationship then deteriorated between Dr. Darden and plaintiff. Dr. Darden testified that he came to suspect "symptom magnification." On 18 June 1991, Dr. Darden discharged plaintiff after determining

that plaintiff suffered 25% permanent partial impairment to his cervical spine. Dr. Anthony Wheeler also examined plaintiff and assigned a 25-30% permanent partial disability rating to plaintiff's back.

On 29 August 1991, defendant-insurer began a vocational rehabilitation program with plaintiff. Defendant-carrier retained vocational counselor Hilda E. Baker to assist plaintiff in finding employment. At that time, plaintiff's work restrictions included no lifting greater than 20 pounds and avoiding bending and stooping, but plaintiff was not required to wear a lumbar corset full time or to wear a body brace.

Ms. Baker testified that her relationship with plaintiff was marked from the beginning by plaintiff's belligerence and uncooperativeness. Ms. Baker testified that plaintiff consistently undermined her efforts to secure employment for him. Ms. Baker testified that plaintiff would (1) wear old clothes on days when interviews were scheduled, (2) nearly always wear his back brace to interviews although he did not wear it often otherwise, (3) exaggerate and accentuate his symptoms during interviews, (4) become disruptive and abusive when speaking with Ms. Baker or with prospective employers, or (5) fail to attend scheduled meetings and interviews. Plaintiff also argued that his English language skills were inadequate despite the fact that plaintiff communicated well with Ms. Baker in English and refused to attend English classes arranged by Ms. Baker.

Finally, defendant-carrier hired Rick Hinson, a private investigator, to conduct surveillance of plaintiff. The videotape taken by Mr. Hinson reveals plaintiff performing a variety of physical activities for substantial periods of time without the appearance of pain. Plaintiff was videotaped climbing over a four foot wall without difficulty, and otherwise bending, stooping and climbing without apparent limitation. Moreover, plaintiff was videotaped spending the day walking around with his family at the Carowinds amusement park in Charlotte, North Carolina. Plaintiff was not wearing a back brace, nor was plaintiff limping or dragging his leg as he often did while attending job interviews. Mr. Hinson's videotape captured plaintiff in a variety of settings and plaintiff was almost always dressed neatly and appropriately. Conspicuously absent were the old sweatpants and sweater that plaintiff regularly wore on days when he would be interviewing.

Based on the evidence collected, defendants requested a hearing alleging that plaintiff had reached maximum medical improvement and was no longer totally disabled. After hearing, Deputy Com-

missioner Lawrence B. Shuping, Jr., determined (1) that plaintiff's receipt of temporary total disability benefits should be terminated as of 6 February 1992 because plaintiff was no longer totally disabled and because plaintiff unjustifiably refused to cooperate in vocational rehabilitation efforts, and (2) that plaintiff had sustained a twenty-five percent permanent partial disability to his back and that plaintiff should be compensated on that basis only. Plaintiff appealed to the Full Commission, and the Full Commission affirmed.

Plaintiff appeals.

Todd, Parham & Harris, by Ken Harris, for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Henry C. Byrum, Jr., for defendant-appellees.

EAGLES, Judge.

[1] Plaintiff first argues that the Industrial Commission erred in concluding that plaintiff unjustifiably refused to cooperate with defendants' reasonable vocational efforts. Plaintiff argues that any failure to cooperate on his part was justified and that he is therefore entitled to continuing temporary total disability benefits. We disagree.

The findings of fact made by the Industrial Commission are conclusive on appeal if supported by any competent evidence. *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). Our review is limited to determining "whether there was competent evidence before the Commission to support its findings and . . . whether such findings support its legal conclusions." *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982). The Industrial Commission is the sole judge of witness credibility. *E.g., Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 74, 441 S.E.2d 145, 149 (1994).

Here, the Commission as finder of fact chose to believe defendants' evidence, including the testimony of Ms. Baker and Mr. Hinson and the videotape taken by Mr. Hinson. Ms. Baker testified in detail as to plaintiff's consistently uncooperative conduct. Mr. Hinson's videotape corroborates Ms. Baker's contention that plaintiff was intentionally uncooperative with her efforts to assist him in returning to the work force. Although, plaintiff's testimony tended to contradict defendants' evidence, the Commission chose not to believe plaintiff's testimony. The Commission's assessment of witness credibility is conclusive. *Burwell*, 114 N.C. App. at 74, 441 S.E.2d at 149.

Accordingly, we conclude that there is competent evidence in the record to support the Commission's determination that plaintiff unjustifiably refused to cooperate with defendants' rehabilitation efforts.

[2] Plaintiff next argues that the Commission erred in concluding that plaintiff's benefits must be terminated pursuant to G.S. 97-25 because plaintiff unjustifiably refused to cooperate with defendants' rehabilitation efforts. Plaintiff asserts that G.S. 97-25 is inapplicable to the vocational rehabilitation efforts employed by defendants here. We disagree. G.S. 97-25 provides in pertinent part that:

> Medical Compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatment as may in the discretion of the Commission be necessary.
>
> . . . .
>
> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases . . . .

G.S. 97-25 (1991). Plaintiff's argument misinterprets this statutory language. While the title of G.S. 97-25 is "Medical treatment and supplies," the title does not identify the full breadth of the statute's language.

G.S. 97-25 explicitly pertains to "medical compensation." G.S. 97-2(19) defines "medical compensation" as "medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . ." G.S. 97-2(19) (1995). Reading these two statutory sections in *pari materia*, it is clear that "treatment," "rehabilitative procedures" or "rehabilitative services" are all within the purview of G.S. 97-25 so long as they "will tend to lessen the period of disability." *Id.*

Here, the Industrial Commission found that defendants secured vocational rehabilitation services for the plaintiff "in order to assist

[plaintiff] in obtaining the type of suitable alternate light/sedentary work required by his permanent back injury . . . ." In this context, we hold that an attempt to secure suitable employment for plaintiff is an appropriate attempt to "lessen the period of disability." We conclude therefore that G.S. 97-25 is controlling and that defendants here have met their burden of showing that plaintiff has unjustifiably refused to cooperate with defendants' rehabilitation efforts. Accordingly, we conclude that the portion of the Industrial Commission's opinion and award that suspends plaintiff's benefits pursuant to G.S. 97-25 should be affirmed.

The terminology of the Industrial Commission's opinion and award, however, effectively terminates plaintiff's right to receive future disability benefits rather than merely suspending that right for the period of plaintiff's unjustified refusal to cooperate with defendants' vocational rehabilitative efforts. Plaintiff argues that this is contrary to the language of G.S. 97-25. We agree. G.S. 97-25 is clear in its mandate that a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation "until such refusal ceases . . . ." Accordingly, we must reverse the Commission's opinion and award as to its conclusion that plaintiff is "no longer entitled to any further weekly compensation benefits . . ." after 6 February 1991. The Commission's opinion and award must reflect the fact that plaintiff may again be entitled to weekly compensation benefits upon a proper showing by plaintiff that he is willing to cooperate with defendants' rehabilitative efforts.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN, JOHN C., and MARTIN, MARK D., concur.

N.C. CENTRAL UNIVERSITY, Petitioner-Appellant, v. BOYD S. TAYLOR, Respondent-Appellee

No. COA95-755

(Filed 4 June 1996)

1. Appeal and Error § 292 (NCI4th)— superior court—certiorari to administrative agency—review by certiorari in Court of Appeals

There is no appeal provided by statute from an interlocutory order of the superior court granting or denying a writ of certiorari to an administrative agency. Therefore, appellant should have filed a petition for a writ of certiorari with the Court of Appeals pursuant to Appellate Rule 21(b) to obtain review of the superior court's partial denial of a writ of certiorari seeking review of an administrative law judge's order denying appellant's motion for summary judgment.

Am Jur 2d, Certiorari §§ 5-14.

2. Administrative Law and Procedure § 51 (NCI4th)— superior court review of interlocutory agency decision—writ of certiorari improperly granted

North Carolina Central University's petition for writ of certiorari filed in the superior court should have been denied *in toto* because it failed to allege or show that no appeal from the administrative law judge's denial of summary judgment was provided by law. Had the superior court not issued a partial writ of certiorari, an administrative hearing would have ensued; thereafter the administrative law judge would have issued a recommended decision to the State Personnel Commission, which would have then issued a final agency decision; and if the State Personnel Commission had decided against North Carolina Central University, it would be entitled to judicial review in the superior court.

Am Jur 2d, Administrative Law § 554; Certiorari §§ 15 et seq.

Appeal by petitioner from an order entered 20 April 1995 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 20 March 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton, III, for the State.

McSurely, Dorosin & Osment, by Alan McSurely, Mark Dorosin and Ashley Osment, for petitioner appellee.

SMITH, Judge.

[1] This case involves appellee Boyd Taylor's rights to priority reemployment consideration under North Carolina law resulting from a Reduction in Force ("RIF") and veteran's preference consideration by appellant, North Carolina Central University ("NCCU"). Both parties attempt to appeal a superior court order which partially denied and partially granted NCCU's petition for certiorari from an administrative law judge's ("ALJ") order denying NCCU's motion for summary judgment. There is no appeal provided by statute from an interlocutory order of the superior court granting or denying certiorari to an administrative agency. Therefore, the parties' attempted appeals in this case are defective and subject to dismissal.

Because no appeal is provided by statute, NCCU should have filed a petition for writ of certiorari with this Court pursuant to Appellate Rule 21(b) to obtain this Court's review of the superior court's partial denial of certiorari. Mr. Taylor's attempt to cross-assign error to the partial granting of certiorari and dismissal of the RIF claim was improper as the alleged error did not "deprive[] the appellee of an alternative basis in law for supporting the judgment . . . from which appeal has been taken." N.C.R. App. P. 10(d) (1995). Therefore, these issues are not properly before this Court. However, pursuant to Appellate Rule 21, and in our discretion, we treat the purported appeals of the parties as petitions for certiorari which are allowed pursuant to N.C. Gen. Stat. § 7A-32(c) (1995). *Munn v. Munn*, 112 N.C. App. 151, 435 S.E.2d 74 (1993). We now address the parties' issues in order to expedite a decision in this case and to promote judicial economy. *See Adams v. Jones*, 114 N.C. App. 256, 258, 441 S.E.2d 699, 700 (1994). For the reasons stated herein, that part of the superior court's order partially granting NCCU's petition for certiorari is vacated. That part of the order partially denying NCCU's petition is affirmed.

The relevant facts and procedural history are as follows: In September 1988, Mr. Taylor was hired by NCCU as a Food Service Director III, at pay grade 74. In November 1991, the University separated Taylor as a result of a RIF. He was advised that the circum-

stances under which he was leaving subjected him to the RIF policy, which provides certain separated employees priority reemployment consideration.

In August 1991, a pay grade 65 Purchasing Agent I position was posted by the University. Mr. Taylor applied and was interviewed for the job. However, a temporary employee was recommended for the position. In January 1992, Taylor contacted Mavis B. Lewis, Director of Personnel at NCCU, with regard to his priority employment rights under the RIF policy. Ms. Lewis informed Joyce Page, Director of Purchasing at NCCU, that Mr. Taylor should be hired for the position based upon his RIF status. Mr. Taylor was not hired and thereafter filed an internal grievance.

On 22 April 1992, the non-academic personnel appeals committee of NCCU found that Mr. Taylor's rights to priority consideration were violated and recommended he be placed in the first available position for which he met minimum requirements. Chancellor Donna J. Benson agreed with the committee's decision and informed Mr. Taylor that his priority reemployment status would be reinstated immediately.

In August 1992, Taylor accepted a position with NCCU for which the salary was $12,915 less than that of his previous position. On 18 September 1992, Mr. Taylor's attorney wrote Ms. Benson informing her that Taylor's priority reemployment consideration was "mishandled," stating the purchasing job was filled "in spite of Mr. Taylor's double priority considerations (Vietnam-era veteran and RIF'ed status) . . . ."

As of 21 March 1994, Mr. Taylor had not received a final decision regarding the University's failure to hire him for the purchasing position. He believed it was futile to again request a final decision. Thus, he filed a contested case petition with the Office of Administrative Hearings ("OAH") on 24 May 1994, pursuant to N.C. Gen. Stat. §§ 126-37 (1995) and 150B-23 (1995). In his contested case petition, a standardized OAH form, Taylor alleged "RIF reemployment rights and due process." He did not reference his veteran's preference claim in the petition. However, he did raise the issue of veteran's preference in the letter to Ms. Benson and in his prehearing statement.

On 24 August 1994, NCCU filed a motion for summary judgment with OAH which was subsequently denied by the ALJ. On 4 January 1995, the superior court granted a temporary stay of the proceedings

in OAH. On 20 April 1995, the superior court granted NCCU's petition for certiorari regarding OAH's jurisdiction over Mr. Taylor's RIF claim and dismissed that portion of Taylor's contested case. The superior court denied NCCU's petition for certiorari with regard to whether OAH had jurisdiction over Taylor's veteran's preference claim.

[2] Appellant NCCU now contends that the superior court erred by partially denying its petition for certiorari on the veteran's preference claim because sovereign immunity precludes Mr. Taylor from pursuing this claim. Mr. Taylor argues the superior court erred by partially granting NCCU's petition. We conclude that the superior court should not have issued the writ of certiorari on the issue of Taylor's RIF status. Thus, we vacate the partial issuance of the writ. The superior court's partial denial of NCCU's petition on Taylor's veteran's preference claim is affirmed.

Certiorari is a common law writ which, in an appropriate case, may issue from a superior court to an inferior body exercising judicial or quasi-judicial powers to send up the record of a particular case for review. *Mize v. County of Mecklenburg*, 80 N.C. App. 279, 282, 341 S.E.2d 767, 769 (1986). However, our courts have frequently observed that a writ of certiorari is an extraordinary remedial writ. *Pue v. Hood*, 222 N.C. 310, 22 S.E.2d 896 (1942).

Issuance of a writ of certiorari is within the discretion of the reviewing court. *See, e.g., King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924); *State v. Grundler and State v. Jelly*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L.Ed.2d 738 (1960). Thus, in our review of the superior court's grant or denial of certiorari to an inferior tribunal, we determine only whether the superior court abused its discretion. We do not address the merits of the petition to the superior court in the instant case. *See Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 445, 23 S.E.2d 897, 901 (1943). We find that the superior court did abuse its discretion by partially granting NCCU's petition for certiorari and therefore vacate that order.

This Court has held that before a writ of certiorari will appropriately issue, the moving party bears the burden of "demonstrat[ing]: (1) no appeal is provided at law; (2) a *prima facie* case of error below; and (3) merit to its petition." *House of Raeford Farms v. City of Raeford*, 104 N.C. App. 280, 284, 408 S.E.2d 885, 888 (1991) (citations omitted). Failure to meet the pleading requirements for this

extraordinary writ deprives the superior court of subject matter jurisdiction of the particular matter over which the moving party seeks review. *Id.* at 283-84, 408 S.E.2d at 887-88.

NCCU's petition for writ of certiorari to the superior court is deficient in its failure to allege or show that no appeal from the ALJ's denial of summary judgment is provided by law. The statutory framework within which this action was commenced, the Administrative Procedure Act, N.C. Gen. Stat. §§ 150B, *et seq.*, creates a right of judicial review for NCCU. Had the superior court not issued a partial writ of certiorari, an administrative hearing would have ensued. Thereafter, the ALJ would have issued a recommended decision to the State Personnel Commission, which would have then issued a final agency decision. *See* N.C. Gen. Stat. § 126-37(a) (1995).

Subsequently, if the State Personnel Commission decided against NCCU, the University would be entitled to judicial review in the superior court. N.C. Gen. Stat. §§ 126-37 and 150B-43. By providing for judicial review of a *final* agency decision, the General Assembly has expressed an intent that courts are not to review interlocutory administrative decisions. *See* N.C. Gen. Stat. § 150B-51.

"Where a statute provides for 'an orderly procedure for an appeal to the superior court for review . . . this procedure is the exclusive means for obtaining judicial review,' and a civil action is only proper after all administrative remedies have been *exhausted.*" *Johnson v. N.C. Dept. of Transportation*, 107 N.C. App. 63, 70, 418 S.E.2d 700, 705 (1992) (quoting *State v. House of Raeford Farms*, 101 N.C. App. 433, 442, 400 S.E.2d 107, 113 (1991)) (emphasis added). NCCU has not yet exhausted all available administrative remedies.

Certiorari is to be granted in situations where no appeal is available and not, as here, for purposes of avoiding prerequisite procedural stages. *See In re Metric Constructors*, 31 N.C. App. 88, 92, 228 S.E.2d 533, 535-36 (1976). Until a final agency decision has been issued, there is no action for the superior court to review. Thus, the superior court did not have subject matter jurisdiction to grant the petition seeking the writ of certiorari. *See Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, *supersedeas dismissed*, 337 N.C. 801, 449 S.E.2d 473 (1994) (Court of Appeals without authority to issue writ of certiorari to review decision of Deputy Commissioner of Industrial Commission). It necessarily follows that any orders issued by the superior court adjudicating the petition for certiorari must be vacated. *Id.* at 788, 448 S.E.2d at 382 (issuance of

writ of certiorari exceeding the court's proper exercise of its discretionary powers must be vacated).

In summary, NCCU's petition for writ of certiorari to the superior court should have been denied *in toto* because NCCU has a right to judicial review of a final agency decision. For this reason the superior court's partial grant of certiorari on the RIF claim is vacated. Denial of certiorari on petitioner's veteran's preference claim is affirmed. Case remanded to superior court for further remand to OAH.

Vacated in part, affirmed in part.

Judges GREENE and LEWIS concur.

CHRIST LUTHERAN CHURCH, BY AND THROUGH ITS TRUSTEES, DALE MATTHEWS, O.W. JARRETT, AND GARY CARPENTER, PLAINTIFF v. STATE FARM FIRE AND CASUALTY COMPANY, DEFENDANT

No. COA95-873

(Filed 4 June 1996)

Insurance § 881 (NCI4th)— employee embezzlement—24 separate checks—one "occurrence"—limited liability

Where an insurance policy provided that defendant would pay up to $5,000 for any one occurrence of employee embezzlement, "occurrence" was defined as "a single act, or series of related acts," and plaintiff's employee embezzled $32,760 by issuing 24 separate checks to himself over a one-year period, the employee's writing of the twenty-four checks was a "series of related acts" and constituted one occurrence under the policy so that defendant was responsible only for coverage in the amount of $5,000.

Am Jur 2d, Insurance § 145.

Insurance of bank against larceny and false pretenses. 15 ALR2d 1006.

Judge WYNN dissenting.

Appeal by plaintiff from judgment entered 30 May 1995 by Judge Ronald E. Bogle in Catawba County Superior Court. Heard in the Court of Appeals 18 April 1996.

Bryce Thomas & Associates, by Bryce O. Thomas, Jr. & Peter R. Gruning, for plaintiff-appellant.

Patrick, Harper & Dixon, by Stephen M. Thomas and Kimberly A. Huffman, for defendant-appellee.

JOHNSON, Judge.

The essential facts in this case are not in dispute. From approximately 31 January 1992 through 16 February 1993, plaintiff Christ Lutheran Church's treasurer embezzled church funds totalling $32,760.00 by issuing twenty-four (24) separate checks to himself on various occasions and in various amounts. Defendant State Farm Fire and Casualty Company was plaintiff's insurer at all times relevant herein. Plaintiff's insurance policy afforded coverage for embezzlement in the Employee Dishonesty subsection, specifically providing that defendant would pay up to $5,000.00 for any one occurrence of embezzlement arising thereunder.

Plaintiff contends that its policy covers the entire $32,760.00 lost by plaintiff Church due to its employee's embezzlement in 1992 and 1993. Defendant denies coverage in such amounts, stating that plaintiff's employee's acts constitute but one occurrence under plaintiff's policy and, therefore, defendant is only responsible for coverage in the amount of $5,000.00.

Plaintiff instituted this action against defendant on 29 April 1994. Defendant was granted an extension of time to answer plaintiff's complaint, and thereafter, served his answer on plaintiff on 2 June 1994. Subsequently, on 22 May 1995, the parties filed stipulated facts. On that same date, this action came on for hearing before Judge Ronald E. Bogle at the civil session of Catawba County Superior Court. After considering the parties' stipulations of fact, and their arguments and contentions, Judge Bogle entered judgment for defendant on 30 May 1995. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erroneously declared that its insurance policy affords coverage of only $5,000.00 for its employee's embezzlement of $32,760.00 by twenty-four (24) separate acts, because the policy language was ambiguous. As such, plaintiff contends that the policy should be construed to allow plaintiff recovery of up to $5,000.00 for each act by plaintiff's employee. We cannot agree.

Insurance policies are to be strictly construed against the insurer, with any ambiguity being resolved in favor of the insured. *Estate of Bell v. Blue Cross and Blue Shield*, 109 N.C. App. 661, 664, 428 S.E.2d 270, 272 (1993). "An ambiguity exists where, 'in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend.' " *Id.* (quoting *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)). However, ambiguity is not established simply because a plaintiff makes a claim based on a construction of the insurance policy's language contrary to that of the company's interpretation. *Id.* at 665, 428 S.E.2d at 272 (citing *Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522).

When an insurance policy contains a definition of a term used in it, that meaning controls, unless the context of the policy mandates otherwise. *Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522. "In the absence of . . . definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." *Id.* Finally, if a nontechnical word has more than one meaning in ordinary usage and the context does not indicate clearly the one intended, then and only then, should the court use its own interpretation, giving the word a meaning favorable to the policyholder. *Id.*

In the instant case, plaintiff's insurance policy provides coverage for employee dishonesty in an amount up to $5,000.00 "for loss in any one occurrence." The policy goes on to define "occurrence": "All loss involving a single act, or series of related acts, caused by one or more persons is considered one occurrence." While plaintiff argues that the language of the policy is ambiguous in regards to what constitutes an occurrence within the meaning of the policy— specifically, contending that the term "related" in the definition of "occurrence" is ambiguous, we do not agree.

There is no case law addressing this particular issue, and thus, this is a case of first impression in North Carolina. However, we do find particularly instructive *Diamond Transp. System v. Travelers Indem.*, 817 F. Supp. 710 (N.D. Ill. 1993) and *Business Interiors, Inc. v. Aetna Cas. & Sur. Co.*, 751 F.2d 361 (10th Cir. 1984). Plaintiff's attempts to distinguish these cases from the instant case are unpersuasive.

In *Diamond*, the defendant indemnity company had issued five successive one-year commercial crime bonds to the plaintiff. Each

bond provided that coverage was limited to a maximum of $250,000.00 per occurrence. In the definition section of plaintiff's commercial crime bond, "occurrence" was defined as "all loss caused by, or involving, one or more 'employee', whether the result of a single act or series of acts." When the plaintiff discovered an employee's fraudulent check-cashing scheme in April 1991, it submitted a $750,000.00 claim to the defendant indemnity company. The defendant paid the plaintiff the limit of its liability under the 1990-1991 bond, $250,000.00. The United States District Court for the Northern District of Illinois held that the plaintiff's entire $750,000.00 loss which had occurred over a period of years (1989 through 1992), as a result of an employee's fraudulent check-cashing scheme, was a single occurrence. *Diamond*, 817 F. Supp. 710.

In *Business Interiors*, the United States Court of Appeals for the Tenth Circuit concluded that embezzlement by an employee, through forty (40) checks, over a period of approximately seven months, constituted a single "occurrence." The insurance policy provided, "As respects any one employee, dishonest or fraudulent acts of such employee during the policy period shall be deemed to be one occurrence for the purpose of applying the deductible." Plaintiff contended that it had suffered forty (40) separate and independent losses because the employee's embezzlement was accomplished through forty (40) separate checks. Defendant insurance company, however, asserted that the insurance policy limited recovery to $10,000.00 because the loss resulted from one occurrence. *Business Interiors*, 751 F.2d 361. In reaching its decision, the Tenth Circuit Court of Appeals employed the general rule that " 'an occurrence is determined by the cause or causes of the resulting injury.' " *Id.* at 363 (quoting *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982)). The court noted that the cause of the plaintiff's loss was the "continued dishonesty of one employee" with the " 'intent to continue the dishonesty, not to commit an entirely new and different act of dishonesty.' " *Id.*

Similarly, in the instant case, plaintiff's employee wrote twenty-four (24) checks, over the course of several weeks, totalling $32,760.00. These checks were all written in furtherance of one employee's dishonest acts. They do not constitute a new and individual act of dishonesty, as alleged by plaintiff, but are instead a continuum of wrongful actions. This was the cause of plaintiff's loss. Further, in accordance with the courts in *Diamond* and *Business Interiors*, we find nothing ambiguous in plaintiff's policy's definition

of "occurrence," and that definition controls. Accordingly, we find that plaintiff's employee's writing the twenty-four (24) checks were "a series of related acts" within the insurance policy's definition, and therefore, constitute one occurrence under that policy. Plaintiff's arguments to the contrary are unpersuasive.

In light of the foregoing, the trial court's decision is affirmed.

Affirmed.

Judge WALKER concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I would decline to follow the federal cases cited by the majority, *Diamond Trans. Sys., Inc. v. Traveler's Indemnity Co.*, 817 F. Supp. 710 (N.D. Ill. 1993) and *Business Interiors, Inc. v. Aetna Casualty & Surety Co.*, 751 F.2d 361 (10th Cir. 1984). Instead, I agree with the Minnesota Court of Appeals that "[t]he phrase 'series of related acts' is subject to more than one reasonable interpretation when determining whether an employee's dishonest acts are subject to a single occurrence coverage limit, and is, therefore, ambiguous. The ambiguous language must be construed in favor of the insured, and the doctrine of reasonable expectations must be applied." *American Commerce Ins. Brokers, Inc. v. Minnesota Mutual Fire & Casualty Co.*, 535 N.W.2d 365, 372 (Minn. App. 1995); *see also Ins. Co. v. Const. Co.*, 303 N.C. 387, 279 S.E.2d 769 (1981) (holding that North Carolina follows the reasonable expectations doctrine, whereby an insurance contract is interpreted according to the reasonable expectations of the purchaser of insurance).

Accordingly, I would remand for a jury determination of what constitutes reasonable expectations of the insured in this matter.

L&S LEASING, INC., PLAINTIFF v. CITY OF WINSTON-SALEM, DEFENDANT

No. COA95-761

(Filed 4 June 1996)

1. Trial § 70 (NCI4th)— summary judgment—unpleaded affirmative defenses

The trial court did not err by granting summary judgment for defendant in an action in which plaintiff alleged a breach of contract to buy property, defendant denied the existence of a contract, and plaintiff contends on appeal that defendant improperly raised affirmative defenses for the first time at the summary judgment hearing. Defendant raised these issues in its answer by denying the existence of a contract between the parties; however, even if the defenses should have been affirmatively stated in the answer, it has been held that the nature of summary judgment and liberal pleading rules require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on a motion for summary judgment.

Am Jur 2d, Summary Judgment §§ 32 et seq.

2. Municipal Corporations § 208 (NCI4th)— contract to purchase land—authority to sign—preaudit certificate

In an action alleging breach of a contract to purchase land, the city official who signed the contract to purchase land was not vested with actual authority to bind the city to a contract, and plaintiff was charged with notice of all limitations upon the authority of the official to enter into a contract which bound the city because the scope of such authority is a matter of public record, so that plaintiff may not rely upon estoppel. Furthermore, even if the official had authority to bind the city, the contract is invalid and unenforceable by virtue of N.C.G.S. § 159-28(a), which sets forth some of the requirements and obligations that must be met before a city may incur contractual obligations, including a preaudit certificate. Plaintiff has failed to show that such a certificate of compliance authorizing the alleged contract exists and none is evidenced in the record.

Am Jur 2d, Housing Laws and Urban Redevelopment § 22.

Appeal by plaintiff from order entered 14 February 1995 by Judge W. Russell Duke, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 20 March 1996.

Kluttz, Reamer, Blankenship & Hayes, L.L.P., by Glenn S. Hayes, for plaintiff appellee.

Wolfe and Collins, P.A., by John G. Wolfe, III, and George M. Cleland, IV; and Assistant City Attorneys Charles C. Green, Jr., and Lynda S. Abramovitz, for defendant appellee.

SMITH, Judge.

Plaintiff L&S Leasing, Inc., filed this action against defendant City of Winston-Salem on 16 May 1994 alleging "breach of contractual obligations." Defendant, in its answer, denied the existence of a contract. Summary judgment was granted in defendant's favor on 14 February 1995. Plaintiff appeals.

In its sole assignment of error, plaintiff contends the trial court erred by granting defendant's summary judgment motion on the ground that defendant improperly raised affirmative defenses for the first time at the summary judgment hearing. Those defenses were an employee's lack of actual or apparent authority to bind the municipality to the alleged contract, violation of city purchasing ordinances and N.C. Gen. Stat. § 159-28(a), which defendant maintains voided any obligations to plaintiff. After review of the record and briefs, we hold that defendant was entitled to judgment as a matter of law and therefore affirm the order of the trial court.

The relevant facts of this case are as follows: In 1992, the Winston-Salem/Forsyth County City/County Utility Commission ("CCUC"), a joint agency of the City of Winston-Salem and the County of Forsyth, began looking for tracts of property that could be utilized as a construction and demolition landfill. The CCUC staff became aware of plaintiff's tract of land and considered the site as a potential landfill. On 30 April 1993, a document entitled "Offer to Purchase and Contract" was executed by William B. Lawson, President of plaintiff, and by John F. Cockerham, defendant's real estate supervisor. In the document, the City of Winston-Salem offers to purchase and L&S Leasing, upon acceptance, agrees to sell a tract of land. However, the offer to purchase is explicitly contingent upon terms included in an addendum attached to the agreement. The addendum contains the following language:

> Purchase is contingent upon approval of City County Utilities Commission and upon the receipt by the buyer of an E.P.A. Report on the site satisfactory to the buyers. . . . Closing to occur by or before thirty days from the receipt of satisfactory E.P.A. report by the buyers and/or Utilities Commission approval and/or buyer[']s receipt of survey, which ever occurs last.

Following EPA testing of the site, CCUC rejected the L&S Leasing site in an 11 April 1994 resolution. In May 1994, L&S Leasing initiated this action.

[1] Plaintiff contends the trial court erred in granting defendant's motion for summary judgment on the ground that defendant improperly raised affirmative defenses for the first time at the summary judgment hearing. A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact for trial and that the moving party is entitled to judgment as a matter of law. In passing upon a motion for summary judgment, the court must view the evidence presented by both parties in the light most favorable to the nonmoving party. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *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). We hold that there was never a binding contract between the parties in this case. Summary judgment was properly entered and defendant is entitled to judgment as a matter of law.

The defenses raised by defendant at the summary judgment hearing were lack of apparent or actual authority of Mr. Cockerham to bind the city to the alleged contract and violation of N.C. Gen. Stat. § 159-28(a). Defendant raised those issues in its answer by denying the existence of a contract between the parties. However, even if the defenses should have been affirmatively stated in defendant's answer, this Court has held that "the nature of summary judgment procedure (G.S. 1A-1, Rule 56), coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment." *Cooke v. Cooke*, 34 N.C. App. 124, 125, 237 S.E.2d 323, 324, *disc. review denied*, 293 N.C. 740, 241 S.E.2d 513 (1977) (citation omitted). Thus, the trial court properly considered the defenses raised by defendant at the summary judgment hearing.

[2] Mr. Cockerham, the Real Estate Supervisor for the City of Winston-Salem, and William Lawson, President of L&S Leasing, signed the "Offer to Purchase and Contract." Mr. Cockerham was not vested with actual authority to bind the city or CCUC to a contract. Article I, § 2-2 of the Winston-Salem Code provides in pertinent part:

> **Purchasing agent to buy all supplies and make all contracts; exceptions.**
>
> (a) It shall be unlawful for any employee of the city, except the authorized purchasing agent, to . . . make any contracts of any nature in the name of the city, unless upon the resolution of the board of aldermen.

Winston-Salem Code § 2-2 (1953). Mr. Cockerham is not the city purchasing agent, nor did the Board of Aldermen vest Mr. Cockerham with actual authority to execute the land purchase contract.

Furthermore, " '[t]he law holds those dealing [with a City] to a knowledge of the extent of the power . . . and of any restrictions imposed . . . [P]ersons dealing with a municipal corporation are charged with notice of all limitations upon the authority of its officers representing them . . .' " *Moody v. Transylvania County*, 271 N.C. 384, 389, 56 S.E.2d 716, 720 (1967) (quoting 38 Am. Jur., Municipal Corporations, § 522, pp. 203-04). This is because the scope of such authority is a matter of public record. *Rowe v. Franklin County*, 318 N.C. 344, 351 n.1, 349 S.E.2d 65, 69 (1986) (citations omitted). Applying this rule to the instant case, L&S Leasing was charged with notice of all limitations upon the authority of Mr. Cockerham to enter into a contract which bound the city. L&S Leasing may not rely upon an estoppel defense against the city or CCUC based upon Mr. Cockerham's apparent authority.

Furthermore, even if Mr. Cockerham had authority to bind the city, the alleged contract is invalid and unenforceable by virtue of N.C. Gen. Stat. § 159-28(a) (1994). N.C. Gen. Stat. § 159-28(a) sets forth some of the requirements and obligations that must be met before a city may incur contractual obligations. The statute provides in pertinent part:

> If [a municipal] obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsec-

tion. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially the following form:

"This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

_____

(Signature of finance officer.)"

* * * *

An obligation incurred in violation of this subsection is invalid and may not be enforced.

N.C. Gen. Stat. § 159-28(a) (emphasis added.) *See Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 399 S.E.2d 758 (1991). Plaintiff has failed to show that such a certificate of compliance authorizing the alleged contract with L&S Leasing exists and none is evidenced in the record. Therefore, we hold that plaintiff's contractual claim against CCUC, a joint city/county entity, fails because N.C. Gen. Stat. § 159-28(a) has not been followed.

For the reasons stated herein, the order granting defendant's motion for summary judgment is

Affirmed.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA, PLAINTIFF V. RENWICK MARVIN BETHEA, DEFENDANT

No. COA95-650

(Filed 4 June 1996)

Criminal Law § 1073.8 (NCI4th)— Structured Sentencing—habitual felon—points for same elements and probation—offenses used in habitual felon status

The trial court did not err when sentencing defendant under the Structured Sentencing Act as an habitual felon by assigning one point pursuant to N.C.G.S. § 15A-1340.14(b)(6) because the offense for which defendant was being sentenced contains the same elements as a prior offense that had been used in establishing his status as an habitual felon and by assigning a point pur-

suant to N.C.G.S. § 15A-1340.14(b)(7) because defendant committed the offense while on probation for an offense that had been used to establish defendant's status as an habitual felon. N.C.G.S. § 15A-1340.14(b)(6) and (b)(7) address the gravity and circumstances surrounding the offense for which defendant is being sentenced, rather than the mere existence of a prior offense.

Am Jur 2d, Criminal Law §§ 525 et seq.

Appeal by defendant from judgment and commitment entered 16 February 1995 by Judge Peter M. McHugh in Forsyth County Superior Court. Heard in the Court of Appeals 21 March 1996.

Defendant was charged with breaking and entering with intent to commit larceny, felonious larceny, and felonious possession of the implements of housebreaking. On 16 February 1995, the defendant pleaded guilty as an habitual felon to the charges of breaking and entering with intent to commit larceny and to the felonious larceny. Defendant also pleaded guilty to the charge of possession of the implements of housebreaking. Defendant's pleas were entered pursuant to a plea agreement under which (1) the offenses would be consolidated for the purposes of judgment, (2) the State would stipulate to the existence of one mitigating factor, (3) the sentences given would be in the mitigated ranges, (4) the sentences would run concurrently, and (5) the defendant would serve a probationary sentence which was already in effect against him.

Defendant's habitual felon status was established by virtue of the following prior convictions:

(1) 15 December 1992 conviction for felony Breaking, Entering, and Larceny in Forsyth County Case No. 92 CRS 36195, occurring on 12 September 1992;

(2) 13 September 1993 conviction for the felony offense of Larceny of a Firearm in Forsyth County Case No. 93 CRS 19228, occurring on 24 May 1993; and

(3) 15 August 1994 conviction for Possession of Cocaine in Forsyth County Case No. 94 CRS 13517, occurring on 1 April 1994.

At the time he committed the offenses which are the subject of this appeal, defendant was on probation as part of the sentence imposed for the 15 August 1994 conviction for possession of cocaine.

Defendant was sentenced pursuant to the Structured Sentencing Act. The trial court determined that defendant was a Class C felon with a Prior Record Level III and imposed a minimum sentence of 80 months and a maximum sentence of 105 months.

Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Jill Ledford Cheek, for the State.

Bruce & Baskerville, by R. Michael Bruce, for defendant-appellant.

EAGLES, Judge.

Defendant argues that the trial court erred in determining defendant's prior record level (1) when it considered that all the elements of the present offense are included in a prior offense which had been used to establish defendant's habitual felon status, and (2) when it considered that the present offense was committed while the defendant was on probation as part of the sentence imposed for a prior offense which had been used to establish defendant's habitual felon status. Defendant argues that calculating the prior record level in this manner is contrary to G.S. 14-7.6. We disagree.

Before imposing a sentence under the Structured Sentencing Act, the trial court must determine the prior record level of the defendant pursuant to G.S. 15A-1340.14. G.S. 15A-1340.13 (1994). G.S. 15A-1340.14 sets out the following scheme for calculating a defendant's prior record level:

> (a) Generally.—The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved in accordance with this section.
>
> (b) Points.—Points are assigned as follows:
>
> (1) For each prior felony Class A conviction, 10 points.
>
> (1a) For each prior felony Class B1 conviction, 9 points.
>
> (2) For each prior felony Class B2, C, or D conviction, 6 points.
>
> (3) For each prior felony Class E, F, or G conviction, 4 points.

(4) For each prior felony Class H or I conviction, 2 points.

(5) For each prior Class A1 or Class 1 misdemeanor conviction, 1 point, except that convictions for Class 1 misdemeanor offenses under Chapter 20 of the General Statutes, other than conviction for misdemeanor death by vehicle (G.S. 20-141.4(a2)), shall not be assigned any points for purposes of determining a person's prior record for felony sentencing.

(6) If all the elements of the present offense are included in the prior offense, 1 point.

(7) If the offense was committed while the offender was on probation or parole, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

G.S. 15A-1340.14 (1995). Once the total number of points is calculated pursuant to G.S. 15A-1340.14(b), the prior record level is determined by comparing the point total calculated to the range of point totals corresponding to each prior record level as listed in G.S. 15A-1340.14(c).

The chief limitation on the use of G.S. 15A-1340.14 is found in G.S. 14-7.6, which states that "[i]n determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." G.S. 14-7.6 (1994). This provision recognizes that there are two independent avenues by which a defendant's sentence may be increased based on the existence of prior convictions. A defendant's prior convictions will either serve to establish a defendant's status as an habitual felon pursuant to G.S. 14-7.1 or to increase a defendant's prior record level pursuant to G.S. 15A-1340.14(b)(1)-(5). G.S. 14-7.6 establishes clearly, however, that the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time.

In calculating defendant's prior record level pursuant to G.S. 15A-1340.14(b)(1)-(5), the trial court here did not consider defendant's prior convictions that were used to establish his status as an habitual felon. The trial court did, however, assign defendant one point pursuant to G.S. 15A-1340.14(b)(6) because the offense for which defendant is now being sentenced contains the same elements

as a prior offense that had been used in establishing his status as an habitual felon. Moreover, the trial court also assigned defendant one point pursuant to G.S. 15A-1340.14(b)(7) because defendant committed the offense for which he is now being sentenced while on probation for an offense that had been used to establish defendant's status as an habitual felon. Defendant argues that this assignment of points pursuant to subsections (b)(6) and (b)(7) was improper in light of the proscriptive language of G.S. 14-7.6. We are not persuaded.

The cardinal 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). In determining legislative intent, we "should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* We must insure 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).

Applying these principles of statutory construction, we conclude that the assignment here of points pursuant to G.S. 15A-1340.14(b)(6) and (b)(7) was not contrary to the language of G.S. 14-7.6. We reach this conclusion because G.S. 15A-1340.14(b)(6) and (b)(7) address the gravity and circumstances surrounding the offense for which defendant is now being sentenced, rather than the mere existence of a prior offense.

The distinction between G.S. 15A-1340.14(b)(1) through (b)(5) and G.S. 15A-1340.14(b)(6) and (b)(7) is easier to recognize when one considers the condition that triggers the assignment of points under each subsection of G.S. 15A-1340.14(b). For points to be assigned pursuant to G.S. 15A-1340.14(b)(1)-(5), the only condition that must be met is the existence of a prior conviction. For points to be assigned pursuant to G.S. 15A-1340.14(b)(6) and (b)(7), however, the mere existence of a prior offense is not dispositive. The timing and nature of the present offense are the dispositive conditions that, if fulfilled, trigger the assignment of an extra point. Further, we note that G.S. 15A-1340.14(b)(1) through (b)(5) address only the existence of prior offenses and do not consider at all the present offense, while G.S. 15A-1340.14(b)(6) involves a comparison of the present offense with prior offenses and G.S. 15A-1340.14(b)(7) is directed to the circumstances of the present offense.

In discerning legislative intent, we note that the Structured Sentencing Act generally provides for more severe punishment for recidivist crimes. The most egregious examples of recidivism would include the commission of offenses which contain the same elements as a prior offense and the commission of offenses while serving probation for a prior offense. Accordingly, we conclude here that there is no error in the trial court's judgment and commitment.

Affirmed.

Judges JOHN and WALKER concur.

IN THE MATTER OF INSPECTION OF: GALVAN INDUSTRIES, INC., 7320 MILLBROOK ROAD, HARRISBURG, NORTH CAROLINA 28075

No. COA95-946

(Filed 4 June 1996)

Appeal and Error § 93 (NCI4th); Searches and Seizures § 143 (NCI4th)— administrative search warrant—validity—not immediately appealable

The denial of a motion to quash an administrative search warrant was not immediately appealable. Administrative search warrants are analogous to discovery requests and, in civil cases, orders compelling discovery are generally not appealable until entry of a final order. It follows that the validity of administrative search warrants is generally not a matter for the appellate courts until the entry of a final order; however, the validity of the warrants can be immediately addressed on appeal upon a showing that a substantial right is affected. In this case, there has been no final order and Galvan has made no showing that any substantial right is affected.

Am Jur 2d, Appellate Review §§ 135, 137, 139, 140.

Appealability of discovery order as "final decision" under 28 USCS sec. 1291. 36 ALR Fed. 763.

Judge MARTIN, Mark D., concurring.

IN RE GALVAN INDUSTRIES

[122 N.C. App. 628 (1996)]

Appeal by petitioner Galvan Industries, Inc., from order entered 6 June 1995 in Cabarrus County Superior Court by Judge James C. Davis. Heard in the Court of Appeals 23 April 1996.

Blakeney & Alexander, by Richard F. Kane and Robert B. Meyer, for petitioner-appellant Galvan Industries, Inc.

Attorney General Michael F. Easley, by Special Deputy Attorney General Ralf F. Haskell and Associate Attorney General John C. Sullivan, for the State.

GREENE, Judge.

Galvan Industries, Inc. (Galvan) appeals from the 6 June 1995 order of the trial court, which denied Galvan's motion to quash an administrative inspection warrant.

On 15 May 1995, the Cabarrus County Superior Court issued an Administrative Inspection Warrant, pursuant to N.C. Gen. Stat. § 15-27.2, for the purposes of conducting an inspection authorized by the Occupational Safety and Health Act of North Carolina. That same day, Galvan made a motion to quash this administrative warrant, which was denied by the trial court on 6 June 1995.

The dispositive issue is whether this appeal must be dismissed as interlocutory.

Administrative search warrants are analogous to discovery requests, as they are for the purpose of discovering facts and obtaining evidence, N.C.G.S. § 15-27.2(f) (1983), a purpose akin to discovery, N.C.G.S. § 1A-1, Rule 26 (1990), and refusal to honor an administrative search warrant subjects an agency to contempt, *Brooks, Comm'r of Labor v. Taylor Tobacco Enters., Inc.*, 39 N.C. App. 529, 531, 251 S.E.2d 656, 657, *rev'd on other grounds*, 298 N.C. 759, 260 S.E.2d 419 (1979), just as refusal to comply with discovery requests subjects a party to sanctions. N.C.G.S. § 1A-1, Rule 37 (1990).

Because the situations are analogous, it is proper to apply the law regarding the appealability of discovery issues in determining the appealability of administrative search warrants. In civil cases, because orders compelling discovery are generally not appealable until entry of a final order, *Benfield v. Benfield*, 89 N.C. App. 415, 418,

366 S.E.2d 500, 502 (1988), it follows that the validity of administrative search warrants are generally not matters for the appellate courts until the entry of a final order. The validity of the warrants can, however, be immediately addressed on appeal upon a showing of a substantial right. *See Taylor Tobacco Enters., Inc.*, 39 N.C. App. at 531, 251 S.E.2d at 657 (allowing appeal from contempt proceedings for failure to comply with administrative search warrants).

In this case, there has been no final order entered and Galvan has made no showing that any substantial right is affected. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (discussing appealability of interlocutory orders). Indeed, Galvan retains the right to move to suppress any "facts discovered or evidence obtained" on the basis that "the warrant is invalid or if what is discovered or obtained is" not within the scope of the warrant.[1] *See* N.C.G.S. § 15-27.2(f).

Appeal dismissed.

Judge JOHN concurs.

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

Judge MARTIN, Mark D. concurring with separate opinion.

The present record establishes that Galvan failed to offer either argument or citation to establish the comprehensive search proposed by the North Carolina Department of Labor, Office of Occupational Safety and Health (OSH) impermissibly infringed on a substantial right—for example, its Fourth or Fourteenth Amendment rights. *See Shaw v. Williamson*, 75 N.C. App. 604, 606-607, 331 S.E.2d 203, 204 (in civil case interlocutory order immediately appealable if substantial constitutional right affected), *disc. review denied*, 314 N.C. 669, 335 S.E.2d 496 (1985). Therefore, as it is not the duty of this Court to "construct arguments for or find support for [Galvan's] right to appeal from an interlocutory order . . . ," *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994), I concur with the majority's dismissal of the present appeal.

1. We need not decide in this case whether the denial of the motion to suppress evidence obtained on the basis of an alleged invalid administrative warrant is immediately appealable. We do note that in the context of the criminal law, the denial of a motion to suppress is not immediately appealable. *State v. Grogan*, 40 N.C. App. 371, 375, 253 S.E.2d 20, 23 (1979).

On remand, should Galvan refuse to honor the administrative warrant and OSH petition the trial court for a hearing compelling Galvan to show cause why it should not be subject to civil contempt, Galvan can therein attack the sufficiency of the probable cause underlying the comprehensive search warrant. *See Brooks, Comr. of Labor v. Butler*, 70 N.C. App. 681, 688, 321 S.E.2d 440, 444 (1984), *appeal dismissed and disc. review denied*, 313 N.C. 327, 329 S.E.2d 385 (1985). Further, any decision rendered by the trial court in the show cause hearing is immediately appealable. *See, e.g., id.* at 683, 321 S.E.2d at 441; *Brooks, Comr. of Labor v. Gooden*, 69 N.C. App. 701, 702, 318 S.E.2d 348, 349 (1984).

Accordingly, I concur in the majority opinion.

SHIRLEY M. SMITH, PETITIONER v. BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM

No. COA95-786

(Filed 4 June 1996)

1. Public Officers and Employees § 59 (NCI4th)— State retirement system disability benefits—offset for Social Security—net amount after attorney fees

A determination that respondent State retirement system was entitled to an offset in disability benefits for the gross amount of petitioner's Social Security disability benefits rather than the net amount after attorney fees was erroneous. *Willoughby v. Board of Trustees*, 121 N.C. App. 444 is dispositive.

Am Jur 2d, Civil Service § 48.

2. Public Officers and Employees § 59 (NCI4th)— State retirement system disability benefits—no reduction by Social Security widow's benefits

The superior court erred in concluding that petitioner's long-term disability benefits payable by the State retirement system were subject to a reduction in the amount of petitioner's widow's insurance benefits. Although petitioner's disability was part of the criteria under which she was eligible for widow's insurance benefits, widow's insurance benefits are separate and different from

Social Security disability benefits and the reference to "Social Security disability benefits" in N.C.G.S. § 135-106(b) does not include widow's insurance benefits.

Am Jur 2d, Civil Service § 48.

Appeal by petitioner from order entered 5 May 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 16 April 1996.

Shirley M. Smith (hereinafter petitioner) is a former employee of the Cumberland County School System who retired due to disabling illness. As a result of petitioner's illness, she began receiving long-term disability benefits from the State Retirement System pursuant to G.S. 135-106. Petitioner filed claims with the Social Security System for disability insurance benefits pursuant to 42 U.S.C. section 423 and for widow's insurance benefits pursuant to 42 U.S.C. section 402(e). After the Social Security Administration denied petitioner's *pro se* claims twice, petitioner retained counsel and requested an administrative hearing regarding her claims. Petitioner and her counsel signed a contingent fee agreement whereby petitioner's counsel would receive twenty-five percent of the back benefits paid to petitioner if her claims were approved, but counsel would receive no fee if petitioner's claims were denied. After the hearing, the Social Security Administration approved both of petitioner's claims. Pursuant to 42 U.S.C. section 406, the Social Security Administration withheld $2352 (twenty-five percent) of petitioner's back benefits for attorneys fees. Petitioner's counsel petitioned the Social Security Administration for payment of the agreed upon fees and after counsel's petition was approved, the Social Security Administration paid $2352 directly to petitioner's counsel.

G.S. 135-106(b) provides that long-term disability benefits are subject to reduction in the amount of the recipient's "primary Social Security disability benefits." The Retirement System determined that petitioner was required to repay an amount equal to the gross amount of Social Security benefits to which she was entitled, including the twenty-five percent that the Social Security Administration paid directly to her attorney for attorneys fees.

Petitioner petitioned for a contested case hearing with the Office of Administrative Hearings, arguing that the amount of offset should be the net amount of Social Security disability benefits (the gross amount of benefits less the twenty-five percent attorneys fee) and

that the Retirement System should not require an offset for petitioner's widow's insurance benefits. After a hearing, the Administrative Law Judge (hereinafter ALJ) issued a recommended decision, concluding that long-term disability benefits paid by the Retirement System could be reduced by the gross amount of Social Security disability benefits, but that long-term disability benefits paid by the Retirement System could not be reduced by the amount of petitioner's widow's insurance benefits. The Board of Trustees of the Teachers' and State Employees' Retirement System (hereinafter respondent) issued its final agency decision, adopting the ALJ's recommended decision in part but declining to accept the ALJ's conclusion that long-term disability benefits could not be reduced by widow's insurance benefits. Respondent concluded that long-term disability benefits must be reduced by both Social Security disability benefits and widow's insurance benefits. Upon petition for review, the superior court affirmed the final agency decision on 5 May 1995.

Petitioner appeals.

Hall & Joneth, P.C., by Charles T. Hall, for petitioner-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for respondent-appellee.

EAGLES, Judge.

I.

[1] Petitioner first argues that under G.S. 135-106(b), the amount of offset for disability benefits received from the Social Security Administration is the net amount after deduction of attorneys fees and costs associated with obtaining the disability benefits. Our recent decision in *Willoughby v. Board of Trustees*, No. COA94-1066 (N.C. Ct. App. Feb. 6, 1996) is dispositive of this issue. In *Willoughby*, we held that the amount of offset for disability benefits received from the Social Security Administration is the *net* amount after deduction of attorneys fees. Accordingly, we hold that the ALJ and the final agency erred in determining that respondent was entitled to an offset for the *gross* amount of petitioner's Social Security disability benefits and the superior court erred in affirming the final agency decision.

II.

[2] Petitioner also argues that under G.S. 135-106(b), widow's insurance benefits are not "primary Social Security disability benefits." A

woman may be entitled to widow's insurance benefits on the Social Security account of her deceased husband if: (1) she is sixty years of age or older or (2) she is at least fifty years of age, but less than sixty years of age, and is disabled. 42 U.S.C. § 402(e); *Cook v. Heckler*, 783 F.2d 1168, 1169 (4th Cir. 1986). Here, petitioner received widow's insurance benefits because she was between fifty and sixty years of age and she was disabled.

A review of the pertinent portions of the Social Security Act (hereinafter Act) reveals that the Act differentiates between disability insurance benefits and widow's insurance benefits. The two benefits are authorized by separate statutory sections. The provision for widow's insurance benefits is found in section 402 of the Act, which is entitled "[o]ld-age and survivors insurance benefit payments." 42 U.S.C. § 402. The provision for disability insurance benefits is in a different section, 42 U.S.C. section 423, entitled "[d]isability insurance benefit payments." The two benefits are paid from separate funds. Pursuant to section 401 of the Act, there are two trust funds from which Social Security benefits are paid. Widow's insurance benefits are paid out of the Federal Old-Age and Survivors Insurance Trust Fund. 42 U.S.C. § 401(h). Disability insurance benefits are paid out of the Federal Disability Insurance Trust Fund. 42 U.S.C. § 401(h).

After reviewing the applicable provisions of the Act, we agree with petitioner that, although her disability was part of the criteria under which she was eligible for widow's insurance benefits, widow's insurance benefits are separate and different from Social Security *disability* benefits. Accordingly, we conclude that the reference to "Social Security disability benefits" in G.S. 135-106(b) does not include widow's insurance benefits. We hold that the superior court erred in concluding that petitioner's long-term disability benefits payable by the State Retirement System were subject to a reduction in the amount of petitioner's widow's insurance benefits.

We reverse and remand to the Superior Court for entry of a decision consistent with this opinion.

Reversed and remanded.

Judges LEWIS and McGEE concur.

STATE OF NORTH CAROLINA v. WELTON WESLEY GRAHAM, DEFENDANT

No. COA95-652

(Filed 4 June 1996)

Criminal Law § 146 (NCI4th)— withdrawal of guilty plea denied—fair and just reason for withdrawal not shown

A defendant who entered a negotiated guilty plea to robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, second degree sexual offense, and first-degree kidnapping failed to show a fair and just reason for withdrawal of the plea and the trial court properly denied defendant's motion for withdrawal. Defendant willingly engaged in protracted plea negotiations with the State; he made no motion to withdraw his plea until nearly five weeks after entering the plea; he made no concrete assertion of innocence; the State's evidence against defendant is strong; there is no indication that defendant did not receive effective assistance of counsel; the record does not reveal that defendant's plea was anything other than voluntarily and understandingly entered; and the record is clear that defendant was properly advised of the mandatory minimum sentence that he faced under the agreement.

Am Jur 2d, Criminal Law §§ 500 et seq.

Appeal by defendant from order entered 5 February 1995 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 20 February 1996.

On 12 April 1993, defendant Welton Wesley Graham was indicted on charges of robbery with a dangerous weapon of Robert Prentis McCall, assault with a deadly weapon with intent to kill inflicting serious injury on Mr. McCall, and first degree sexual offense and first degree kidnapping of Teresa L.C. Rodriguez. All charges stemmed from the events of the night of 25 January 1993, when defendant allegedly beat Mr. McCall with a hammer, slit his throat while robbing him, and then kidnapped and sexually assaulted Ms. Rodriguez. On 23 August 1993, defendant entered pleas of not guilty to the offenses charged.

On 19 July 1994, defendant came before Judge Robert L. Farmer and entered a negotiated plea of guilty to robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting

serious injury, second degree sexual offense, and first degree kidnapping. Pursuant to this plea agreement, the first degree sexual offense charge which carried a mandatory life sentence was reduced to second degree sexual offense. The trial court then continued prayer for judgment for thirty days.

On 24 August 1994, defendant filed a "Motion for Withdrawal of Plea" alleging, *inter alia*, that he wished to withdraw his guilty plea because (1) he had "always felt that he was not guilty . . . ," (2) the evidence was insufficient to convict him, (3) he believed strongly in his right to jury trial and wished to exercise that right, and (4) he was persuaded by his attorney to enter the guilty pleas and he stated that it was not in his best interest to plead guilty. On 5 February 1995, Judge Wiley F. Bowen entered an order denying defendant's motion, and on 8 March 1995, Judge Stafford G. Bullock sentenced defendant to two consecutive thirty year sentences.

Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Jill Ledford Cheek, for the State.

John T. Hall for defendant-appellant.

EAGLES, Judge.

Defendant argues that the trial court erred in failing to grant his motion to withdraw his guilty plea. We disagree.

In *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990), our Supreme Court held that a "presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *Id.* at 539, 391 S.E.2d at 162. The court in *Handy* identified several factors which, if present, would favor the granting of defendant's motion to withdraw his guilty plea.

> Some of the factors which favor withdrawal include whether the defendant has asserted his legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

State v. Meyer, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992) (quoting *Handy*, 326 N.C. at 539, 391 S.E.2d at 163). "After a defendant has

come forward with a 'fair and just reason' in support of his motion to withdraw, the State 'may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea.' " *Id.* We review the record independent of the trial court's action and we must determine, "considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw." *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993).

Here, defendant had willingly engaged in protracted plea negotiations with the State. Often over his attorney's advice, defendant continued to hold out seeking a better deal. Finally, on the eve of trial with the State's witnesses and evidence aligned against him, defendant accepted the plea agreement that is before us now. That agreement allowed defendant to avoid the mandatory life sentence that would be required upon conviction of first degree sexual offense, and instead provided for a maximum sentence of 140 years on all charges with a mandatory minimum sentence of 14 years for robbery with a dangerous weapon. Defendant admitted on cross-examination that previously "on several occasions" he had "come into court and gone over a transcript with [his] lawyer and entered a plea of guilty."

Defendant made no motion to withdraw his plea until nearly five weeks after entering his plea of guilty. Upon filing his motion, defendant made no concrete assertion of innocence, stating only that he "always felt that he was not guilty . . . ." The transcript of plea, however, reveals that defendant answered "yes" to the court's question "are you in fact guilty?" Further, defendant's trial attorney L. Michael Dodd testified that, prior to defendant accepting the plea, he stated to defendant "[i]f you don't feel you are guilty don't take it."

As a standard practice, Mr. Dodd kept extensive and detailed notes of his conversations with clients and these notes formed the basis of his testimony. Mr. Dodd testified that his notes reflect no conversation in which he coerced or persuaded defendant to accept the guilty plea. At the motion hearing, the court asked defendant if he was "dissatisfied with Mr. Dodd and his legal services . . . ," and defendant answered "no, sir." The trial judge then repeated his question asking "you are not?" Defendant again replied "no, sir." Moreover, defendant stated at the plea hearing that "Mr. Dodd did the best job he could do . . . ."

Finally, our review of the record reveals, contrary to defendant's assertion, that the State's evidence against defendant here is strong.

The State's forecast of evidence indicated a wealth of both testimonial and physical evidence tending to prove that defendant committed each of the crimes charged. We find it unnecessary to set out in further detail the extensive evidence against defendant.

In sum, we conclude that defendant has failed to show a fair and just reason for withdrawal and that the trial court properly denied defendant's motion. We have examined defendant's remaining assignments of error and find them without merit, as the denial of a motion to withdraw a guilty plea does not *ipso facto* give rise to constitutional violations. *See, e.g., Handy*, 326 N.C. at 538-40, 391 S.E.2d at 162-64; *State v. Elledge*, 13 N.C. App. 462, 466, 186 S.E.2d 192, 195 (1972). There is no indication here that defendant did not receive effective assistance of counsel, nor does the record reveal that defendant's plea was anything other than voluntarily and understandingly entered. In addition, the record is clear that defendant was properly advised of the mandatory minimum sentence that he faced under the plea agreement.

Affirmed.

Judges JOHN and WALKER concur.

STATE OF NORTH CAROLINA v. JAMES ROBERT ELLISON

No. COA96-2

(Filed 4 June 1996)

1. Automobiles and Other Vehicles § 141 (NCI4th)— driving while license revoked—cutting up license and mailing it to DMV

Defendant's argument in a prosecution for driving with a revoked license that he had rescinded his contract with the State by cutting up his license and returning it to the Division of Motor Vehicles and that he should be able to travel freely without having to meet the statutory requirements was without merit. N.C.G.S. § 20-28 provides that any person driving a motor vehicle upon the highways with a revoked license is guilty of a misdemeanor and it has been held that the right to operate a motor

vehicle upon the State's highways is not unrestricted but a privilege which can be exercised only in accordance with legislative restrictions. Defendant's intent to liberate himself from statutory requirements had no bearing on the fact that he committed an offense expressly forbidden by statute.

Am Jur 2d, Automobiles and Highway Traffic § 148.

2. Automobiles and Other Vehicles § 141 (NCI4th)— driving while license revoked—1983 Plymouth not a road machine—defendant not exempted

There was no merit in a defense argument in a prosecution for driving with a revoked license that defendant was operating a "road machine" and not a motor vehicle and was exempted from having a license under N.C.G.S. § 20-8. Although not defined in the statute, when read *in pari materia* with the other terms used in the statute, a road machine differs from an automobile in that it involves only temporary operation for purposes other than travel. In this case, defendant was driving a 1983 Plymouth automobile.

Am Jur 2d, Automobiles and Highway Traffic § 148.

Appeal by defendant from judgments entered 20 July 1995 by Judge Catherine C. Eagles in Cabarrus County Superior Court. Heard in the Court of Appeals 27 May 1996.

Defendant was charged with driving while licensed revoked in violation of N.C. Gen. Stat. § 20-28(a) (1993) and driving with fictitious tag in violation of N.C. Gen. Stat. § 20-111(2) (1993). Evidence presented at trial tended to show that on 15 November 1994 at 11:00 p.m., Sergeant Keith Cauthen of the Concord Police Department stopped defendant, who was operating a 1983 Plymouth automobile on Burrage Road, based on information that defendant was driving without a license. Sergeant Cauthen called in the license tag to the police department, which notified him that the tag had too many letters to have been issued by the North Carolina Department of Motor Vehicles. Sergeant Cauthen approached the car and asked defendant for a driver's license. Defendant responded that he did not have one and that he did not keep a license tag on the vehicle because "it was a personal consumer good[.]"

Upon determining that defendant's driver's license was in a state of revocation from 5 November 1993 until 5 November 1995, Sergeant

Cauthen issued a citation to defendant for driving while license revoked and driving with a fictitious license tag. A jury found defendant guilty as charged. He was sentenced to forty-five days imprisonment for the driving while license revoked conviction and forty-five days suspended with three years supervised probation for the driving with fictitious tag conviction. Defendant appealed.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth Rouse Mosley, for the State.

Fred A. Biggers for defendant-appellant.

MARTIN, John C., Judge.

Defendant's counsel does not bring forward any assignments of error on appeal. Instead, he states that he "finds no basis to challenge evidentiary rulings concerning admissibility, jury instructions or even procedural aspects of the case," and asks this Court "to look for any plain error that exists . . . ."

By letter dated 27 December 1995, defendant's counsel informed defendant that in his opinion there was no error in defendant's trial and that defendant could file his own arguments in this Court if he so desired. Copies of the transcript, record, and the brief filed by counsel were sent to defendant. On 12 February 1996, defendant filed a *pro se* brief in this Court.

We hold that defendant's counsel has fully complied with the holdings in *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). Pursuant to *Anders* and *Kinch*, we must determine from a full examination of defendant's *pro se* brief and all the proceedings whether the appeal is wholly frivolous.

[1] In defendant's *pro se* brief, he argues that the Uniform Driver's License Act either was unconstitutionally applied to his case or, in the alternative, that he qualified under an exemption from licensing. First, defendant argues that since he cut up his driver's license and returned it to the Division of Motor Vehicles, he effectively rescinded his contract with the State and should be able to travel freely without having to meet the statutory requirements. N.C. Gen. Stat. § 20-28 provides that "[a]ny person whose drivers license has been revoked, other than permanently, who drives any motor vehicle upon the highways of the State while the license is revoked is guilty of a misdemeanor." N.C. Gen. Stat. § 20-28(a). This Court has recognized that

regardless of the driver's intentions, the right to operate a motor vehicle upon State highways " 'is not an unrestricted right but a privilege which can be exercised only in accordance with the legislative restrictions fixed thereon.' " *State v. Tharrington*, 1 N.C. App. 608, 609, 162 S.E.2d 140, 141 (1968) (quoting *State v. Correll*, 232 N.C. 696, 697, 62 S.E.2d 82, 83 (1950)). "The doing of the act itself is the crime, not the intent with which it was done." *State v. Hurley*, 18 N.C. App. 285, 287, 196 S.E.2d 542, 544 (1973). Defendant's intent to liberate himself from statutory requirements, therefore, had no bearing on the fact that he committed an offense expressly forbidden by statute. *Id.* Defendant's argument is without merit.

[2] Furthermore, we find no merit in defendant's argument that he was operating a "road machine" and not a motor vehicle, thereby exempting him from having to have a driver's license under N.C. Gen. Stat. § 20-8 (1993). That statute provides that a person is exempt from license if "driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway[.]" N.C. Gen. Stat. § 20-8(2). Although "road machine" is not defined in the statute, when read *in pari materia* with the other terms used in the statute, a road machine differs from an automobile in that it involves only temporary operation for purposes other than travel. A "motor vehicle" on the other hand is defined as "[e]very vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle." N.C. Gen. Stat. § 20-4.01(23) (1993). In this case, defendant was driving a 1983 Plymouth automobile. Clearly, defendant was operating a motor vehicle and not a "road machine." His argument that he is exempt from license requirements is therefore overruled.

Upon review of defendant's *pro se* brief and the entire record, we find the appeal to be wholly frivolous. We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges JOHNSON and LEWIS concur.

DENISE E. COOK, PLAINTIFF, v. RONALD J. CINOCCA, DEFENDANT

No. COA95-669

(Filed 4 June 1996)

Appeal and Error § 113 (NCI4th)— denial of motion to dismiss—personal jurisdiction—appeal interlocutory

An appeal from the denial of a motion to dismiss in a domestic action was dismissed as interlocutory because it pertained merely to the process of service used to bring the party before the court. Under *Updike v. Day*, 71 N.C.App. 636, N.C.G.S. § 1-277(b) applies to the State's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint.

Am Jur 2d, Appellate Review §§ 163-165.

Appeal by defendant from order entered 12 April 1995 by Judge Robert E. Hodges in Catawba County District Court. Heard in the Court of Appeals 21 March 1996.

Plaintiff, Denise E. Cook, and defendant, Ronald J. Cinocca, were married on 7 December 1984, but before their marriage, on 14 November 1984, they entered into an antenuptial agreement purporting to preclude claims for equitable distribution and alimony. While married, the parties had one child, Nathan E. Cinocca, born 31 December 1985. The parties separated on 15 August 1992.

On 1 March 1993, defendant commenced an action in Catawba County District Court (93 CVD 466) seeking custody and support for the parties' minor child. In response, plaintiff timely filed an answer and counterclaim for alimony and equitable distribution. Subsequently, on 9 November 1993, defendant filed a separate action (93 CVD 2701) in which he sought an absolute divorce. In 93 CVD 2701, the defendant also asked that "all matters relating to spousal support and equitable distribution be governed by those orders lawfully entered in that separate Catawba County action bearing File Number 93 CVD 466."

On 22 December 1993, plaintiff filed an answer in 93 CVD 2701 admitting the allegations of the complaint, and a counterclaim "reassert[ing] her claim for alimony and equitable distribution of mar-

ital property which claim is set forth in the Complaint bearing file number 93 CVD 466, which Complaint is incorporated herein by reference." On 25 February 1994, the trial court entered an order stating:

> 1. That the counterclaims for alimony and Equitable Distribution by the Defendant in 93 CVD 2701 dated December 22, 1993, shall be consolidated for hearing under the prior pending action bearing File No. 93 CVD 466.
>
> 2. That with respect to the Defendant's claims for alimony and equitable distribution, all matters, including any notices, motions, requests for discovery and Orders shall be made from this day forward under and captioned with the File No. 93 CVD 466.

Plaintiff's consolidated counterclaims were set for trial on 26 September 1994, but prior to trial plaintiff voluntarily dismissed her consolidated counterclaims pursuant to Rule 41(a).

Thereafter, on 17 October 1994, plaintiff Denise Cook filed a complaint in this action seeking, *inter alia,* alimony and equitable distribution. Plaintiff also obtained an ex parte order prohibiting waste of personal property. On 20 October 1994, defendant moved to dismiss for lack of personal and subject matter jurisdiction, and on 7 November 1994, defendant filed an amended motion to dismiss arguing that plaintiff's claims were barred because plaintiff had previously filed and dismissed two identical claims for relief. Defendant also asserted that the ex parte order prohibiting waste was void. On 29 March 1995, plaintiff filed an amended complaint and the trial court heard defendant's motion to dismiss. At the hearing, Judge Robert E. Hodges recognized that on 21 November 1994, the summons had been returned unserved. The trial court then delayed ruling on defendant's motion to dismiss and gave the parties time to submit briefs on the issue of personal jurisdiction. On 12 April 1995 the trial court entered an order denying defendant's motion to dismiss after finding that defendant had not properly raised the issue of personal jurisdiction and that the defense was therefore waived.

Defendant appeals.

Samuel H. Long, III, for plaintiff-appellee.

Rudisill & Brackett, P.A., by H. Kent Crowe for defendant-appellant.

EAGLES, Judge.

Defendant argues that the trial court erred in denying his motion to dismiss for lack of personal jurisdiction. Defendant argues that the trial court lacks personal jurisdiction because (1) he was never served with a copy of the summons and complaint in this action, (2) no alias and pluries summons was issued nor was any endorsement secured from the clerk's office, (3) he properly preserved his objection to the trial court's assertion of personal jurisdiction, and (4) he made no general appearance or other waiver of his objection to the trial court's assertion of personal jurisdiction. We do not reach the merits of defendant's appeal, however, because we conclude that defendant's appeal from denial of a motion to dismiss is interlocutory and must be dismissed.

We recognize that G.S. 1-277(b) provides that an "interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." This right of immediate appeal is limited, however, in that

> "G.S. 1-277(b) applies to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. . . . [I]f the court has the jurisdictional power to require that the party defend and the challenge is merely to the process of service used to bring the party before the court, G.S. 1-277(b) does not apply." *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 145 (1982). "Allowing an immediate appeal only for 'minimum contacts' jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than 'minimum contacts' with this state will never be forced to trial against their wishes." *Id.* at 581, 291 S.E.2d at 146.

Updike v. Day, 71 N.C. App. 636, 637, 322 S.E.2d 622, 622-23 (1984). Defendant's appeal here pertains merely to the "process of service used to bring the party before the court . . . ." *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 145 (1982). Accordingly, we dismiss defendant's appeal ex mero motu as interlocutory. We need not address plaintiff's remaining assignments of error as they too are interlocutory and do not affect a substantial right.

Dismissed.

Judges JOHN and WALKER concur.

KENT THOMPSON BAITY, Plaintiff v. STEPHEN LESLIE BREWER and PATRICIA FITZGERALD POOLE, Defendants

No. COA95-920

(Filed 4 June 1996)

Damages § 53 (NCI4th)— no double recovery for single injury—failure to grant defendant credit for monies already received—error

Based upon the common law principle that a plaintiff should not be permitted a double recovery for a single injury, the trial court erred in failing to grant defendant a credit for the money previously paid plaintiff by another alleged tortfeasor in this action arising from a multi-car pile-up even though the jury found that the other alleged tortfeasor was not negligent.

Am Jur 2d, Damages §§ 566 et seq.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability. 47 ALR3d 234.

Receipt of public relief or gratuity as affecting recovery in personal injury action. 77 ALR3d 366.

Validity and construction of state statute abrogating collateral source rule as to medical malpractice actions. 74 ALR4th 32.

Appeal by defendant from judgment entered 10 May 1995 by Judge Forrest D. Bridges in Forsyth County Superior Court. Heard in the Court of Appeals 22 April 1996.

T. Dan Womble for plaintiff-appellee.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Robert A. Ford, for defendant-appellant, Patricia Fitzgerald Poole.

WYNN, Judge.

On 8 October 1992, defendant Patricia Fitzgerald Poole ("Poole") traveled in the left lane of Peters Creek Parkway in Winston-Salem, North Carolina followed by plaintiff Kent Baity ("plaintiff") who in turn was followed by defendant Stephen Brewer ("Brewer"). An accident occurred when Poole slowed to make a left turn and in response plaintiff slowed his car resulting in Brewer colliding into the rear end of plaintiff's car. Plaintiff suffered serious injury.

Prior to the trial of the subject action, Brewer settled with the plaintiff for fifty thousand dollars ($50,000), the limits of his insurance policy. Plaintiff in turned signed a release with Brewer and his insurance carrier, releasing them from liability but reserving the right to proceed against Brewer in order to prosecute a claim against the underinsured motorist carriers (UIM carriers). Upon the consent of all parties, the trial court relieved Brewer's insurance carrier of its duty to defend in the subject case.

The case was tried against both defendants. The jury found Poole to be negligent, Brewer not to be negligent, and awarded plaintiff $67,500.

Poole moved that the trial court grant her a credit for the $50,000 already received by the plaintiff from Brewer for his injury. The trial court denied Poole's motion for a credit, holding that there cannot be contribution or a credit unless there is joint liability, and since the jury found Brewer not to be negligent there was no joint liability. From this portion of the judgment, Poole appeals.

On appeal, Poole contends that the trial court erred when it failed to grant her a credit for the money paid by Brewer to plaintiff. We agree, and therefore reverse the contrary part of the judgment below.

Chapter 1B of the North Carolina General Statutes, commonly known as the Uniform Contribution Among Tortfeasors Act, provides that a right of contribution exists "where two or more persons become jointly or severally liable in tort for the same injury to person or property . . . ." N.C. Gen. Stat. §1B-1(a) (1983); *see also Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 586, 397 S.E.2d 358, 360 (1990); *Ryder v. Benfield*, 43 N.C. App. 278, 287, 258 S.E.2d 849, 855 (1979). Plaintiff contends that defendant Poole is not entitled to contribution from Brewer because the jury did not find that Brewer

was a joint tort-feasor. However, while plaintiff correctly states the law regarding contribution among tort-feasors, that law is not applicable here. Defendant Poole based her motion for credit not on any right of contribution under Chapter 1B but on the common-law principle that a plaintiff should not be permitted a double recovery for a single injury. *See Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 415-16, 363 S.E.2d 643, 652, *disc. review denied*, 322 N.C. 113, 367 S.E.2d 917 (1988) (holding that defendant is entitled to a credit based on the principle that plaintiff can have only one recovery for its injury, rather than on a statutory right of contribution).

In *Holland v. Utilities Co.*, 208 N.C. 289, 180 S.E. 592 (1935), our Supreme Court stated that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage." *Id.* at 292, 180 S.E. at 593-94. The *Holland* decision is in full force and effect in North Carolina, having been cited as controlling authority in the recent case of *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 242, —, 468 S.E.2d 69, 74-75 (1996) (holding that where plaintiff sued both defendants to recover for one indivisible injury, her damages were limited to the "total recovery" for that single injury and her award was properly reduced by amount of pre-trial settlement with one defendant). In addition, *Holland* is cited with approval in § 885(3) of the Restatement (Second) of Torts, which provides that:

> [A] payment *by any person* made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, *whether or not the person making the payment is liable* to the injured person and whether or not it is so agreed at the time of payment or the payment is made before or after judgment.

Restatement (Second) of Torts §885(3) (1982) (emphasis supplied) (citing *Holland*). The rule in *Holland* is directly on point here and mandates reversal of the portion of the trial court's judgment denying defendant Poole a credit.

Reversed and remanded for proceedings consistent with this opinion.

Judges JOHNSON and WALKER concur.

STATE OF NORTH CAROLINA v. KENNETH HOUSTON

No. COA95-1012

(Filed 4 June 1996)

1. **Appeal and Error § 150 (NCI4th)— constitutional issue not raised in trial court—no consideration on appeal**

Where defendant, who was charged with willful failure to file North Carolina income tax returns, never raised the unconstitutionality of the income tax statute as a defense to the charges against him, the constitutional question was not properly presented to the appellate court.

Am Jur 2d, Appellate Review §§ 690 et seq.

2. **Taxation § 234 (NCI4th)— willful failure to file income tax returns—conflicting evidence of willfulness—jury question**

Where the evidence in a prosecution for willful failure to file state income tax returns was conflicting as to whether defendant's failure to file his returns was the result of a misunderstanding of the law, which might negate willfulness, or a disagreement with the law, which would not, the trial court properly submitted the charges to the jury.

Am Jur 2d, State and Local Taxation § 881.

Retailer's or buyer's defenses against exaction of penalties for failure to file, or deficiency in, state or local sales-tax return. 20 ALR4th 952.

Appeal by defendant from judgment entered 13 January 1995 by Judge Ronald Stephens in Wake County Superior Court. Heard in the Court of Appeals 22 April 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for the State.

Kenneth Houston, defendant-appellant, pro se.

PER CURIAM.

Defendant was charged with two counts of willful failure to file North Carolina income tax returns for tax years 1991 and 1992 in violation of N.C. Gen. Stat. § 105-236(9). Following jury verdicts of guilty on both counts, defendant was sentenced to two two-year prison terms which were suspended on conditions of probation.

[1] On appeal, defendant presents the following question for review: "Was defendant/appellant prosecuted for . . . conduct which is protected by the Constitution of North Carolina (Art. I Sec. 1 clause 'the enjoyment of the fruits of their on [sic] labor')?" Defendant is apparently asking this Court to declare that the State income tax, as applied to him, violates Article I, Section 1 of the North Carolina Constitution. However, it is well-settled that an appellate court may not consider constitutional questions that were neither raised nor decided below. *State v. Crews*, 286 N.C. 41, 47-48, 209 S.E.2d 462, 466 (1974), *cert. denied*, 421 U.S. 987, 44 L. Ed. 2d 477 (1975); *State v. Greene*, 33 N.C. App. 228, 229, 234 S.E.2d 428, 429-30 (1977). A careful review of the record and transcript reveals that defendant never raised the unconstitutionality of the income tax statute as a defense to the charges against him. Rather, his sole defense was that his failure to file his income taxes was not willful. As the constitutional question presented by defendant on appeal was neither raised nor decided below, we decline to address it.

However, rather than dismissing defendant's appeal, we exercise our authority under N.C.R. App. P. 2 to review the sufficiency of the evidence to warrant submission of the charges to the jury and entry of judgment in accordance with the verdicts.

[2] To withstand defendant's motion to dismiss, the State had to present substantial evidence that (1) defendant was required by law to file tax returns for the tax years 1991 and 1992; (2) defendant failed to file such returns; and (3) defendant's failure to file such returns was willful. *See* N.C. Gen. Stat. § 105-236(9) (1995). Defendant does not contend that the State failed to meet its burden as to the first two elements, but only that the State did not show that his failure to file State tax returns for 1991 and 1992 was willful. He argues that the element of willfulness was negated by his sincere belief that the State was powerless to impose upon him an income tax which would deprive him of the right, conferred by Article I, Section 1 of the North Carolina Constitution, to enjoy the fruits of his own labor.

In *State v. Davis*, 96 N.C. App. 545, 386 S.E.2d 743 (1989), the defendant was charged with various tax-related misdemeanors, including willful failure to file State income taxes. *Id.* at 547, 386 S.E.2d at 744. Defendant argued that his "subjective, good faith belief" that he was not liable to pay state income taxes was a defense to willfulness and that the trial court erred in failing to so instruct the jury. *Id.* at 554, 386 S.E.2d at 748. This Court upheld the substance of the

trial court's instructions as in keeping with federal precedent, stating that "while a good-faith *misunderstanding* of the law may negate willfulness, a good-faith *disagreement* with the law does not." *Id.* (emphasis added) (*citing United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983)).

The evidence at the trial of the instant case was conflicting as to whether defendant's failure to file his returns was the result of a misunderstanding of the law or a disagreement with it. The trial court correctly determined that, given this conflicting evidence, the issue of willfulness was for the jury to resolve. We hold there was ample evidence from which a jury could have concluded that defendant's failure to file his returns was willful. Thus, the court did not err in submitting the charges to the jury or in entering judgment in accordance with the verdicts.

In the trial below, we find

No error.

Panel consisting of:
Johnson, Wynn, Walker

SUSAN G. KEARNS, PLAINTIFF v. RUTH M. SPANN AND KENNETH D. SPANN, DEFENDANTS

No. COA95-1412

(Filed 4 June 1996)

Costs § 9.1 (NCI4th)— voluntary dismissal—costs

In an automobile accident case in which plaintiff took a voluntary dismissal, a trial court order denying defendant's motion for costs "at the present time" and allowing defendant to reapply for approval of costs should plaintiff refile the action was void. Pursuant to N.C.G.S. § 1A-1, Rule 41(d), the trial court or the clerk shall tax the costs of the action to the plaintiff taking a voluntary dismissal; the trial court's authority after the dismissal of an action is limited to taxing costs.

Am Jur 2d, Dismissal, Discontinuance and Nonsuit §§ 9-40; Equity § 220.

Appeal by North Carolina Farm Bureau Mutual Insurance Company from order entered 28 September 1995 by Judge J. Russell Lanier, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 27 May 1996.

On 2 June 1994, plaintiff filed a complaint seeking damages from defendants arising out of an automobile accident. On 30 June 1994, North Carolina Farm Bureau Mutual Insurance Company (hereinafter "Farm Bureau"), the alleged underinsured motorist's insurer of plaintiff, filed an answer denying negligence on the part of defendants and alleging contributory negligence on the part of plaintiff. On 29 July 1994, the trial court entered an order relieving defendants' liability insurance carrier, Allstate Insurance Company (hereinafter "Allstate"), of its duty to defend this action after Allstate tendered its policy limits. On 27 February 1995, Farm Bureau filed its notice of election to defend the action in the name of defendants.

On 31 August 1995, plaintiff filed a voluntary dismissal without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990). On 7 September 1995, Farm Bureau filed a "Motion for Taxation of Costs" pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(d) along with an affidavit setting out expenses incurred by Farm Bureau in defending the action.

Following a hearing, the trial court entered an order on 28 September 1995 denying the motion for costs "at the present time" and stating that "should the Plaintiff refile this action, the Defendant at the conclusion of the refiled action, is granted leave to reapply to the Court hearing the refiled action for approval of the costs that are the subject of the present motion." Farm Bureau appeals.

Davis, Murrelle & Lumsden, P.A., by Treve B. Lumsden, for plaintiff-appellee.

Harris, Shields and Creech, P.A., by R. Brittain Blackerby and Charles E. Simpson, Jr., for appellant North Carolina Farm Bureau Mutual Insurance Company.

MARTIN, John C., Judge.

Farm Bureau argues the trial court erred by denying the motion for costs following plaintiff's voluntary dismissal. Specifically, Farm Bureau contends Rule 41(d) requires the trial court to enter an order of costs following a voluntary dismissal without prejudice. We agree.

Rule 41(d) provides:

> (d) *Costs.*—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

Pursuant to this rule, the trial court or the clerk of court *shall* tax the costs of the action to the plaintiff taking a voluntary dismissal. *Fields v. Whitehouse and Sons Co.*, 98 N.C. App. 395, 390 S.E.2d 725, *disc. review denied*, 327 N.C. 427, 395 S.E.2d 676 (1990).

In this case, the trial court denied Farm Bureau's motion for costs "at the present time" and ruled that Farm Bureau could seek payment for costs after the conclusion of a second action if one is filed. The trial court erred by failing to tax costs after the voluntary dismissal.

The trial court's authority after the dismissal of an action is limited to taxing the costs. *Id.* Therefore, the trial court in this case had authority to do nothing other than enter an order taxing the costs. Its attempt to reserve Farm Bureau's right to seek costs after the conclusion of a second action is void. *See Fields*, 98 N.C. App. 395, 390 S.E.2d 725.

Because the order entered by the trial court is void, the order must be vacated and the matter remanded. On remand, the trial court shall determine which expenses set out by Farm Bureau in its affidavit may be taxed against plaintiff and enter an appropriate order taxing costs.

Vacated and remanded.

Judges EAGLES and LEWIS concur.

STATE v. WHEELER

[122 N.C. App. 653 (1996)]

STATE OF NORTH CAROLINA v. WILLIAM ROGERS WHEELER

No. COA95-773

(Filed 18 June 1996)

1. **Robbery § 84 (NCI4th)— attempted robbery with dangerous weapon—sufficiency of evidence**

The evidence was sufficient to be submitted to the jury in a prosecution for attempted robbery with a dangerous weapon where it tended to show that the victim was a guest in defendant's house; defendant knew that the victim had $700 in his pocket; defendant testified that he entered the bedroom where the victim was sleeping, told him to get up, and shot into the mattress when the victim did not get up; defendant told the victim to empty his pockets; and defendant then shot the victim.

Am Jur 2d, Robbery § 89.

2. **Criminal Law § 1102 (NCI4th)— assault and attempted robbery—maintaining dwelling house where illegal drug use occurred—finding of nonstatutory aggravating factor—error**

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and attempted robbery with a dangerous weapon, the trial court erred in finding as a nonstatutory aggravating factor that defendant maintained a dwelling where illegal drug use was occurring on the grounds that it created an atmosphere that led up to the commission of the crimes, since the fact that illegal drug use had occurred in defendant's residence prior to his commission of the assault and attempted robbery did not make him more culpable for those offenses.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 27 October 1994 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 March 1996.

The State presented evidence which tended to show that at approximately 1:00 a.m. on 2 February 1994, Benjamin Franklin Thompson went to the defendant's residence in Mecklenburg County. Thompson had known the defendant for about ten years, and believed

that he and the defendant were friends. Thompson went to defendant's apartment because there was "usually some partying going on over there" and "you can meet some females." Thompson also testified that, before going to defendant's, Thompson had been drinking gin and was "high" when he got there. When Thompson arrived, the defendant and his girlfriend Shalette, and four other people were already there. Thompson entered through the back door and spoke with the defendant. Then Thompson went to the front room where everyone was, and began to smoke some crack cocaine which he had brought with him. Thereafter, Thompson played cards, drank beer and continued to smoke crack cocaine. Thompson sold some of the cocaine to the man with whom he played cards and he gave some to the defendant. Thompson also testified that everyone at the party knew that he had just received his tax refund of $700.00 and that he had it with him in the pocket of his jacket. Thompson said that he told everyone at the party that he had this money because, "[he] was among friends and it just—it's, you know, look what I got; it's my tax day, my tax came." During the evening Thompson asked the defendant if the defendant thought that Thompson was seeing the defendant's girlfriend. The defendant said that he did not. People began to leave the defendant's home at approximately 5:00 a.m. Thompson planned to leave but defendant told him that he could stay, so Thompson lay down on the bed in a back bedroom and went to sleep. Thereafter the defendant woke Thompson by saying, "get up and put your hands up." Then the defendant asked Thompson to empty his pockets onto the floor. It was dark but Thompson could see by the light from the hallway that the defendant had a shiny pistol in his hand. Thompson put his hands up and emptied the contents of his pockets, which included some cocaine and his $700.00 tax refund, onto the floor. After emptying his pockets the defendant shot Thompson in the left side of his chest. Thompson then "charged" the defendant and the two men struggled for the gun. The defendant shot Thompson again and the bullet hit Thompson in the middle of the chest. Thompson hit the defendant in the head and took possession of the gun. Thompson tried to shoot the defendant but the gun would not fire. Thompson ran out of the house to a neighbor's house to call for help.

The defense put on evidence which tended to show that the defendant felt threatened by Thompson's presence at the party. The defendant testified that he had not invited Thompson to his house and that Thompson made him feel uneasy because, "he was always

approaching me at my house and, you know, and I would tell him to sit down and then he would always get in my face." As people started to leave the party the defendant told Thompson that he could spend the night at defendant's home. When the defendant unsuccessfully tried to wake Thompson up, the defendant shot a .32 caliber pistol into the mattress and advised Thompson to get out of bed. Defendant then told Thompson to empty his pockets. Thompson emptied his pockets on to the floor and began to walk towards the defendant. Defendant then shot Thompson. Defendant made a statement to the police in which he admitted that he had been told that Thompson and Shalette were having an affair. Additionally, the defendant said that he asked Thompson to empty his pockets because he was going to take Thompson's money and drugs and throw them out the front door and then Thompson would have to leave the house to retrieve his belongings.

Defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury and attempted robbery with a dangerous weapon. He was sentenced to 16 years and 14 years respectively.

Attorney General Michael F. Easley, by Assistant Attorney General Richard G. Sowerby, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant first assigns error to the trial court's denial of the defendant's motion to dismiss the charge of attempted armed robbery where the evidence was insufficient for a rational trier of fact to find every element of that crime beyond a reasonable doubt. We disagree.

In ruling upon defendant's motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Fletcher*, 301 N.C. 709, 272 S.E.2d 859 (1981). "When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Whether evidence presented constitutes substantial evidence is a question of law for the court." *Id.*

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* "[T]he trial court should only be concerned that evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *Id.* at 237, 400 S.E.2d at 61. "It is *not* the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *Id.* "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.*

N.C. Gen. Stat. § 14-87(a) (1993) defines attempted armed robbery with a dangerous weapon.

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

Thus, "[a]n attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987). Felonious intent is an essential element of the offense of armed robbery and of the attempt to commit armed robbery. *State v. Spratt*, 265 N.C. 524, 526, 144 S.E.2d 569, 571 (1965). Felonious intent means the intent to permanently deprive the owner of his property. *State v. Smith*, 268 N.C. 167, 170, 150 S.E.2d 194, 198 (1966).

In *State v. Davis*, 340 N.C. 1, 455 S.E.2d 627 (1995), the defendants, Davis and Hood, murdered the owner of a pawn shop. The defendants and the owner of the pawn shop engaged in a brief discussion regarding the sale of a shotgun. *Id.* at 9, 455 S.E.2d at 630. Defendants then drew their pistols, and Davis stated to the victim, Mark Lane, "Buddy, don't even try it. Buddy, don't even try it." *Id.* at 9, 455 S.E.2d 630-631. Davis then immediately shot Lane twice. *Id.* Lane returned fire once after falling to the floor. *Id.* Hood then shot Lane. *Id.* Both defendants fled the scene and no money or property was taken from the pawn shop. *Id.* The court found the defendants'

actions to be sufficient evidence to support the charges of attempted armed robbery, even though there was no demand for money or property. *Id.* at 13, 455 S.E.2d at 633.

Also, in *State v. Smith*, 300 N.C. 71, 77, 265 S.E.2d 164, 169 (1980), the defendant pulled a gun on a store owner and said, "Don't move. . . . Don't put your hands under that counter." The defendant made no demand for money and the court upheld the attempted robbery conviction. *Id.* at 81, 265 S.E.2d at 171.

In the present case, defendant argues that *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983) is controlling. In *Bates*, the defendant and the victim engaged in a struggle in an open field and as a result of the struggle the victim's personal belongings were scattered throughout the field. *Id.* The court held in *Bates* that the defendant's testimony, "in its entirety had to be characterized as a clarification of the State's testimonial and physical evidence, because it in no way contradicted the prosecution's case." *Id.* at 535, 308 S.E.2d at 263. Consequently, the court found that there was no substantial evidence of a taking by the defendant with the intent to permanently deprive the victim of his property. The North Carolina Supreme Court reversed the ruling of the trial court and held that the defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been granted. *Id.* at 535, 308 S.E.2d at 264.

The present case is distinguishable from the facts in *Bates*. The defendant was aware that Thompson had just received his tax refund and that Thompson was carrying the $700.00 refund in his pocket. Additionally, the defendant testified that he entered the bedroom with a gun where Thompson was sleeping and told him "to get up," and when Thompson did not do so the defendant shot into the mattress. Then the defendant told Thompson to empty his pockets. We find the present case to be more closely aligned with the facts of *Davis*, 340 N.C. 1, 455 S.E.2d 627, and *Smith*, 300 N.C. 71, 265 S.E.2d 164. The State's evidence showed that the defendant possessed a gun and that he threatened Thompson with its use, and he also shot Thompson with the gun after demanding that Thompson empty his pockets. When considering the evidence in the light most favorable to the State, the State offered substantial evidence of the defendant's guilt on every element of attempted robbery with a dangerous weapon.

[2] The defendant's second assignment of error is that the trial court erred in finding as a nonstatutory aggravating factor that the defendant maintained a dwelling where illegal drug use was occurring, on

the grounds that this aggravating factor was not reasonably related to the purposes of sentencing. We agree and remand for a new sentencing hearing.

N.C. Gen. Stat. § 15A-1340.3 (1988) sets forth the purposes of sentencing a person convicted of a crime.

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

"This section does not require that only aggravating or mitigating factors listed in the section be considered. The court may use any factors which are supported by the preponderance of the evidence and are reasonably related to the purposes of sentencing." *State v. Setzer*, 61 N.C. App. 500, 504-505, 301 S.E.2d 107, 110 (1983).

> An aggravating factor is intended to aid the trial court in imposing a punishment commensurate with defendant's culpability. . . . [T]he Supreme Court stated a guideline for determining when a factor is properly used to aggravate a sentence. The Court said a factor should not be considered in aggravation of a sentence unless it makes defendant more blameworthy than he already is as a result of committing a violent crime against another person.

State v. Underwood, 84 N.C. App. 408, 413, 352 S.E.2d 898, 901 (1987), (citing *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985)), *rev'd on other grounds*, *State v Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991). In *State v. Wall*, 96 N.C. App. 45, 384 S.E.2d 581 (1989), the defendant was convicted of possession with intent to sell and deliver cocaine, sale of cocaine and delivery of cocaine. The trial court found the following to be a nonstatutory aggravating factor:

> the defendant operated the Midnight Express where beer is sold and dance hall is maintained under conditions rendering his possession of controlled substances for purpose of sale, particularly aggravating because of large public dependence and exposure to opportunity for abuse of controlled substances.

Id. at 51, 384 S.E.2d at 584. "Evidence which increases a defendant's culpability may properly be considered as an aggravating factor."

State v. McKinney, 88 N.C. App. 659, 665, 364 S.E.2d 743, 747 (1988), (citing *State v. Perry*, 316 N.C. 87, 110-11, 340 S.E.2d 450, 464-465 (1986)). This Court found that the trial court erred in making this finding, because increased access to potential customers did not increase the defendant's culpability for his drug convictions and remanded for a new sentencing hearing. *Wall* at 52, 394 S.E.2d at 585.

Similarly, in the instant case the trial court's finding as an aggravating nonstatutory factor, that the defendant maintained a dwelling where illegal drug use was occurring on the grounds that it created an atmosphere that led up to the commission of the crimes, was improper. The fact that illegal drug use had occurred in the defendant's residence prior to his commission of assault with a deadly weapon and attempted robbery with a dangerous weapon did not make him more culpable for these offenses. The defendant testified that he had not invited Thompson to his house and that Thompson is the one who brought crack cocaine with him and sold it to other people at the party in defendant's home. Because the trial court erred in making this finding, we remand for a new sentencing hearing.

In the trial court's denial of defendant's motion to dismiss the charge of attempted armed robbery we find no error.

Remand for resentencing.

Judges MARTIN, John C. and SMITH concur.

STATE OF NORTH CAROLINA v. KENNETH WAYNE CHAPLIN

No. COA95-1051

(Filed 18 June 1996)

Constitutional Law § 327 (NCI4th)— three-year delay between arrest and trial—unavailability of witness—denial of speedy trial

Defendant was denied his constitutional right to a speedy trial, and the trial court erred in refusing to allow defendant's motion to dismiss where nearly three years elapsed between defendant's arrest and trial; his case was calendared thirty-one times, requiring defendant to travel from New York to North

Carolina, thus missing work, losing income, and losing the ability to locate his key witness; the witness's testimony that drugs found in defendant's car were his alone would have in fact exculpated defendant; although given an opportunity to do so, the State did not offer any evidence to refute defendant's argument that the witness was an essential witness who was no longer available; there was no evidence that defendant could locate other potential witnesses; and the substantial prejudice to defendant, the conduct of the State, and the lengthy delay far outweighed defendant's failure to formally assert his right to a speedy trial. N.C. Const. art. I, § 18; U.S. Const. amend. VI.

Am Jur 2d, Criminal Law § 655.

Illness or incapacity of judge, prosecuting officer, or prosecution witness as justifying delay in bringing accused speedily to trial—state cases. 78 ALR3d 297.

Accused's right to speedy trial under Federal Constitution—Supreme Court cases. 71 L. Ed. 2d 983.

Appeal by defendant from judgment entered 23 March 1995 in Halifax County Superior Court by Judge W. Russell Duke, Jr. Heard in the Court of Appeals 15 May 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Charles J. Murray, for the State.

Law Office of Jimmie R. "Sam" Barnes, by Sam Barnes and Laura-Jean Alford, for defendant-appellant.

GREENE, Judge.

Kenneth Wayne Chaplin (defendant) appeals from the trial court's 23 March 1995 Judgment and Commitment, sentencing him to seven years in prison for trafficking in cocaine by transporting cocaine, in violation of N.C. Gen. Stat. § 90-95.

Defendant, a resident of New York, and three passengers in his vehicle were arrested on 28 April 1992 for possession of marijuana and trafficking in cocaine, after being stopped at an interdiction check point on Interstate 95. Jaquan Price (Price), Gerald McDonald (McDonald) and Mark Thompson (Thompson), none of whom defendant knew before 28 April 1992, were passengers in defendant's car on a trip from New York to North Carolina. Defendant remained in jail in

Halifax County for sixty-four days from his initial arrest. Subsequent to defendant's arrest, Price pled guilty to the above charges and was sentenced to seven years in prison.

Defendant's unrefuted evidence shows that between the years of 1992 and 1995, defendant's case was placed on the trial calendar thirty-one times. Nothing in the record indicates that defendant ever asked for a continuance. In fact, the record reveals that the district attorney never called the case to trial, until 20 March 1995.

During this time, defendant made efforts to locate McDonald and Thompson to have them testify at trial, but was unable to locate them. Defendant also notified the State of his intention to call Price to testify and had information that Price would testify that the cocaine "was exclusively his contraband and was to the exclusion of all others in that automobile." In fact, defendant requested that the Department of Correction, where Price was serving his sentence for the earlier guilty plea, have Price "brought to the courthouse on the writ of habeas corpus ad testificandum on several terms prior to" the actual trial of defendant's case. At the time of the actual trial of defendant's case, however, Price had been released from the Department of Correction and defendant was informed by Price's family that he had been deported from the United States to Trinidad.

On 22 February 1995, defendant filed a motion to dismiss the present action against him because he had been denied his right to a speedy trial, pursuant to the United States Constitution and the North Carolina Constitution. Defendant specifically argued that his case had been delayed for trial, while cases "of less significance and with the indictment date subsequent to that of this Defendant's" had been tried and concluded. Defendant also argued that the State was allowing Price to serve his sentence and thereby gain the possibility of parole before defendant's trial, which would make defendant's locating Price to testify at defendant's trial "virtually impossible."

On 20 March 1995, defendant's case was called to trial, and after empaneling the jury, but before any hearing on defendant's motion, the trial court denied defendant's motion to dismiss, stating that "[t]he Court has read and considered" the motion. Defendant then requested that "[a]t some point in time" he be allowed to "get in the events of the calendar since the date of indictment." To which the trial court initially responded that "the court records would speak for themselves," but subsequently did allow defendant's request to introduce all court calendars and minutes from the date of defendant's

charge until 20 March 1995. Defendant also requested that he be allowed to "get" evidence of defendant's prejudice "into" the record and defendant was allowed to argue to the court that the State's delay of defendant's trial "substantially prejudiced defendant," by requiring defendant to travel from New York to North Carolina thirty-one times and thus, miss work and lose income. Defendant also argued that he was prejudiced by the delay, because he was denied a material witness. Defense counsel offered to "tender [defendant] who'll testify that the evidence—the information from the family of Jaquan Price is that he's in Trinidad." The trial court then asked the clerk of court if defendant had in fact moved to have Price brought to court, to which the clerk responded positively and stated that Price was not in the Department of Correction, because Price was paroled.

The State responded to defendant's argument by stating that "there is no indication, whether it be in the form of a statement by Mr. Price . . . that is going to indicate that he would, in fact, testify as [defense counsel] has said." The State also argued that "according to a motion by the previous attorney . . . the other two witnesses . . . Thompson and . . . McDonald . . . would provide the same information that . . . Price would provide." Defendant, however, responded that Thompson and McDonald's cases had been dismissed by the State and attempts to locate them had been unsuccessful. After hearing these arguments, the trial court again denied the defendant's motion to dismiss.

The issue is whether the defendant has been denied his constitutional rights to a speedy trial.

In determining whether a defendant has been deprived of his right to a speedy trial, N.C. Const. art I, § 18; U.S Const. amend VI, our courts consider four interrelated factors together with " 'such other circumstances as may be relevant.' " *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989) (quoting *Barker v. Wingo*, 407 U.S. 514, 533, 33 L. Ed. 2d 101, 118 (1972)). The factors are "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay." *Id.* "No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C 134, 140, 240 S.E.2d 383, 388 (1978). Instead the factors and other circumstances are to be balanced by the court with an awareness that it is "dealing with a fundamental right of the accused" which is "specifically affirmed in the

Constitution." *Id.* The burden is, nonetheless, on the defendant to show that his constitutional rights have been violated and a defendant "who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice." *Id.* at 141, 240 S.E.2d at 388. Thus the defendant is required to show that the unreasonable delay in his trial was caused by the "neglect or wilfulness of the prosecution," as the Constitution does not "outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case." *Id.* A showing of a particularly lengthy delay establishes a *prima facie* case that the delay was due to the neglect or wilfulness of the prosecution and requires the State to "offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing." *See id.* at 143, 240 S.E.2d at 390; *cf. State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994) (case calendared six times in six months did not alone "demonstrate[] prosecutorial negligence or willfulness").

In ruling on a motion for a speedy trial the trial court is not always required to conduct an evidentiary hearing and make findings of facts and conclusions of law. *See State v. Dietz*, 289 N.C. 488, 495, 223 S.E.2d 357, 362 (1976). In those instances, however, when the motion to dismiss for denial of a speedy trial is based on allegations not "conjectural and conclusory [in] nature," an evidentiary hearing is required and the trial court must enter findings to resolve any factual disputes and make conclusions in support of its order. *Id.* When there is no objection, evidence at the hearing may consist of oral statements by the attorneys in open court in support and in opposition to the motion to dismiss. *See State v. Pippin*, 72 N.C. App. 387, 397-98, 324 S.E.2d 900, 907 (findings properly based on oral arguments of attorney where opposing party did not object to procedure), *disc. rev. denied*, 313 N.C. 609, 330 S.E.2d 615 (1985).

In this case the allegations asserted by the defendant in support of this motion to dismiss are substantive and entitled him to an evidentiary hearing. Although it does appear that the trial court was initially reluctant to allow the defendant to present evidence, it did subsequently permit the defendant to submit evidence and attorneys for the defendant and the State, without objection, made oral presentations. The State did not present any evidence or request that it be permitted to present evidence.

The information before the trial court is not in dispute and thus the failure of the trial court to make findings of fact does not prevent

review by this Court. *See Harris v. North Carolina Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) (failure to make findings does not require remand where facts not in dispute). Whether the undisputed evidence supports the implied conclusion of the trial court that defendant's constitutional rights to a speedy trial were not violated requires application of legal principles and thus is reviewable *de novo*. *See Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980).

Length of Delay

In this case, defendant's trial did not occur until 1055 days, or thirty-five months, or nearly three years from the date of his arrest. "While not enough in itself to conclude that a constitutional speedy trial violation has occurred, this delay is clearly enough to cause concern and to trigger examination of the other factors." *Webster*, 337 N.C. at 679, 447 S.E.2d at 351 (delay of sixteen months sufficient to trigger consideration of factors); *Groves*, 324 N.C. at 365-66, 378 S.E.2d at 767 (delay of two years, two months sufficient to trigger consideration of factors); *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984) (delay of twenty-two months sufficient to trigger consideration of factors).

Reason for the Delay

In this case, the record reveals that the defendant's case was placed on the trial calendar thirty-one times; five times in 1992, fourteen times in 1993, nine times in 1994, and three times, prior to 20 March, in 1995. On average, defendant's case was calendared for trial once a month for a period of three years, but never called by the district attorney. This is sufficient to establish a *prima facie* case that the State was either negligent or wilful in not calling defendant's case to trial. Although given the opportunity to argue against the defendant's motion and present evidence, the State presented no argument or evidence justifying the delay. Furthermore there is the unrefuted argument of the defendant that the State delayed the defendant's trial until after Price was paroled, thus making it more difficult for the defendant to secure Price's presence at the defendant's trial.

Assertion of Right

Although a "[d]efendant is not required to demand that the [S]tate prosecute him," the failure to assert his right to a speedy trial weighs heavily against defendant. *Pippin*, 72 N.C. App. at 395, 324 S.E.2d at 906; *Webster*, 337 N.C. at 680, 447 S.E.2d at 352. The defendant did not

formally assert his right to a speedy trial until 22 February 1995 and his trial was held within thirty days of this assertion.

Prejudice

Two important aims of the right to a speedy trial are the minimization of "anxiety and concern of the accused" and to limit the "possibility that the defense will be impaired." *Webster*, 337 N.C. at 681, 447 S.E.2d at 352 (quoting *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972)). The most serious aim of the right to a speedy trial is the prevention of impairing the defense, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* In this case, the defendant has suffered great prejudice. Not only has he been required to travel away from his family in New York, to North Carolina, thirty-one times during the course of three years, thus missing work and losing income, he has also lost the ability to locate his key witness. The nearly three-year delay has allowed Price to be released from the control of the Department of Correction and deported from the United States, thus, outside of defendant's subpoena power. Defendant has information that Price would have testified that the drugs were his to the exclusion of all others in the car. Although the State argued that there is nothing in the record to "indicate that [Price] would" testify that the drugs were his, the State did not object to the motion being determined upon defense counsel's oral argument and defendant's argument regarding Price's expected testimony is record evidence that Price would, in fact, exculpate defendant. Furthermore, although given an opportunity to do so, the State did not offer any evidence to refute defendant's argument that Price was an essential witness who was no longer available. The denial of this key, exculpatory witness works a substantial prejudice and injustice to defendant's defense of the charges against him.

Furthermore, although the State argues that defendant could subpoena McDonald and Thompson, there is no evidence that defendant knows where McDonald and Thompson are now located. In any event, even if they were located, appeared and testified for the defendant, it does not remedy the prejudice caused by the absence of Price.

Balancing

In this case the substantial prejudice to the defendant, the conduct of the State, and the lengthy delay far outweigh defendant's fail-

ure to formally assert his right to a speedy trial. Thus the defendant has been denied his right to a speedy trial and the trial court erred in refusing to allow the defendant's motion to dismiss. This case is remanded to the trial court for dismissal of the charges. *See McKoy*, 294 N.C. at 144, 240 S.E.2d at 390.

Reversed and remanded.

Judges MARTIN, John C., and WALKER concur.

STATE OF NORTH CAROLINA v. CHAD LEE DALTON

No. COA95-1049

(Filed 18 June 1996)

1. **Burglary and Unlawful Breakings § 57 (NCI4th)— first-degree burglary—sufficiency of evidence**

The evidence was sufficient to be submitted to the jury in a prosecution for first-degree burglary where it tended to show that defendant told his companions there was a house where a lady lived in which they might be able to "get some stuff for some money"; during the dark early morning hours when the victim was asleep on her sofa, defendant opened her sliding glass door and stepped inside her kitchen; defendant took a knife from the kitchen and took a purse containing $300 to $400, jewelry and other valuables; and defendant exited the back door and handed the purse to one of his companions.

Am Jur 2d, Burglary § 45.

2. **Rape and Allied Offenses § 120 (NCI4th)— attempted first-degree rape—sufficiency of evidence**

The evidence was sufficient to be submitted to the jury in a prosecution for attempted first-degree rape where it tended to show that defendant and a companion had looked through the victim's house and were preparing to leave when defendant stated he was "horny" and wanted to rape the victim; defendant said he would hold a knife to the victim's throat and instructed his companion to put a pillow over her face so defendant could rape

her; when the victim woke up defendant was on top of her trying to pull down her shorts; she felt a knife at her neck and defendant told her that if she opened her eyes he would "hurt [her] real bad"; defendant called her obscene names and told her she was going to get what she deserved; and the victim wrestled defendant and kneed him in the groin before he and his companion fled out the back door.

Am Jur 2d, Rape § 88.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 ALR4th 1213.

3. Robbery § 65 (NCI4th)— robbery with a dangerous weapon—insufficiency of evidence

The trial court erred in denying defendant's motion to dismiss the charge of robbery with a dangerous weapon where there was evidence that defendant may have been in possession of a knife, but there was no evidence that he used it or threatened to use it to harm the victim during the taking of her purse, as the taking occurred while the victim was sleeping; furthermore, defendant's alleged use of the knife while attempting to rape the victim was not so joined in time and circumstances with the taking of the purse as to be part of one continuous transaction.

Am Jur 2d, Robbery § 25.

4. Conspiracy § 28 (NCI4th)— multiple intended victims—one conspiracy—insufficiency of evidence of multiple conspiracies

The evidence was insufficient to support the existence of three separate conspiracies to commit second-degree rape, although defendant and his companions went to three homes in search of a victim, where it tended to show that defendant and his co-conspirators had as their only objective to find someone to rape; they did not plan to or agree to rape a specific woman but instead went from home to home looking for a victim; the time interval from formation of the conspiracy until its abandonment was brief (a few hours); the number and identity of the participants remained the same throughout; and only one meeting occurred between the participants in planning the crime.

Am Jur 2d, Conspiracy §§ 11, 37.

Appeal by defendant from judgments entered 23 March 1995 by Judge James M. Webb in Forsyth County Superior Court. Heard in the Court of Appeals 15 May 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Marilyn E. Massey for defendant-appellant.

WALKER, Judge.

Defendant was convicted by a jury on one count of first-degree burglary, one count of attempted first-degree rape, one count of robbery with a dangerous weapon, and three counts of conspiracy to commit second-degree rape. The trial court sentenced defendant to concurrent prison terms of life for the first-degree burglary, twenty years for the attempted first-degree rape, fourteen years for the robbery with a dangerous weapon, and ten years for each of the conspiracies to commit second-degree rape.

The evidence tended to show that in the afternoon hours of 26 July 1994, Jeffrey Blanken, Corey Hicks, and Johnny Vaughn came to defendant's workplace at Hardee's in Lewisville, North Carolina. When defendant finished his shift, the four men walked to a grocery store, where defendant arranged for a friend to purchase some beer for them. They then returned to Hardee's to get the day's leftover chicken, went to defendant's house, and proceeded to a bridge near defendant's home. The four men sat under the bridge to eat the chicken and drink the beer.

While sitting under the bridge, the men's conversation turned to the subject of girls. The suggestion was then made that they should go and find a girl to rape. Defendant stated he knew a house where they could go. The four proceeded to the home of Carolyn S. While two of them waited, the other two went to the front door and rang the bell. There was no response, and the four went to the rear of the house. When the rear floodlights came on, they ran from the area of the house. They then continued to the residence of Peggy S., where defendant entered the garage and took a radio. The four then proceeded to the home of Donna E., where they looked in the window and saw a woman lying on the sofa. The men left that residence and went to the apartment of Wilma W., where they knocked on the door, asked for water, and left.

Finally, the four men stopped at the home of Kelly B. Defendant and Jeffrey Blanken entered the house from the rear entrance, which opened up into the kitchen. Defendant looked through a purse on the kitchen table, then picked up a knife from the kitchen counter. Defendant and Blanken looked through the rest of the house and then entered the living room, where Ms. B. was asleep on the sofa. Defendant picked up another purse from the floor beside the sofa and left the house. After rummaging through the purse, he threw it aside and re-entered the house. Ms. B. awoke with a man she later identified as defendant sitting on top of her trying to remove her shorts. Defendant was threatening her with a knife. After a struggle, defendant and Jeffrey Blanken left the house, and the four men returned to the bridge. Defendant was arrested on the evening of 2 August 1994.

Defendant assigns as error the trial court's denial of his motions to dismiss certain charges against him. The question presented by a defendant's motion to dismiss is whether the State has presented substantial evidence of the 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.

[1] Defendant first argues that the court erred by denying his motion to dismiss the first-degree burglary charge (94 CRS 26597). The essential elements of this offense are: (1) the breaking (2) and entering (3) into a dwelling (4) at night (5) while the dwelling is occupied (6) with the intent to commit a felony. *State v. Wells*, 290 N.C. 485, 496, 226 S.E.2d 325, 332 (1976); *see also* N.C. Gen. Stat. § 14-51 (1993). Defendant concedes that the State presented "some evidence" of each of the above-listed elements but contends that such evidence was not substantial.

The State presented evidence that defendant told his three companions there was a house where a lady lived in which they might be able to "get some stuff for some money" (referring to the house of Kelly B.). During the dark early morning hours of 27 July 1994, Kelly B. was in her house, asleep on the sofa. Defendant went up the back steps, opened the sliding glass door, and stepped inside the kitchen. Defendant got a knife from the kitchen and took a purse from beside the sofa in the living room. The purse contained $300 to $400, jewelry, and other valuables. Defendant exited the back door and handed the purse to one of his companions. We agree with the State that this was

substantial evidence of defendant's guilt of first-degree burglary, and the trial court correctly denied defendant's motion to dismiss this charge.

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of attempted first-degree rape (94 CRS 26598). The essential elements of this offense are (1) an attempt to (2) engage in vaginal intercourse (3) with another person (4) by force and (5) against the will of the other while (6) employing a dangerous weapon, or inflicting serious injury on the victim or another person. *State v. Worsley*, 336 N.C. 268, 275, 443 S.E.2d 68, 71 (1994); *see also* N.C. Gen. Stat. § 14-27.2 (1995).

The State's evidence tended to show that after entering Kelly B.'s house, defendant and Jeffrey Blanken looked through the house and were preparing to leave when defendant stated he was "horny" and wanted to rape Ms. B. Defendant said he would hold a knife to Ms. B.'s throat and instructed Blanken to put a pillow over her face so defendant could rape her. When Ms. B. woke up, defendant was on top of her trying to pull down the boxer shorts she was wearing. She felt a knife at her neck and defendant told her that if she opened her eyes he would "hurt [her] real bad." Defendant called her obscene names and told her that she was going to get what she deserved. Ms. B. wrestled defendant and kneed him in the groin before he and Blanken fled out the back door.

Defendant claims that the "various accounts" of what transpired at the home of Kelly B. "cause serious credibility problems and give rise to a reasonable doubt." While the versions of events given by the State's witnesses may have differed in minor respects, any discrepancies or contradictions were for the jury to resolve. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). Moreover, in order to withstand defendant's motion to dismiss, the State was not required to prove the elements of the charge beyond a reasonable doubt, but only had to present substantial evidence of those elements. We find that there was substantial evidence that defendant committed the offense of attempted first-degree rape, and the trial court did not err in denying defendant's motion to dismiss this charge.

[3] In his third assignment of error, defendant contends the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon (94 CRS 26599). To withstand this motion, the State had to prove the following elements: (1) the unlawful taking of the personal property of another (2) from his person or presence

(3) by a person who, having in his possession, or with the use or threatened use of, a weapon (4) threatens or endangers the life of the other person. *State v. Porter*, 303 N.C. 680, 686, 281 S.E.2d 377, 382 (1981); *see also* N.C. Gen. Stat. § 14-87 (1993).

Defendant contends the State failed to establish that an armed robbery took place because the evidence did not show that the taking of Kelly B.'s purse occurred as a result of the use or threatened use of a weapon whereby Ms. B.'s life was endangered. In the light most favorable to the State, the evidence showed that defendant and Jeffrey Blanken entered the rear of Ms. B.'s house. While in the kitchen, defendant picked up a knife. He and Blanken then proceeded into the rest of the house and eventually into the living room where Ms. B. was asleep on the sofa. Defendant and Blanken saw Ms. B.'s purse on the floor. Defendant picked up the purse, left the house with Blanken, and looked through the purse. Defendant and Blanken then re-entered the house. Sometime thereafter, Ms. B. awoke with defendant on top of her, threatening her with a knife. Defendant claims that an armed robbery did not occur because the purse was taken while Ms. B. was asleep and before there was any threat of harm to Ms. B. with the alleged use of the knife.

In order for an armed robbery to occur, the use of force must be such as to induce the victim to part with the property. *State v. Richardson*, 308 N.C. 470, 477, 302 S.E.2d 799, 803 (1983). Armed robbery requires both an act of possession of a weapon and an act whereby the weapon is used to endanger the life of the victim. *State v. Gibbons*, 303 N.C. 484, 491, 279 S.E.2d 574, 578 (1981). In *Gibbons*, the victim was beaten with fists by one of three men who had broken into her home. A purse was taken during the course of the incident. One of the co-defendants had a shotgun while in the house. *Id.* at 485, 279 S.E.2d at 575. However, the Supreme Court held that no armed robbery occurred because there was no evidence that the gun was used in any way to harm or threaten the victim in order to induce her to part with the purse. *Id.* at 490, 279 S.E.2d at 578. In the instant case, while defendant may have been in possession of a knife, there was no evidence he used it or threatened to use it to harm Ms. B. during the taking of the purse. The taking of the purse occurred while Ms. B. was asleep; therefore, she could not have known of the presence of the knife and could not have been induced by it to part with her purse.

The State concedes that defendant's use or threatened use of the knife did not precede or accompany the taking of the purse. However,

the State argues that defendant could still be found guilty of armed robbery because his use or threatened use of a weapon was "so joined by time and circumstances with the taking as to be part of one continuous transaction." *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992). In *Olson*, the defendant used a gun to shoot a homeowner who returned to his home just as defendant was preparing to leave with some items he had obtained after breaking into the house. *Id.* at 562, 411 S.E.2d at 594. In contrast, defendant here took the purse, left the house, gave the purse to Corey Hicks, and re-entered the house before he decided to rape Ms. B. We cannot conclude that defendant's alleged use of the knife while attempting to rape Ms. B. was so joined in time and circumstances with the taking of the purse as to be part of one continuous transaction. Moreover, unlike *Olson*, the harm or threatened harm in the instant case was not for the purpose of completing the taking of Ms. B.'s property. For the foregoing reasons, we hold that the trial court erred by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, and we arrest judgment on that charge.

[4] Defendant's last four assignments of error relate to the trial court's denial of his motions to dismiss the three charges of conspiracy to commit second-degree rape (94 CRS 28953, 28954, and 28955). He claims that the State did not present sufficient evidence that any of the charged conspiracies existed. In the alternative, he claims that the evidence supported the existence of at most one conspiracy.

A criminal conspiracy is an agreement between two or more people to commit a substantive offense. *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993). The agreement may be an express understanding or a mutual implied understanding. *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984). The existence of a conspiracy may be established by direct or circumstantial evidence. *Id.* Once an unlawful agreement is formed, the conspiracy continues until it is either completed or abandoned. *Griffin*, 112 N.C. App. at 841, 437 S.E.2d at 392. Where, as here, the State elects to charge multiple separate conspiracies, it must prove the existence of separate and distinct agreements to commit the substantive offense(s). *Id.* at 840, 437 S.E.2d at 392. The State contends that three separate conspiracies were formed and abandoned during the early morning hours of 27 July 1994.

In the light most favorable to the State, the evidence showed that defendant and his three companions agreed to rape a female by going

up to her door, knocking her out, and raping her. The four agreed that in the event of a struggle, they should be sure the victim did not scratch them, thereby getting skin under her fingernails. They further agreed that after raping the victim they should put her into the bathtub to wash off the evidence. We find that this constitutes substantial evidence of one conspiracy to commit second-degree rape. However, we agree with defendant that the evidence did not support the existence of three separate conspiracies.

This Court has held that in determining the number of conspiracies formed, several factors must be considered, including the objective, the time interval, the number of participants, and the number of meetings. *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). Each of defendant's alleged co-conspirators testified that on the night of the alleged offenses, only one objective existed among the four men: to "find somebody that night and rape them." They testified that they did not plan or agree to rape a specific woman such as Carolyn S., Wilma W., or Donna E. Moreover, the time interval was brief (a few hours), the number and identity of the participants remained the same throughout, and only one meeting occurred between the participants in planning the crime. The evidence here showed at most that the men agreed to rape *someone*. Pursuant to this general objective, they went to Ms. S.'s house. After having no success there, the men did not abandon their plan, but continued in their effort to find a woman to rape. Over the course of the evening, this effort took them to the homes of Ms. W., Ms. E., and Ms. B. Their plan was abandoned only upon leaving Ms. B.'s home, after which time they stopped looking for a woman to rape. Since the evidence supports the existence of only one conspiracy, it was error for the trial court to deny defendant's motions to dismiss two of the three conspiracy charges. We therefore arrest judgment in 94 CRS 28954 and 28955.

No error in 94 CRS 26597, 26958, and 28953.

Judgment arrested in 94 CRS 26599, 28954, and 28955.

Remanded for resentencing.

Judges GREENE and MARTIN, JOHN C. concur.

STACY L. PRICE, PLAINTIFF v. ROBIN HOWARD, DEFENDANT

No. COA95-900

(Filed 18 June 1996)

Parent and Child § 24 (NCI4th)— custody dispute between natural parent and care giver—right of parent to custody

A custody dispute between a natural parent and a person who receives a minor child into his home and openly holds out that child as his biological child, but who was excluded as the father by a court-ordered paternity test, is not to be determined according to the "best interests of the child" standard; rather, the court should apply the rule of *Petersen v. Rogers*, 337 N.C. 397, that, absent a finding that natural parents are unfit or have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail.

Am Jur 2d, Parent and Child §§ 23, 28.

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

Judge JOHN concurring in the result.

Judge GREENE dissenting.

Appeal by plaintiff from order signed 28 March 1995 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 19 April 1996.

Ann Marie Vosburg for plaintiff-appellant.

Mildred T. Hardy for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff, Stacy L. Price, appeals from the trial court's order granting defendant, Robin Howard, sole custody of Dominique Price.

Plaintiff and defendant lived together from approximately November 1985 until some time in 1989. The couple never married. A child, Dominique Price, was born to defendant on 10 June 1986, during the time plaintiff and defendant lived together in Durham, North Carolina. From the time of her birth, plaintiff held out the child as his

biological child and the child believed plaintiff was her biological father. Plaintiff and defendant separated during 1989, with defendant remaining in the Durham area, until the summer of 1991, when defendant moved to Eden, North Carolina. After the separation in 1989, plaintiff became an "equal caretaker" of the child and in some instances the "primary" caretaker. After defendant's 1991 move to Eden, Dominique remained with plaintiff in Durham. In 1992, plaintiff sought sole custody of the child, at which time defendant denied plaintiff was the child's biological father. A court-ordered paternity test excluded plaintiff as the father. At the request of plaintiff, joined in by defendant, the trial court appointed Kristi Olson (Olson) "to serve as Advocate for Dominique." The order of appointment granted Olson "standing to do any act consistent with representing the best interests of the child." She was to be notified of "all hearings, proceedings, interviews, depositions and the like, and shall have [the] right to be present at all these." Finally, Olson was directed to "report to the Court as necessary, with copies of written reports to the respective attorneys of the parties, as circumstances require."

On 29 March 1995 the trial court entered its final order in this action. In that order, the trial court concluded that although "both the Plaintiff and Defendant are fit and proper persons to exercise the exclusive care and custody of the minor child," "it is in the minor child's best interest that she be in the primary physical custody of the Plaintiff." Nonetheless, the trial court concluded that because there was no evidence defendant was unfit or had neglected the child and because, as the trial court implicitly found, plaintiff was not the biological father of the child, the ruling in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994) did not permit an award of custody to plaintiff. The trial court ordered that defendant be "awarded the exclusive care, custody and control of" the child.

On appeal plaintiff first alleges the trial court erred in finding defendant was a "fit and proper" person to care for the child and had not neglected the child because the findings were not supported by the evidence. The record, however, discloses ample evidence to support the trial court's findings and, accordingly, they are binding on appeal, *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

The question for resolution, therefore, is whether a custody dispute between a natural parent and a person who receives a minor child into his home and openly holds out that child as his biological

child is to be determined according to the "best interests of the child" standard.

In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901, our Supreme Court held "absent a finding that [natural] parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403-404, 445 S.E.2d at 905. *See also Lambert v. Riddick*, 120 N.C. App. 480, 482, 462 S.E.2d 835, 836 (1995); *Bivens v. Cottle*, 120 N.C. App. 467, 468, 462 S.E.2d 829, 830 (1995), *disc. review allowed*, 342 N.C. 651, 467 S.E.2d 704, *appeal retained and disc. review allowed*, 342 N.C. 651, 467 S.E.2d 898 (1996); *Speaks v. Fanek*, 122 N.C. App. 389, —, 470 S.E.2d 82, 83 (1996).

In the case before us, the evidence tends to show plaintiff and defendant were involved in an intimate relationship before and after the child's birth. During the course of their relationship, the unmarried couple lived together with the child. Because, absent a finding of unfitness or neglect, "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, the trial court did not err in awarding custody to defendant.

In plaintiff's final assignment of error, he argues the trial court erred in finding he must share in "all uninsured costs for [the child's] therapy . . . ." We agree and, accordingly, reverse that portion of the order. *See Boyd v. Boyd*, 81 N.C. App. 71, 77-78, 343 S.E.2d 581, 585-586 (1986) (support for minor children is a parental obligation).

Affirmed in part and reversed in part.

Judge JOHN concurs in the result with separate opinion.

Judge GREENE dissents.

Judge JOHN concurring in the result.

The circumstances of the case *sub judice* are compelling. Plaintiff has served as *de facto* father and either as primary caretaker or at a minimum equal caretaker of the minor child since her birth approximately nine years prior to trial, and the record reflects more than occasional indifference on the part of defendant to the welfare of the child. Indeed, the trial court in its order, after considering all

the evidence, observing the parties, and making its determination of their capabilities and the minor child's needs, concluded:

> 3. That it is in the minor child's best interest that she be in the primary physical custody of the Plaintiff, but that the ruling in *Peterson* [sic] *v. Rogers* does not allow this Court to make that award.

Like the trial court and the majority, however, I am constrained to agree we are bound by *Petersen* and therefore concur in the result reached in the majority opinion. *See Mabry v. Bowen*, 14 N.C. App. 646, 647, 188 S.E.2d 651, 652 (1972) ("[T]his Court does not have the authority to overrule decisions of the Supreme Court.").

Nonetheless, I note the strict rule of *Peterson* has been criticized as a rejection of the "best interests of the child" test. *See* Note, *Why the Best Interests Standard Should Survive Petersen v. Rogers*, 73 N.C. L. Rev. 2451 (1995). Further, both the dissent and this Court in the cases cited by the majority have attempted to clarify and distinguish the *Petersen* holding. The fact of a dissent herein affords our Supreme Court an opportunity to address *Petersen* in light of these developments. *See Henry v. Henry*, 29 N.C. App. 174, 175, 223 S.E.2d 564, 565, *aff'd*, 291 N.C. 156, 229 S.E.2d 158 (1976) ("wisdom of determining whether or when the effect of a prior decision of the Supreme Court shall be modified is a matter for exclusive determination by that Court").

Judge GREENE dissenting.

I disagree with the majority's determination that *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), requires that the trial court be affirmed because there has been no showing of unfitness on the part of the mother. I continue to believe that *Petersen* requires a showing of unfitness or neglect *only* when there is a dispute between a parent, who is living with the child in an intact family, and a third party, and in those situations where parents "have lost custody as a result of some unlawful action by a third party." *Lambert v. Riddick*, 120 N.C. App. 480, 484, 462 S.E.2d 835, 837 (1995) (Greene, J., dissenting). In those situations where the parent does not have custody of the child and seeks custody from a third party nonparent who has custody, an order must be entered awarding custody to such persons as "will best promote the interest and welfare of the child." N.C.G.S. § 50-13.2(a) (1995); *see also Lambert*, 120 N.C. App. at 484, 462 S.E.2d at 837 (Greene, J., dissenting).

In this case, the defendant, natural parent was not living with her child as an intact family and therefore she was not entitled to the *Petersen* parental preference. In other words, it was not necessary for the plaintiff to show that the defendant was unfit or had neglected the child. The custody should have been determined on the basis of the best interest of the child.

The custody determination in this case is also not governed by *Petersen* for another, more fundamental reason, which has not yet been addressed by this Court. In this case, although the plaintiff has no biological relationship with the child, "biological relationships are not [the] exclusive determination of the existence of a family." *Smith v. Organization of Foster Families*, 431 U.S. 816, 843, 53 L. Ed. 2d 14, 34 (1977). "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Id.* at 844, 53 L. Ed. 2d at 35. Here the plaintiff and the child were part of the same family for six years. He had taken the child into his home, with the consent of the mother, and held the child out to others as his biological child. Had the defendant attempted to release the child for adoption, she could not have done so without the plaintiff's consent. In North Carolina, the adoption of a child cannot proceed without the consent of "[a]ny man who may or may not be the biological father" of a minor child if that man has "received the minor into his home and openly held out the minor as his biological child." N.C.G.S. § 48-3-601(2)(b)(5) (1995); *see* N.C.G.S. § 48-3-603 (1995) (listing exceptions not applicable here).

Therefore, this plaintiff, although not the biological parent of the child, must not be treated like a third party nonparent within the meaning of *Petersen*. Within the meaning of *Petersen*, the plaintiff is more like a parent and thus the best interest test should be applied.[1] It is thus not necessary that the plaintiff show that the defendant was unfit or has neglected the child. I would reverse the order of the trial court and remand this matter to be decided using the best interest of the child analysis.

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1. It is not necessary to address, as the issue is not raised on these facts, what rights the plaintiff would have in a custody dispute with the defendant if another man were to be judicially determined to be the biological father of the child. *See* N.C.G.S. § 48-3-603(a)(2) (1995).

BRENDA McANINCH, EMPLOYEE-PLAINTIFF/APPELLEE v. BUNCOMBE COUNTY SCHOOLS, SELF-INSURED, (EDUCATOR BENEFITS SERVICES, INC., SERVICING AGENT), EMPLOYER-DEFENDANT/APPELLANT

No. COA95-508

(Filed 18 June 1996)

Workers' Compensation § 263 (NCI4th)— public school employee—method of calculating average weekly wages

A public school employee's "average weekly wages" pursuant to N.C.G.S. § 97-2(5) should be calculated by aggregating her wages from defendant employer with her wages earned from other employment during the summer vacation period, and dividing that sum by 52.

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

Appeal by defendant from an opinion and award entered 13 March 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 1996.

Plaintiff, Brenda R. McAninch, worked for defendant as a cafeteria worker for approximately eight years until 16 August 1990, when she suffered a compensable injury in the course of her employment. Plaintiff remains totally disabled as a result of this injury. Plaintiff's position as a cafeteria worker existed only while school was in regular session and plaintiff therefore worked only forty two weeks per year for defendant. Because her position did not employ her for the entire year, plaintiff had a choice of two different payment options. Plaintiff chose the first under which she received an average of $163.37 per week during the forty-two weeks that she worked, and then received no wages from defendant during the remaining ten weeks of the year. The second unchosen option would have allowed plaintiff to defer a portion of her earnings so that she would have received equal payment installments throughout the entire year.

On 3 October 1990, the parties entered into a Form 21 agreement for the payment of compensation at a rate of $108.91 per week based upon her average weekly wage of $163.37. This agreement provided for plaintiff to be compensated weekly at this rate so long as her disability continued. The Form 21 agreement was approved by the Industrial Commission on 16 October 1990. This rate of compensation reflected in the Form 21 agreement did not reflect any wages plaintiff

earned from other employment undertaken during the ten week summer vacation period that she was not working for defendant. On this issue, plaintiff testified that she earned an average of $150.00 per week performing painting, housekeeping and babysitting chores.

In light of plaintiff's employment period and her choice of compensation plans, defendant refused to pay plaintiff during the two month summer vacation period. In response, plaintiff filed a Form 33 request for a hearing, and the matter was heard before Deputy Commissioner Morgan S. Chapman on 19 May 1994. The Deputy Commissioner determined that plaintiff was entitled to compensation during the summer months, but that plaintiff's compensation rate must be adjusted so that her average weekly wage would reflect her annual salary spread out over fifty-two weeks instead of forty-two. Plaintiff appealed to the Full Commission, and the Full Commission reinstated plaintiff's original compensation rate as stated in the Form 21 agreement and also ordered that plaintiff be compensated at that rate during the summer months as well.

Defendant appeals.

Mraz & Dungan, by John A. Mraz, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson, Allen C. Smith and Jeffrey A. Doyle, for defendant-appellant.

EAGLES, Judge.

Defendant first argues that the Full Commission erred in calculating plaintiff's average weekly wages pursuant to G.S. 97-2(5). We agree. In this case we face the novel issue of whether a public school employee's "average weekly wages" should be calculated with or without regard to the ten week summer vacation period.

G.S. 97-2(5) defines average weekly wages and provides in pertinent part that:

> [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; [2] but if the injured employee lost more than seven consecutive calendar

days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] *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] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

[5] *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.*

G.S. 97-2(5) (1995) (emphasis added). As the bracketed numerals denote, this statute in essence provides a hierarchy of five general methods by which an injured employee's average weekly wages may be computed. We defer to the Commission's findings and conclusions, unless a finding of fact is unsupported by competent evidence or a conclusion of law is "predicated on an erroneous construction of the statute." *Liles v. Electric Co.*, 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956).

"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). In determining legislative intent, we "should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* The dominant intent of G.S. 97-2(5) "is that results fair and just to both parties be obtained." *Liles*, 244 N.C. at 660, 94 S.E.2d at 795-96.

In interpreting G.S. 97-2(5), defendants argue that our analysis is controlled by *Joyner v. A.J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966). In *Joyner*, the plaintiff sustained an injury by accident

while working as a part-time truck driver for defendant oil company. Plaintiff's position as a part-time truck driver was inherently intermittent; some weeks the job would provide steady work for plaintiff and some weeks the job was nonexistent. The Industrial Commission calculated plaintiff's average weekly wages based on the third method found in G.S. 97-2(5) which provides:

> Where the employment prior to the injury extended over a period of less than fifty-two 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.

The Supreme Court reversed, however, upon determining that the employment as a part-time truck driver was "in effect, one continuous employment for which we have a complete record during the 52 weeks preceding plaintiff's injury." *Joyner*, 266 N.C. at 522, 146 S.E.2d at 449-50. The Court held that fairness to the employer requires that consideration be given to "both peak and slack periods." *Id.*, 146 S.E.2d at 450.

Defendant argues that this holding is dispositive to our case as well. We are not persuaded, however, because we conclude that *Joyner* is factually distinct and must be distinguished. The *Joyner* Court's holding is entirely dependent upon its determination that plaintiff's employment could not be considered one with a "period of less that 52 weeks." G.S. 97-2(5). That plaintiff in *Joyner* may not have worked at all one week and then may have worked long hours the next bears no resemblance to the facts of our case. The dispositive distinction is that the plaintiff in *Joyner* was to be available to work during any week that his employer required his services, while plaintiff here has a predetermined period of less than 52 weeks that she is to be available, and a predetermined period where the job is guaranteed to be nonexistent.

No legal fiction can be created or payment plan devised that can alter the essential fact that plaintiff's employment here extends for a period of less than 52 weeks. That plaintiff could have elected to be compensated over twelve months rather than over the ten months that she actually worked is irrelevant because the twelve month plan is merely an agreement to defer the receipt of a part of her 42 weeks of compensation. To have a period of employment within the meaning of G.S. 97-2(5), not only must the employer have a continuing obliga-

tion to compensate the employee, but the employee must have a commensurate continuing obligation of performance to the employer. No such reciprocal obligation exists here during the ten week summer vacation period. Accordingly, we must first calculate plaintiff's average weekly wages pursuant to the third method in G.S. 97-2(5).

Performing this calculation pursuant to G.S. 97-2(5) yields an average weekly wage of $163.37. Having performed the prescribed statutory calculation, the only remaining inquiry is whether the results obtained are "fair and just to both parties." G.S. 97-2(5). If the results obtained are not, the fifth prescribed method of calculation must be used in order to achieve a more equitable result. *Wallace v. Music Shop*, 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971).

We conclude that the resulting average weekly wage of $163.37 obtained pursuant to the third calculation method is not fair and just to defendant. G.S. 97-2(5). Specifically, we reach this conclusion upon recognizing that plaintiff could receive a windfall if she were compensated at a rate that reflected wages greater than those she actually earned from her employment. The purpose of our Workers' Compensation Act is not to put the employee in a better position than she was in prior to the injury. Accordingly, we must now look to the fifth method of calculation which states:

> 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.

G.S. 97-2(5). As we have indicated, this method may only be utilized subsequent to a finding that the third method was applicable but would fail to produce results fair and just to both parties. *Wallace*, 11 N.C. App. at 331, 181 S.E.2d at 239.

Applying this fifth method of calculation, we conclude that the Commission erred in calculating plaintiff's average weekly wages. The language of the fifth calculation method creates no specific mathematical formula to be applied; instead it directs that the average weekly wage calculated must "most nearly approximate the amount which the injured employee would be earning were it not for the injury." G.S. 97-2(5). This calculation necessarily includes wages earned in employment other than that in which the employee was injured. *Holloway v. T.A. Mebane, Inc.*, 111 N.C. App. 194, 198, 431

S.E.2d 882, 884 (1993). As this court recognized in *Holloway*, the statutory language setting out the fifth calculation method

> could hardly be more clear: [T]he test is what the claimant would have earned if he had not been injured. . . . The statute does not refer to what he would have earned "in the same employment."
>
> Indeed, the whole point of having a catch-all clause is to prevent unfairness in just such situations as this. . . . [F]airness means approximating what the employee would have made if not injured.

Id. (quoting *Larson, Workmen's Compensation*, 60.31(c) (1993)). Consequently, we remand to the Industrial Commission for a determination of plaintiff's wages earned during the ten week summer vacation period. Plaintiff's average weekly wage must then be calculated by aggregating plaintiff's wages from defendant-employer with her wages earned during the ten week summer vacation period and dividing that sum by 52.

This result is the most "fair and equitable" to both parties and most fulfills the goal "of the average weekly wage basis for compensation, which is to 'measure . . . the injured employee's earning capacity.' " *Holloway*, 111 N.C. App. at 198, 431 S.E.2d at 884 (quoting *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 197, 347 S.E.2d 814, 817 (1986)). Under the fifth calculation method

> fairness to the employee and fairness to the employer-carrier are not symmetrical, and cannot be judged by the same standards. . . . The rule operates impartially in both directions. Today this employer-carrier may be saddled with a slight extra cost; tomorrow the positions may be reversed . . . .

Holloway, 111 N.C. App. at 199, 431 S.E.2d at 885 (quoting *Larson, Workmen's Compensation*, 60.31(c) (1993)).

We note that defendants call to our attention two cases from other jurisdictions interpreting their workers' compensation laws as defendant contends we should interpret ours. *Herbst's Case*, 416 Mass. 648, 624 N.E.2d 564 (1993); *Duran v. Albuquerque Public Schools*, 105 N.M. 297, 731 P.2d 1341 (1986), *cert. denied*, 105 N.M. 290, 731 P.2d 1334 (1987). Those cases are not persuasive under the language of our current statute. The different results reached in those cases reflect the differences between our North Carolina workers' compensation statute and the respective workers' compensation

statutes of those two states. We need not address defendants' remaining assignments of error.

Reversed and remanded.

Judges JOHN and WALKER concur.

STEPHEN MOORE BROWER, PETITIONER-APPELLEE v. ALEXANDER KILLENS, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT-APPELLANT

No. COA95-1015

(Filed 18 June 1996)

Judgments § 237 (NCI4th)— criminal DWI case dismissed—subsequent automatic license revocation hearing—existence of probable cause to arrest for DWI—DMV collaterally estopped from relitigating issue

In this action for *de novo* review of petitioner's automatic license revocation based on his refusal to submit to chemical analysis of his breath, respondent DMV was collaterally estopped from relitigating the existence of probable cause to arrest petitioner for driving while impaired, since the trial court in a criminal prosecution of petitioner for DWI concluded that the trooper had insufficient probable cause to arrest petitioner; petitioner in this case was defendant in that case; and DMV in this case was in privity with the prosecution in the criminal case, as the State instituted both the civil hearing and the criminal prosecution, and the State represented the same interest in both actions—that of the citizens of North Carolina in maintaining safe roadways.

Am Jur 2d, Judgments § 698.

Appeal by respondent from order signed 22 June 1995 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 23 April 1996.

Attorney General Michael F. Easley, by Associate Attorney General Sondra C. Panico, for respondent-appellant.

Smith, Follin & James, L.L.P. by Seth R. Cohen, and Charles A. Lloyd for petitioner-appellee.

MARTIN, Mark D., Judge.

Respondent Alexander Killens[1], Commissioner of the North Carolina Division of Motor Vehicles (DMV), appeals from order of the trial court finding DMV was collaterally estopped from litigating the existence of probable cause to arrest petitioner Stephen Brower (Brower).

On 10 February 1994 Brower was stopped by Trooper R.D. Mendenhall while traveling on Interstate 40 in Guilford County and subsequently arrested for operating his vehicle under the influence of an impairing substance. Trooper Mendenhall offered Brower the opportunity to submit to chemical analysis of his breath. Brower was marked as having refused such analysis.

As a result of the alleged refusal, DMV revoked Brower's license. Brower requested, and received, an administrative hearing to contest the automatic license revocation. By letter dated 24 June 1994, the revocation was upheld. On 30 June 1994 Brower instituted the present action for *de novo* review of the revocation (case II).

In September 1994 the criminal case against Brower for driving while impaired was called in Guilford County District Court (case I). At trial Brower challenged his arrest for lack of probable cause. After a full hearing, the trial court, by order issued 14 September 1994, concluded Trooper Mendenhall had insufficient probable cause to arrest Brower. The trial court suppressed the tainted evidence and granted Brower's motion to dismiss.

On 20 October 1994 Brower amended his complaint in case II to assert collateral estoppel as an affirmative defense to the license revocation. By order filed 23 June 1995 the trial court concluded DMV was estopped from relitigating whether or not Trooper Mendenhall had probable cause to arrest Brower for driving while impaired.

On appeal DMV contends the trial court erred by: (1) concluding DMV was collaterally estopped from relitigating the probable cause issue; and (2) signing an invalid order.

I.

We first consider whether DMV is collaterally estopped from relitigating the existence of probable cause to arrest Brower for driving while impaired.

1. Effective 29 April 1996, Alexander Killens resigned as Commissioner of DMV. At present, Frederick Aikens is the Acting Commissioner.

"The doctrine of collateral estoppel provides that a party will be estopped from relitigating an issue where 1) the issue has been necessarily determined previously and 2) the parties to that prior action are identical to, or in privity with, the parties in the instant action." *State v. O'Rourke*, 114 N.C. App. 435, 439, 442 S.E.2d 137, 139 (1994). In the present case, the lack of probable cause to arrest was clearly established in case I; and Brower was the defendant in both case I and case II. Further, to sustain Brower's license revocation, DMV must establish Trooper Mendenhall had reasonable grounds to believe Brower was driving while impaired, *see* N.C. Gen. Stat. § 20-16.2(d)(2) (1993), which is "substantially equivalent" to a probable cause determination, *see In re Gardner*, 39 N.C. App. 567, 571, 251 S.E.2d 723, 726 (1979) (" 'Probable cause and "reasonable ground to believe" are substantially equivalent terms.' " (*quoting State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971))). It follows therefore that our consideration of the collateral estoppel issue is necessarily limited to whether DMV in case II is in privity with the prosecution in case I.

Privity exists where one party is "so identified in interest with another that [it] represents the same legal right [as the other]." *County of Rutherford ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 76, 394 S.E.2d 263, 266 (1990) (*quoting* 46 AM. JUR. 2D *Judgments* § 532 (1969)). "Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts . . . ." *Id.* Indeed, the doctrine of issue preclusion should operate to bar relitigation of an issue only where the instant party was "fully protected" in the earlier proceeding. *Id.*

DMV argues this Court's decision in *State v. O'Rourke*, 114 N.C. App. 435, 442 S.E.2d 137 (1994), is dispositive of the present case. In *O'Rourke* this Court considered whether the State was collaterally estopped from introducing evidence of the defendant's refusal to submit to a blood alcohol test because DMV had previously concluded defendant did not willfully refuse the test. *Id.* at 439, 442 S.E.2d at 139. The *O'Rourke* Court held the District Attorney was not collaterally estopped from introducing the challenged evidence because, even assuming the willful refusal issue was resolved by DMV, the District Attorney and DMV were not in privity. *Id.* at 439-440, 442 S.E.2d at 139.

The *O'Rourke* Court focused on two factors in concluding the District Attorney and DMV were not in privity. First, the criminal pro-

ceeding directed by the District Attorney and the civil licensing hearing controlled by DMV protect different interests. *Id.* at 440, 442 S.E.2d at 139. Second, "the District Attorney had no role in the administrative proceeding and, therefore, was not 'fully protected' in that proceeding." *Id.*

Subsequent to this Court's decision in *O'Rourke*, however, our Supreme Court clarified that it was actually the people of North Carolina, rather than District Attorneys, who are the real parties in interest in criminal prosecutions. *Simeon v. Hardin*, 339 N.C. 358, 368, 451 S.E.2d 858, 865 (1994) (*citing* N.C. Const. art. IV, § 13(1)). Therefore, as DMV is also a servant of the people, *see* N.C. Const. art. I, § 2 ("All political power is vested in and derived from the people; all government . . . is instituted solely for the good of the whole"), we conclude the district attorney and DMV actually represent the same interest in driving while impaired cases—that of the citizens of North Carolina in prohibiting individuals who drive under the influence of intoxicating substances from using their roads. *See Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 226, 239, 182 S.E.2d 553, 562 (1971) (license revocation statute is designed to promote breathalyzer examinations which supply evidence directly related to state's enforcement of motor vehicle laws).

Nevertheless, we remain bound by the *O'Rourke* Court's admonition, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989), that "the District Attorney [has] no role in the administrative proceeding and, therefore, [is] not 'fully protected' [therein]." *O'Rourke*, 114 N.C. App. at 440, 442 S.E.2d at 139. *See also Whitener*, 100 N.C. App. at 76-77, 394 S.E.2d at 266 (collateral estoppel applies only if interest of instant party is fully protected in previous proceeding). Consequently, under *O'Rourke* and *Whitener*, we recognize the District Attorney is not collaterally estopped from relitigating issues previously determined in license revocation proceedings.

The present case, however, does not implicate the same concerns of non-representation as *O'Rourke* because the District Attorney's office was necessarily involved from the inception of the criminal case against Brower. Therefore, we believe our Supreme Court's decision in *State v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984), rather than this Court's opinion in *O'Rourke*, is dispositive of the present case.

In *Lewis*, the State, through its New Bern Child Support Agency, filed a civil proceeding against defendant seeking indemnification for public assistance it rendered two of defendant's minor children. *Id.* at

728, 319 S.E.2d at 147. Defendant, in his answer, alleged he was not the father of the children. *Id.* Noting defendant was adjudicated the natural father of the children in a prior criminal action also instituted by the State, the trial court concluded defendant was estopped from denying paternity. *Id.* at 728-729, 319 S.E.2d at 147.

The Supreme Court, affirming the trial court, stated, "[d]efendant . . . contends that the state in this [civil] action is not identical to or in privity with the state in the prior criminal action. We find this argument feckless." *Id.* at 732, 319 S.E.2d at 149. In reaching its holding, the *Lewis* Court recognized the State instituted both the criminal and civil proceeding; the State "was not a nominal party" in either action; and the State pursued the same interest in both cases—having parents financially support their children. *Id.*

Likewise, in the present case, the State instituted both the criminal prosecution for driving while impaired and the civil license revocation hearing. The State represented the same interest in both actions—that of the citizens of North Carolina in maintaining safe roadways. *See Joyner*, 279 N.C. at 239, 182 S.E.2d at 562. Further, we note the District Attorney, acting as the legal representative of the citizens of North Carolina, was actively involved in the probable cause determination in case I. Therefore, under *Lewis*, *Whitener*, *Simeon*, and *Joyner*, we conclude DMV in case II is in privity with the State in case I.

Our holding is a narrow one. Indeed, by finding privity in the present case, we do not imply DMV is collaterally estopped from relitigating any other issue previously determined in a criminal trial for driving while impaired. Such an expansive rule would ignore our Supreme Court's admonition that:

> the same motor vehicle operation may give rise to two separate and distinct proceedings. One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other, and the outcome of one action is of no consequence to the other.

Joyner, 279 N.C. at 238, 182 S.E.2d at 562 (*quoting Ziemba v. Johns*, 163 N.W.2d 780, 781 (Neb. 1968)). Rather, our decision is necessarily limited to collaterally estopping DMV from relitigating the probable

cause determination—the precise inquiry adjudicated by the district court in case I.

We believe, by limiting our holding to probable cause determinations, our decision remains faithful to the Supreme Court's recognition of the fundamental difference between criminal prosecutions and civil license revocation proceedings. *See Id. See also State v. Chandler*, 100 N.C. App. 706, 711, 398 S.E.2d 337, 340 (1990) (State must establish every element of a criminal charge beyond a reasonable doubt); *Wyatt v. Coach Co.*, 229 N.C. 340, 342, 49 S.E.2d 650, 652 (1948) (burden of proof in ordinary civil actions is preponderance of the evidence). This is true because there is no legal distinction between probable cause to arrest in a criminal proceeding and "reasonable ground to believe" that the accused was driving while impaired in a license revocation hearing. *See Gardner*, 39 N.C. App. at 571, 251 S.E.2d at 726 (*quoting Harris*, 279 N.C. at 311, 182 S.E.2d at 367) (" 'Probable cause and "reasonable ground to believe" are substantially equivalent terms.' "). *See also Montgomery v. N.C. Dept. of Motor Vehicles*, 455 F. Supp. 338, 342-343 (W.D.N.C. 1978) (upholding the constitutionality of automatic license revocation statute because officer must have probable cause to arrest), *aff'd*, 599 F.2d 1048 (4th Cir. 1979). Put simply, the quantum of proof necessary to establish probable cause to arrest in criminal driving while impaired cases and civil license revocation proceedings, notwithstanding the different burdens on the remaining elements, is virtually identical. Therefore, we can discern no rational reason to allow DMV to relitigate the probable cause determination from case I.

Accordingly, we affirm the trial court's order collaterally estopping DMV from relitigating whether or not Trooper Mendenhall had probable cause to arrest Brower.

II.

Finally, DMV contends the trial court's order is invalid because it does not contain a judgment.

It is well settled that when, as here, the contested order is "defective because it did not contain [an appropriate judgment] . . . [t]he remedy to correct this deficiency . . . is not a new trial, but rather a remand for entry of a proper judgment." *Pitts v. Broyhill*, 88 N.C. App. 651, 658, 364 S.E.2d 738, 743 (1988). See also N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1990) ("In all actions tried upon the facts without a jury . . . the court shall find the *facts* specially and state sepa-

rately its *conclusions* of law thereon and direct the entry of the *appropriate judgment.*") (emphasis added).

Accordingly, under *Pitts*, we remand this case to the trial court for entry of an order consistent with this opinion which satisfies the strictures of N.C.R. Civ. P. 52(a)(1).

Affirmed and remanded.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. LEE ANDREW SANDERS, DEFENDANT

No. COA95-776

(Filed 18 June 1996)

1. Evidence and Witnesses § 1240 (NCI4th)— defendant not in custody—voluntariness of statement

The trial court's findings were sufficient to support a conclusion that a reasonable person in defendant's position would not have believed himself to be in custody and his statement to officers was voluntary where the court found that defendant agreed to accompany detectives to the police station as requested; the interview room had doors for privacy but no locks; two detectives were in the room with defendant for the two-hour interview and were joined by a third officer for a brief time; defendant was never threatened or promised that he would not be prosecuted or would obtain a lesser sentence by cooperating with police; defendant was allowed to relieve himself upon request and was allowed a 20-minute break outside the interview room to smoke a cigarette; defendant was told he was free to leave and could call his wife later; defendant was confronted with physical evidence found at the crime scene, which was true, and was told that the victim had identified him, which was not true; and defendant admitted robbing and beating the victim but consistently denied that he had used a weapon.

Am Jur 2d, Criminal Law §§ 749, 750; Evidence §§ 788 et seq.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona* requiring that suspect be informed

of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

2. Appeal and Error § 155 (NCI4th)— trial court's declaration of mistrial ex mero motu—failure of defendant to object—issue not preserved for review

Where defendant raised no objection to the trial court's declaration of mistrial, even though the judge gave notice of his decision to declare a mistrial on his own motion, and there was ample opportunity for defendant to object to this decision, defendant failed to preserve this issue for appellate review.

Am Jur 2d, Appellate Review §§ 186, 614.

Appeal by defendant from judgment entered 14 March 1995 by Judge Wiley F. Bowen in Wake County Superior Court. Heard in the Court of Appeals 25 March 1996.

Attorney General Michael F. Easley, by Associate Attorney General James T. Johnson, for the State.

David S. Brannon for defendant-appellant.

MARTIN, John C., Judge.

On 22 August 1994, defendant was indicted by the Wake County grand jury for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. Both offenses were alleged to have occurred on 6 August and to have been committed against Alfonza Batten. Defendant entered pleas of not guilty and filed a pretrial motion to suppress evidence of an inculpatory statement made to Raleigh police officers.

The motion to suppress was heard by Judge Henry W. Hight, Jr., on 17 October 1994. Judge Hight made findings of fact, concluded defendant was not in custody at the time he made the statement and that his statement was voluntary, and denied the motion to suppress.

Defendant's trial commenced on 31 October 1994 before Judge A. Leon Stanback. On 3 November 1994, while the jury was deliberating, Judge Stanback declared a mistrial *ex mero motu*. The mistrial order stated "Court finds that procedure errors were made during course of trial therefore with [sic] withdrew juror # 1, and on Court [sic] own Motion declared Mis-trial [sic]."

On 8 November 1994, the grand jury returned superseding bills of indictment. Defendant subsequently moved to dismiss the indictments on double jeopardy grounds, alleging that Judge Stanback had not followed the requirements of G.S. § 15A-1064 when declaring the mistrial in that he made no findings of fact as to the grounds for declaring the mistrial before doing so. Defendant's motion to dismiss was heard on 9 February 1995 by Judge Stanback, who denied the motion and entered a second written order of mistrial in which he made findings of fact as to the grounds upon which he had earlier declared the mistrial.

The case was tried before Judge Wiley Bowen commencing 13 March 1995. Prior to trial, defendant renewed his earlier motion to dismiss and motion to suppress. Judge Bowen denied both motions. The jury returned verdicts finding defendant guilty of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. Defendant appeals from judgments entered upon the verdicts.

Defendant appeals from the trial court's denial of his motions: (1) to suppress the evidence of his inculpatory statement; and (2) to dismiss on grounds of former jeopardy. We reject defendant's arguments and find no error.

I.

[1] First, defendant assigns error to the denial of his motion to suppress. He argues the totality of the circumstances show he was in police custody at the time he made the statement, that he was not warned of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and, therefore, his statement was inadmissible as evidence against him.

The criterion for determining police custody "is an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992) (citing *Oregon v. Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714 (1977); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985)). The test is, after examining all of the circumstances surrounding the interrogation, "whether a reasonable person in the suspect's position would feel free to leave at will or compelled to stay." *State v. Mahaley*, 332 N.C. 583, 591, 423 S.E.2d 58, 63 (1992). *See also Stansbury v. California*, 511 U.S. —, —, 128 L. Ed. 2d

293, 298 (1994) ("[T]he ultimate inquiry [in determining custody] is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (citations omitted)). "[The] objective test must necessarily be applied on a case-by-case basis, taking into account the facts and circumstances surrounding each case." *Mahaley*, 332 N.C. 583, 591, 423 S.E.2d 58, 63.

In this case, the trial court found, *inter alia*, that defendant agreed to accompany the detectives to the police station as requested; that the interview room had doors for privacy but no locks on the doors; that two detectives were in the interview room with defendant during the entire period of the interview, which lasted approximately two hours, and were joined by a third officer for a brief time; that defendant was never threatened or promised that he would not be prosecuted or obtain a lesser sentence by cooperating with police; that defendant was allowed to relieve himself upon request; that defendant was allowed a twenty minute break outside the interview room to smoke a cigarette; that defendant was told he was free to leave; that defendant asked to call his wife and was told he could do so later; that defendant was confronted with physical evidence that was found at the crime scene, which was true, and was told that the victim had identified him as the person who beat and robbed him, which was not true; and that defendant admitted robbing and beating the victim but consistently denied that he had used a weapon.

A trial court's findings of fact after a *voir dire* hearing as to the admissibility of a defendant's statements are conclusive and binding on appeal when supported by competent evidence. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). The trial court's findings are amply supported by the evidentiary record in this case and are clearly sufficient to support a conclusion that a reasonable person in defendant's position would not have believed himself to be "in custody" for *Miranda* purposes, and that defendant's statement was voluntary. Defendant's first assignment of error is overruled.

II.

[2] During the jury deliberations at defendant's first trial Judge Stanback, apparently concerned that he had committed error with respect to certain rulings in connection with the bills of indictment, advised counsel, in the absence of the jury, as follows:

COURT: All right. Gentleman [sic], in reviewing the occurrences and the unusual nature of things that have happened in this trial, the Court is of the opinion that certain errors may have been made and I am going to on my own motion declare a mistrial in this case. I have received another question from the jury and it appears to the Court that they have been confused by the nature of the proceedings and I am going to declare a mistrial on my own motion.

All right, bring the jury out please.

[JURY RETURNS TO JURY BOX.]

COURT: All right. Ladies and gentlemen of the jury, the Court has considered the occurrences that have taken place during the course of this trial and in the light of certain things that have happened, the Court is of the opinion that certain errors may have been committed in this trial. I am going to on my own motion declare a mistrial in this case . . . .

By his second and third assignments of error, defendant contends Judge Stanback erred when he declared the mistrial without following the requirements of G.S. § 15A-1064, and that such error entitles defendant to a dismissal of the charges on grounds of former jeopardy. Though the judge's failure to comply with the statute was error, the error does not entitle defendant to the relief he seeks.

"It has long been a fundamental principle of the common law of North Carolina that no person can be twice put in jeopardy of life or limb for the same offense." *State v. Lachat*, 317 N.C. 73, 82, 343 S.E.2d 872, 876 (1986). *See* U.S. Const. amend. V; N.C. Const. art. I, §19. "However, the principle is not violated where a defendant's first trial ends with a mistrial which is declared for a manifest necessity or to serve the ends of public justice." *Lachat*, 317 N.C. at 82, 343 S.E.2d at 877.

Before granting a mistrial, G.S. § 15A-1064 requires a judge to "make finding [sic] of facts with respect to the grounds for the mistrial and insert the findings in the record of the case." N.C. Gen. Stat. § 15A-1064 (1988). *See also State v. Odom*, 316 N.C. 306, 311, 341 S.E.2d 332, 335 (1986) ("The making of findings sufficient to support the judge's decision to grant a mistrial is . . . mandatory, and the failure to make such findings would be error."). The purpose of this section is "to ensure that mistrial is declared only where there exists real necessity for such an order," and to protect the accused from "arbi-

trary judicial action." *State v. Jones*, 67 N.C. App. 377, 382, 313 S.E.2d 808, 812 (1984). If the required findings are not made, and "a mistrial is improperly entered *over defendant's objection*, a plea of former jeopardy or a motion to dismiss must be granted." *Id.* at 387, 313 S.E.2d at 815 (emphasis added).

In the present case, the trial judge did not make the requisite findings of fact before granting a mistrial, and the court's subsequent findings do not remedy this omission. *Id.* at 385, 313 S.E.2d at 814 ("Findings must be made *before* the declaration to ensure full deliberation; the creation of a record subsequently is no substitute . . ."). Nevertheless, though G.S. § 15A-1064 is mandatory in nature, our Supreme Court has held that the statute does not relieve a defendant from the responsibility of objecting at trial to preserve error for appellate review, *Odom*, 316 N.C. at 311, 341 S.E.2d at 335; *see also Lachat*, 317 N.C. at 85, 343 S.E.2d at 878 holding that "a defendant is not entitled by reason of former jeopardy to dismissal of the charge against him, where he failed to object to the trial court's termination of his first trial by a declaration of mistrial," so long as the defendant was given notice and opportunity to object before the mistrial was declared. *Lachat*, 317 N.C. at 86, 341 S.E.2d at 879.

Here, the record discloses no objection by defendant to Judge Stanback's declaration of mistrial even though, as indicated above, Judge Stanback gave notice of his decision to declare a mistrial on his own motion, and there was ample opportunity for defendant to object to this decision while the jury was being returned to the courtroom. Accordingly, defendant has failed to preserve this issue for appellate review as required by Rule 10(b) of the North Carolina Rules of Appellate Procedure. *State v. Odom*, 316 N.C. 306, 341 S.E.2d 332.

No error.

Chief Judge ARNOLD and Judge SMITH concur.

GARDNER v. HARRISS

[122 N.C. App. 697 (1996)]

ANNETTE M. GARDNER, PLAINTIFF v. ROBERT C. HARRISS AND THOMAS HARRISS D/B/A SATELLITE ATLANTIC TV, DEFENDANTS

No. COA95-984

(Filed 18 June 1996)

Discovery and Depositions § 67 (NCI4th)— failure to comply with discovery—remittitur inappropriate sanction

In an action to recover for injuries sustained by plaintiff when she slipped and fell on defendants' premises, the trial court properly recognized that defendants were prejudiced by plaintiff's failure to comply with discovery; however, the trial court abused its discretion when it decided to remit a portion of the verdict rather than granting defendants' motion for a new trial.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

Judge WYNN concurring.

Appeal by both parties from judgment entered 16 February 1995 and signed by consent out of session 20 March 1995 by Judge Donald W. Stephens in Chatham County Superior Court. Heard in the Court of Appeals 24 April 1996.

Mark T. Sheridan for plaintiff-appellee.

Alexander & Miller, P.A., by Sydenham B. Alexander, Jr. and Stephen B. Miller, for defendants-appellants.

WALKER, Judge.

Defendants Robert C. Harriss and Thomas Harriss own and operate Satellite Atlantic TV, a company that manufactures and sells satellite equipment. Robert C. Harriss and his wife own the property on which the company is located. In April 1986, plaintiff was hired by the company to work as an office manager. Plaintiff alleges that on 27 January 1989, she slipped and fell on the company's warehouse floor because of a spill near the pipe cutting machinery. On 14 October 1993, plaintiff instituted this negligence action for back injuries she sustained as a result of the slip and fall. In response, defendants denied liability for plaintiff's injuries.

Prior to trial the defendants made several discovery requests. Defendants filed the first motion to compel when plaintiff failed to

respond to a set of interrogatories and a request for the production of documents. The trial court granted such motion and ordered plaintiff to comply with defendants' discovery request within 30 days. While plaintiff did respond, defendants contend that the answers were incomplete and lacked verification. Thereafter, defendants filed a second motion to compel discovery and impose sanctions. The trial court ordered plaintiff to comply with defendants' discovery requests and to pay $500.00 in sanctions. Defendants contend that plaintiff's responses remained incomplete.

On the first day of trial, newly discovered evidence revealed that plaintiff failed to disclose information that she had received treatment for a prior back injury resulting from an automobile accident. For this reason, defendants moved to exclude portions of plaintiff's case which they argued unfairly prejudiced them, which motion was denied.

Plaintiff offered the videotaped testimony of Dr. Stephen Montgomery who opined that plaintiff suffered from degenerative disc disease which was caused by her fall at the warehouse. Dr. Montgomery based his opinion in large part on the absence of any prior related back injuries. At the conclusion of plaintiff's evidence, defendants made a motion for directed verdict. The court granted the motion only with respect to the owners of the premises.

Subsequently, during its deliberations, the jury requested to view certain photographs of the warehouse, specifically plaintiff's exhibits 2-7. Over the defendants' objection, the jury was permitted to view this evidence in the jury room. The jury returned a verdict in favor of the plaintiff on the issues of negligence and contributory negligence and awarded plaintiff $25,000 in damages.

Defendants then moved for a judgment notwithstanding the verdict and a new trial, which motions were denied. In lieu of granting a new trial, the court remitted $17,000 of the verdict as sanctions for plaintiff's earlier discovery violations.

We first address defendants' argument that the trial court erred in determining appropriate sanctions for plaintiff's willful failure to comply with discovery. Specifically, defendants argue that the trial court abused its discretion in deciding to remit a portion of the verdict in lieu of granting a new trial because of plaintiff's failure to comply with discovery.

It is well established that the trial courts in this State have no authority to grant remittitur without the consent of the prevailing party. *Pittman v. Nationwide Mutual Fire Ins. Co.*, 79 N.C. App. 431, 434, 339 S.E.2d 441, 444, *disc. review denied*, 316 N.C. 733, 345 S.E.2d 391 (1986). While plaintiff did not consent to the remittitur, she now argues that the trial court did not abuse its discretion by failing to order a more severe sanction.

Rule 37 grants the trial judge discretion to impose sanctions upon a party for failure to comply with discovery processes. *Willoughby v. Wilkins*, 65 N.C. App. 626, 643, 310 S.E.2d 90, 101 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 698 (1984). According to this rule:

> If a party . . . fails . . . (iii) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule.

N.C. Gen. Stat. § 1A-1, Rule 37(d)(iii) (1990).

Remittitur is not, however, an enumerated sanction provided under Rule 37. While the sanction provisions permit the imposition of non-enumerated sanctions, the choice of sanctions must be "just" under the circumstances of each case. *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992). Further, the

> "[i]mposition of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default, are examined in the light of *the general purpose of the Rules to encourage trial on the merits*."

Imports Inc. v. Credit Union, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978) (*quoting* 4A *Moore's Federal Practice*, §§ 37.08 at 37-112, 113) (emphasis added).

In the present case, the plaintiff's failure to reveal information concerning prior back injuries resulted in defendants being disadvantaged as such information was crucial to the question of causation. Furthermore, Dr. Montgomery relied heavily on the absence

of any prior back condition when forming his opinion that plaintiff's injury was work-related. Plaintiff's failure to comply with discovery requests prevented defendants from adequately challenging this testimony.

The trial court recognized that defendants were prejudiced by plaintiff's failure to comply with discovery. However, rather than granting plaintiff's motion for a new trial based on newly discovered evidence pursuant to Rule 59, the trial court attempted to effect a remedy by ordering a remittitur. Such a remedy did not ensure a trial on the merits and was not "just" under the circumstances of this case. Therefore, the trial court abused its discretion when it decided to remit a portion of the verdict rather than granting defendants' motion for a new trial. Accordingly, we reverse the trial court's decision and remand the case for a new trial.

Defendant also argues that the trial court erred by allowing the jury to view photographs of the warehouse, admitted into evidence for illustrative purposes, in the jury room over the defendants' objection. It is well established in this State that it is error to permit the jury to view exhibits in the jury room absent the parties' express consent. *State v. Stephenson*, 218 N.C. 258, 265, 10 S.E.2d 819, 824 (1940); *Doby v. Fowler*, 49 N.C. App. 162, 163, 270 S.E.2d 532-533 (1980).

However, this Court has held that the complaining party is not entitled to a new trial absent a showing that the error was prejudicial. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 528, 361 S.E.2d 909, 919 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). This rule is entirely consistent with N.C. Gen. Stat. § 1A-1, Rule 61, which provides that an error may not be the basis for awarding a new trial unless it amounts to the denial of a substantial right. N.C. Gen. Stat. § 1A-1, Rule 61 (1990). In this case, however, we need not decide whether the defendant was prejudiced by the fact that the jury was permitted to view the photographs in the jury room, since we have already determined that the defendant is entitled to a new trial and this error is not likely to occur at retrial.

New trial.

Judge JOHNSON concurs.

Judge WYNN concurs in a separate opinion.

Judge WYNN concurring.

I agree with the majority that a new trial is warranted in this case but on different grounds.

In the case *sub judice*, the plaintiff introduced photographs to assist her in describing her pathway through the warehouse. The trial judge limited their admissibility to illustrative purposes in the absence of authenticating testimony. Later, the trial court permitted the jury to view the photographic evidence in the jury room over the defendant's objection. This was error.

Our Supreme Court has held that without the consent of parties, it is error to permit the jury to take evidence into the jury room. *State v. Stephenson*, 218 N.C. 258, 10 S.E.2d 819 (1940). Juries are believed to be impartial when they base their verdict solely on what they see and hear in court. *State v. Caldwell*, 181 N.C. 519, 106 S.E. 139 (1921). Allowing them to conduct a private investigation, thereby making inferences contrary to those made in court, denies counsel an opportunity to reply to the improper inferences. *Doby v. Fowler*, 49 N.C. App. 162, 270 S.E.2d 532 (1980). Moreover, it is well established that it is error to allow jury room viewing of exhibits not received into evidence. *Collins v. Ogburn Realty Co., Inc.*, 49 N.C. App. 316, 271 S.E.2d 512 (1980) (holding that the trial court committed error by permitting the jury to retain exhibits which have been marked but not admitted).

In the instant case, Satellite objected to the jury's request to view the photographic exhibits in the jury room because of the strong possibility that a private viewing of unauthenticated exhibits would have an effect on the jury's impartiality. At trial, plaintiff neither testified as to the accuracy of the photographs nor to whether significant changes had occurred between the time of the incident and the time the photographs were made. As such, the trial court limited their admissibility to *illustrative purposes only.*

Because of the consent rule and the nature of the evidence in the case before us, I would award a new trial.

GARRISON v. CONNOR

[122 N.C. App. 702 (1996)]

EDWARD L. GARRISON, DIRECTOR, PITT COUNTY DEPARTMENT OF SOCIAL SERVICES, EX REL. LOIS ANN WILLIAMS, PLAINTIFF v. PAUL CONNOR, JR., DEFENDANT

No. COA95-610

(Filed 18 June 1996)

Divorce and Separation § 431 (NCI4th)— child support—15% presumption—showing of changed circumstances by other means not required

The presumption allowing modification of a child support order which is at least three years old when there is a disparity of 15% or more between the amount of support payable under the original order and the amount owed under the Child Support Guidelines based on the parties' current income and expenses in the Revised 1994 Child Support Guidelines was intended to eliminate the necessity that the moving party show change of circumstances by other means when he or she has presented evidence which satisfies the requirements of the presumption. The creation of this presumption is within the scope of the Conference of Chief District Judges' legislative mandate to ensure that application of the Guidelines results in adequate child support awards and is consistent with the requirements of the Family Support Act.

Am Jur 2d, Divorce and Separation §§ 1018-1021, 1078, 1079.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments. 89 ALR2d 7.

Appeal by defendant from order entered 17 February 1995 by Judge David A. Leech in Pitt County District Court. Heard in the Court of Appeals 27 February 1996.

Pitt County Legal Department, by Associate County Attorney Pamela Weaver Best and Staff Attorney Amy K. Cooney; and R. Erika Churchill; for plaintiff-appellee.

W. Gregory Duke for defendant-appellant.

WALKER, Judge.

Plaintiff and defendant are the biological parents of twin sons born 20 April 1982. On 3 April 1985, defendant entered into a voluntary support agreement and order in which he agreed to pay plaintiff $25.00 per week in child support. On 3 October 1994, plaintiff filed a motion to increase the amount of child support in the original order. As grounds for her motion, plaintiff stated:

> 3. Upon information and belief, it is alleged the Defendant now has an income of $1,993.18, which is a substantial increase in income from the date of the [original] order . . . .
>
> 4. At the time this action was instituted, the reasonable expenses necessary to meet the needs of the minor child(ren) . . . were much less than they are at the present time. The reasonable expenses for the health, education, maintenance and welfare of the minor child(ren) . . . exceed $465.22.
>
> 5. There has been a substantial change of circumstances warranting an increase in the amount of the defendant's child support obligation.

In addition to a monetary increase, plaintiff requested that defendant be required "to add the minor child(ren) . . . as beneficiary(ies) to any health insurance policy provided to the Defendant by his employer, if such addition can be done at a reasonable cost to the Defendant" and "to pay one-half of all uninsured medical bills of the minor children, for as long as Defendant is required to pay child support."

Following a hearing at which both parties were present and represented by counsel, the trial court entered an order finding as follows:

> 4. When the Order of child support . . . was entered herein, the Defendant had an income that was less than it is at this time. At the present time, the Defendant earns a gross monthly salary of $1,993.18 through his employment . . . .
>
> 5. The Defendant testified that he did not remember how much he earned in 1985 but that he has had salary increases since that time.
>
> . . .
>
> 7. There has been a substantial change of circumstances warranting an increase in the amount of Defendant's child support

> obligation based on the fact that the Order is more than three (3) years old and the amount of child support owed under the new guidelines is more than a 15% increase over the original order.

Based on these findings, the court concluded as a matter of law that there had been a substantial change of circumstances warranting an increase in defendant's child support obligation and ordered that defendant's child support obligation be increased to $490.00 per month beginning 1 January 1995. The court also ordered defendant to add the minor children to his health insurance policy if such could be done "at no extra cost" to defendant. However, the court did not order that defendant be responsible for any portion of uninsured medical expenses incurred on behalf of the minor children.

An order for support of a minor child may be modified at any time upon a showing by the moving party of changed circumstances. N.C. Gen. Stat. § 50-13.7 (1995). It is evident from Finding of Fact 7 of the court's order that in finding a change of circumstances warranting an increase in defendant's child support obligation, the court relied on the 1994 revision of North Carolina's Child Support Guidelines (the Guidelines), which includes the following provision:

> In any proceeding to modify an existing [child support] order which is three years old or older, a deviation of 15% or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines shall be presumed to constitute a substantial change of circumstances warranting modification. If the order is less than three years old, this presumption does not apply.

We have not found any interpretation of this provision by our courts, and the parties differ as to its meaning. Defendant argues that this provision notwithstanding, plaintiff failed to meet her burden of showing a substantial change of circumstances because she did not present evidence that the needs of the children had increased since the entry of the original order. Plaintiff acknowledges that under N.C. Gen. Stat. § 50-13.7, she has the burden of showing a change of circumstances; however, she claims she has met this burden by demonstrating that the facts of this case fall within the above provision.

In 1988, Congress enacted the Family Support Act (FSA), P.L. 100-485. The FSA required all states to establish, by law or by judicial administrative action, a set of mandatory, presumptive child support guidelines. 42 U.S.C. 667 (1988). In North Carolina, the legislature del-

egated this responsibility to the Conference of Chief District Judges (the Conference) by the enactment of N.C. Gen. Stat. § 50-13.4(c1), which provides:

> Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate . . . . The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance . . . .

N.C. Gen. Stat. § 50-13.4(c1) (1989 & Cum. Supp. 1995). Pursuant to this authority, the Conference enacted mandatory presumptive child support guidelines effective 1 July 1990.

N.C. Gen. Stat. § 50-13.4(c1) also states:

> Periodically, but at least once every four years, the Conference . . . shall review the guidelines to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly . . . . Any modifications of the guidelines or criteria shall be reported to the General Assembly by the Administrative Office of the Courts before they become effective . . . .

N.C. Gen. Stat. § 50-13.4(c1) (1989 & Cum. Supp 1995). In keeping with its statutory mandate, the Conference revised the Guidelines in 1991 and again in 1994. Included in the 1994 revisions was the presumption at issue here allowing modification of a child support order which is at least three years old when there is a disparity of 15% or more between the amount of support payable under the original order and the amount owed under the Guidelines based on the parties' current income and expenses (the 15% presumption). We find the creation of this presumption to be within the scope of the Conference's legislative mandate to ensure that application of the Guidelines results in adequate child support awards.

The Conference's action in creating the 15% presumption is also consistent with the requirements of the FSA. One of the primary purposes of the FSA is to ensure that child support awards remain adequate over time. *See, e.g.*, 45 C.F.R. 302.56(e) (1996) (requiring states

to review their child support guidelines every four years "to ensure that their application results in the determination of appropriate child support award amounts"); 45 C.F.R. 303.8(c)(4) (1996) (requiring that all states implement a process for reviewing, at least once every three years, child support orders in cases handled by state or local child support enforcement agencies (IV-D cases)). The United States Department of Health and Human Services, which adopted the regulations implementing the review and adjustment requirements of the FSA, recognized that these requirements would conflict with state laws requiring proof of changed circumstances for modification or adjustment of child support orders, stating that the FSA

> signals a need for States to at least expand, if not replace, the traditional "change in circumstances" test as the legal prerequisite for changing the amount of child support to be paid, by making State guidelines the presumptively correct amount of support to be paid.

57 Fed. Reg. 61,559, 61,560 (1992).

In light of the foregoing, it is apparent that the inclusion of the 15% presumption in the revised Guidelines was intended to eliminate the necessity that the moving party show change of circumstances by other means when he or she has presented evidence which satisfies the requirements of the presumption. In addition, as the facts of the present case illustrate, the 15% presumption in the Guidelines provides a much-needed incentive for custodial parents and child support enforcement agencies to periodically review existing child support orders to ensure that they continue to reflect the proper balance between the needs of the child(ren) and the parents' ability to pay.

Plaintiff here presented evidence satisfying the requirements of the 15% presumption, and defendant presented no evidence. We therefore hold that under the Guidelines as revised in 1994, plaintiff has shown a change of circumstances sufficient to warrant an increase in defendant's child support obligation. The order of the trial court is

Affirmed.

Judges EAGLES and JOHN concur.

STATE OF NORTH CAROLINA v. GREGORY MUNDINE

No. COA95-248

(Filed 18 June 1996)

Constitutional Law § 342 (NCI4th)— exclusion of plaintiff from conference in camera—defense counsel present—right of defendant to be present at every stage of trial not violated

Defendant's right to be present at every stage of his trial was not violated by his exclusion from a conference *in camera* which included defendant's court-appointed counsel, the assistant district attorney, and an attorney whom defendant wished to have represent him, since the matters discussed in the conference involved replacing the court-appointed attorney with defendant's privately retained attorney and the court's refusal to grant a continuance to allow the privately retained attorney to prepare for trial; both of those decisions were discretionary; there was no abuse of discretion in this case; and there was no showing that defendant's presence would have a reasonably substantial relation to his opportunity to defend himself.

Am Jur 2d, Criminal Law §§ 692 et seq., 901 et seq.

Appeal by defendant from judgments and commitments entered 27 October 1994 by Judge Quentin T. Sumner in Jones County Superior Court. Heard in the Court of Appeals 24 October 1995.

Attorney General Michael F. Easley, by Special Deputy Attorney General Mabel Y. Bullock for the State.

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

McGEE, Judge.

On 26 August 1993, Gary Scott Austin stopped at a Jones County store, Annie's One Stop, to speak with defendant about a debt which Austin owed to defendant. Heated words and threats were exchanged and the discussion escalated into violence. Austin was shot in his neck and shoulder. He was driven to the Sheriff's Department where he collapsed on the floor. Austin was eventually taken to the hospital where he received medical treatment for several days.

Defendant was later indicted for: (1) assault with a deadly weapon with intent to kill inflicting serious injury against Gary Austin; (2) discharging a firearm into a vehicle occupied by Gary Austin; and (3) communicating threats against Lessie Barfield, a dispatcher at the Jones County Sheriff's Department. The case was heard before Judge Quentin T. Sumner during the 22 October 1994 Criminal Session of Jones County Superior Court. Although there was conflicting testimony as to whether defendant shot and wounded Austin, the jury found defendant guilty on all charges and on 27 October 1994, Judge Sumner entered judgment sentencing defendant to consecutive terms of 20 years for assault with a deadly weapon with intent to kill inflicting serious injury; 10 years for discharging a firearm into an occupied vehicle; and 6 months for communicating threats. From these judgments and commitments, defendant appeals.

Defendant contends the trial court committed prejudicial error when it conducted a conference *in camera* which excluded defendant, but included defendant's court-appointed counsel, the assistant district attorney, and an attorney whom defendant wished to have represent him. Defendant argues this conference violated federal and state constitutional liberties which guarantee him the right to be present at every stage of his trial. After careful review of the record and briefs, we conclude there was no violation of defendant's constitutional rights.

Under the United States Constitution, the Due Process and Confrontation Clauses grant a defendant the right to be present in the courtroom during his trial. *Illinois v. Allen*, 397 U.S. 337, 338, 25 L. Ed. 2d 353, 356, *reh'g denied*, 398 U.S. 915, 26 L. Ed. 2d 80 (1970); *See also United States v. Gagnon*, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 490, *reh'g denied*, 471 U.S. 1112, 85 L. Ed. 2d 865 (1985). This right is required of the states through the Fourteenth Amendment to the federal constitution. *Pointer v. Texas*, 380 U.S. 400, 401, 13 L. Ed. 2d 923, 924 (1965). Courts often consider the test for a due process violation of the federal constitutional right to presence to be "whether defendant's presence at the conference would have had a reasonably substantial relation to his opportunity to defend himself." *State v. Buchanan*, 330 N.C. 202, 216-17, 410 S.E.2d 832, 840 (1991).

Our state constitutional guarantee of a defendant's right to presence is broader than the federal right. *Buchanan*, 330 N.C. at 217, 410 S.E.2d at 840-41. Article I § 23 of the North Carolina Constitution guarantees an accused the right to be present "at every stage of his

trial," not just during critical stages of the trial. *Buchanan*, 330 N.C. at 217, 410 S.E.2d at 841 (emphasis omitted). The *Buchanan* Court addressed a defendant's state constitutional right to presence at trial by saying:

> If . . . the subject matter of the conference implicates the defendant's confrontation rights, or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend, the defendant would have a constitutional right to be present. The burden is on the defendant to show the usefulness of his presence in order to prove a violation of his right to presence.

Buchanan, 330 N.C. at 223-24, 410 S.E.2d at 845 (citations omitted).

During jury selection in this case, defense counsel informed the court that his client was dissatisfied with his services and that defendant wanted his lawyer to withdraw from the case so that he could retain the services of a privately retained attorney, Nick Harvey (Harvey). The court asked defendant for a clarification and defendant explained that he wanted to hire a private attorney, but all the lawyers he contacted, including Harvey, told him he must first have his court-appointed attorney released before they could represent him. After explaining to defendant that "[i]t works the other way around," the court stated that defendant could contact Harvey to see if he would be willing to represent defendant. Before making the telephone call, the court continued its discussion with defendant about defendant's dissatisfaction with his current lawyer. Defendant explained that he felt he had already been tried and convicted and that his lawyer had indicated that "if I don't take 10 years you're (the judge) going to give me 40 [years]." The court responded by assuring defendant that at this point, defendant was innocent. Additionally, the court stated:

> Now, let's get to the meat of the matter. No. 1, I am not releasing Mr. Henderson until Mr. Harvey comes in and says he represents you. No. 2, I am not discharging him to your dissatisfaction. The reasons are invalid. No. 3, there is no request to continue this case at this time. This case is for trial, will be tried today, sir, to fruition. All right? Now, I've addressed those three matters, Mr. Mundine, if there's something else that you want to say, say it. I don't want to talk about those three matters anymore.

Defendant continued to insist that he did not wish further representation by his court-appointed counsel. The court responded, "your choices are these, sir. . . . Either accept Mr. Henderson, or get another

lawyer, sir, or represent yourself." Defendant was then allowed to place his telephone call to Harvey. After returning to the courtroom, defendant advised the court that Harvey was "on his way." The court then proceeded with jury selection.

A short time later, Harvey arrived in the courtroom and the court took a brief recess to meet with counsel in chambers. The judge summarized the meeting for the record saying:

> Let the record reflect that during the jury selection process of this trial, State versus Gregory Patrick Mundine, that Attorney Nick Harvey from [the] Kinston Bar came to the courtroom and the Court took a brief recess and met with Mr. Harvey in chambers along with Mr. Greg Butler and Mr. Charles Chris Henderson. Mr. Harvey related to the Court in chambers that he had been in contact with the defendant, Gregory Patrick Mundine, that Mr. Mundine had not yet retained Mr. Harvey, but there had been some preliminary discussion regarding his taking of the case. Mr. Harvey impressed upon the Court that he was prepared to make an appearance in the matter, but was not prepared to try the case at this time, that he would be seeking a continuance.
>
> The Court advised Mr. Harvey that the Court would not look favorably upon a continuance in this matter in light of the fact that the matter is now for trial, the jury selection process was proceeding, that Mr. Butler had entered strong objections to a continuance. The Court finds as fact further that the defendant, Gregory Patrick Mundine was court appointed counsel on October 15, 1993, that Mr. Charles Chris Henderson was appointed at that time and Mr. Mundine has in fact had ample time in which to retain private counsel if he desired to do so. The Court thereupon advised Mr. Nick Harvey that he would not allow a continuance in the matter, that Mr. Harvey was free to make an appearance if he desired to do so. Mr. Harvey indicated to the Court that he declined that offer and he apprised Mr. Mundine of that fact.

Again, defendant vigorously restated his reservations about his court-appointed counsel. After again listening to defendant's concerns, the court proceeded with the trial with opening statements given by defense counsel and the prosecution.

Under these facts, defendant has failed to show that the *in camera* conference violated either his federal or state constitutional

rights. Prior to the *in camera* conference, the court had already rendered a decision about releasing defendant's court-appointed attorney and allowing Harvey to replace him. From the record, it appears the only new decision made during the conference was whether the court would grant a continuance of the case.

Both the decision to allow replacement of defense counsel and the ruling on a continuance motion are generally discretionary, unless the motions are based on federal or state constitutional rights. *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E.2d 524, 529 (1976); *State v. Smathers*, 287 N.C. 226, 230, 214 S.E.2d 112, 114-15 (1975). The court's decision in these matters is only overturned by a showing the court abused its discretion. *Sweezy*, 291 N.C. at 371-72, 230 S.E.2d at 529. It appears the court would have allowed a replacement of defendant's court-appointed counsel but the attorney that defendant selected declined to represent him when a continuance of the trial was not granted. Judge Sumner said that during the *in camera* conference he indicated to all parties that "Mr. Harvey was free to make an appearance [on defendant's behalf] if he desired to do so." However, upon being advised the court would not allow a continuance of the case, the court stated Harvey "declined that offer and he apprised Mr. Mundine of that fact." Judge Sumner stated a continuance was inappropriate because defendant had been "court appointed counsel on October 15, 1993, . . . [and that defendant] had ample time in which to retain private counsel if he desired to do so." Under these circumstances, the court did not abuse its discretion in denying the motion for continuance.

We find the subject matter of the conference did not implicate defendant's confrontation rights and defendant has not shown that his presence would have "a reasonably substantial relation to his opportunity to defend" himself. *Buchanan*, 330 N.C. at 224, 410 S.E.2d at 845. Therefore, we overrule defendant's assignment of error.

No error.

Judges GREENE and MARTIN, Mark D. concur.

BURNETT v. BURNETT

[122 N.C. App. 712 (1996)]

JOANNE V. BURNETT v. JULIAN H. BURNETT

No. COA95-1086

(Filed 18 June 1996)

1. Divorce and Separation § 121 (NCI4th)— equitable distribution—classification of lot as marital property—error

The trial court erred in classifying a lot as marital property where the lot was transferred to defendant from his mother during the marriage; though the recitation in the deed that consideration was paid by defendant to his mother in the amount of $10 and "other valuable consideration" was *prima facie* evidence that the consideration was received, the undisputed testimony was that no consideration was in fact given; and the fact that there were no revenue stamps on the deed indicated a gift. N.C.G.S. § 50-20(b)(2).

Am Jur 2d, Divorce and Separation § 884.

2. Divorce and Separation § 144 (NCI4th)— equitable distribution—need of spouse to occupy marital home—no distributional factor

The need of a spouse to occupy the marital residence, unless it involves a spouse with custody of the children, N.C.G.S. § 50-20(c)(4), does not relate to the economic condition of the marriage and is not properly considered as a distributional factor. N.C.G.S. § 50-20(c)(12).

Am Jur 2d, Divorce and Separation § 915.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases. 55 ALR4th 14.

Divorce: excessiveness or adequacy of trial court's property award—modern cases. 56 ALR4th 12.

3. Divorce and Separation § 144 (NCI4th)— occupancy of marital home—distributional factor

Because evidence was presented that plaintiff possessed the marital residence subsequent to the date of separation, the trial

court was required to consider this as a factor in determining the proper equitable distribution.

Am Jur 2d, Divorce and Separation § 915.

Appeal by defendant from judgment entered 1 March 1995 in New Hanover County District Court by Judge Paul A. Hardison. Heard in the Court of Appeals 22 May 1996.

Billy H. Mason for plaintiff-appellee.

Lea, Clyburn & Rhine, by J. Albert Clyburn and James W. Lea, III, for defendant-appellant.

GREENE, Judge.

Julian H. Burnett (defendant) appeals an order entered 1 March 1995 pursuant to Joanne V. Burnett's (plaintiff) and defendant's claims for equitable distribution.

Plaintiff and defendant filed claims for equitable distribution, requesting the trial court to classify, value and divide the parties' marital property. After hearing evidence concerning the parties' property, the trial court found that the parties "were married on September 3, 1960, lived together as husband and wife until on or about December 2, 1992, . . . and were subsequently divorced on March 4, 1994"; the property which is the subject of this appeal was acquired "during the course of the marriage" and is marital; and an "unequal division of the marital assets would be equitable." In determining that an unequal division would be equitable, the trial court considered several factors, including "the need of the plaintiff to have the marital home."

The evidence reveals that in 1973 the defendant's mother divided a tract of land she owned into tracts and conveyed a tract to each of her four children. The defendant received a deed for tract four (River Lot) and it recited that the deed was given "for and in consideration of the sum of Ten ($10.00) DOLLARS, and other valuable consideration." The deed contained no revenue stamps. The defendant testified that he did not pay his mother any consideration for the property. The evidence also indicates that the plaintiff had exclusive use and possession of the marital residence since the separation of the parties. There is no indication in the judgment of the trial court that it con-

sidered as a distributional factor the plaintiff's use of the marital home.

The issues are whether (I) the classification of the River Lot as marital property is supported in the record; (II) the need of the plaintiff to have the marital home was properly considered as a distributional factor under section 50-20(c)(12); and (III) the trial court was required to make findings of fact concerning plaintiff's exclusive use and possession of the marital residence subsequent to the parties' date of separation.

I

[1] Marital property is defined to include all property "acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned, except property determined to be separate property." N.C.G.S. § 50-20(b)(1) (1995). Separate property is defined to include all property "acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." N.C.G.S. § 50-20(b)(2).

The party claiming a certain classification has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification. *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991). Thus a party claiming property acquired during the marriage to be separate, on the basis that it was a gift, has the burden of showing that the "alleged donor intended to transfer ownership of the property without receiving any consideration in return." Brett R. Turner, *Equitable Distribution of Property* § 5.16 at 195 (2d ed. 1994) (hereinafter *Turner*); *See Godley v. Godley*, 110 N.C. App. 99, 109, 429 S.E.2d 382, 388 (1993). When, however, the property was acquired during the marriage by *a* spouse from his or her parent(s), a rebuttable presumption arises that the transfer is a gift to that spouse.[1] *See Bowen v. Darden*, 241 N.C. 11, 14, 84 S.E.2d 289, 292 (1954) (recognizing that a transfer of property from a parent to a child creates a rebuttable presumption of a gift to the child); *Hollowell v. Skinner*, 26 N.C. 165, 171 (1843); *see also* 38 C.J.S. *Gifts* § 65(e), at 860 (1943). In this event, the burden shifts to the spouse resisting the separate property classification to show lack of donative intent.

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1. Because our statute provides that gifts to "a" spouse during the course of the marriage is the separate property of that spouse, it follows that gifts to "both spouses jointly are not within the definition of separate property," *Turner* § 5.17, at 203, but instead are marital property.

"The evidence most relevant in determining donative intent [or the lack of donative intent] is the donor's own testimony." *Turner* § 5.16, at 195. Other evidence relevant to donative intent includes the testimony of the alleged donee, documents surrounding the transaction, whether a gift tax return was filed, and whether an excise tax was paid. *Id.* at 195-97; *see Johnson v. Johnson*, 114 N.C. App. 589, 592-93, 442 S.E.2d 533, 535-36 (1994); *Patterson v. Wachovia Bank and Trust Co.*, 68 N.C. App. 609, 612-14, 315 S.E.2d 781, 783-84 (1984); *Kirkpatrick v. Sanders*, 261 F.2d 480, 482 (4th Cir. 1958), *cert. denied*, 359 U.S. 1000, 3 L. Ed. 2d 1029 (1959). Transfer documents stating that the property is a gift or characterizing the consideration as love and affection is strong evidence of donative intent. *See Miller v. Miller*, 428 S.E.2d 547, 550 (W. Va. 1993). On the other hand, transfer documents indicating receipt of consideration is *prima facie* evidence that the recited consideration was indeed paid. *Randle v. Grady*, 224 N.C. 651, 655, 32 S.E.2d 20, 22 (1944). A mere recital of consideration, however, does not compel a finding that consideration was received, if other evidence reveals that no consideration was in fact received. James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 17-9, at 719 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994); *see* Kenneth S. Broun, *North Carolina Evidence* § 30, at 116 (4th ed. 1993) (defining *prima facie*). Bargain sales, or those where some small consideration is received in exchange for the transfer, if accompanied with donative intent, are treated as partial gifts. *Turner* § 5.16, at 200-01; *see Kirkpatrick*, 261 F.2d at 482 (receipt of nominal consideration does "not convert the gifts to transfers for a valuable consideration"); *see also* I.R.C. § 2512 (1996) (where there is donative intent, treating sale of property to another at artificially low price as part gift and part sale for federal tax purposes).

In this case, the River Lot was transferred to the defendant from his mother during the marriage. This transfer raises a rebuttable presumption that it was a gift to the defendant and places the burden on the plaintiff to show that the mother did not intend to make a gift of the property to her son. The plaintiff relies on the recitation in the deed that consideration was paid by the defendant to his mother in the amount of ten dollars and "other valuable consideration" to rebut the presumption. Although this is *prima facie* evidence that the recited consideration was received by the mother, the undisputed testimony is that no consideration was in fact given in exchange for the transfer. Furthermore there were no revenue stamps on the deed, again indicating a gift. The plaintiff, therefore, has failed to meet her

burden of rebutting the presumption of a gift to the defendant and the marital classification of the River Lot must be reversed. On remand the River Lot must be classified as the defendant's separate property.

II

[2] In this case the trial court considered "the need of the plaintiff to have the marital home" as a distributional factor in making an unequal distribution. Defendant argues that section 50-20(c) does not "specifically authorize the [trial] court to consider . . . the need of a party to have the use or possession of the marital residence," and that consideration of this factor pursuant to section 50-20(c)(12) is improper. We agree.

Our Supreme Court has unequivocally stated that the only considerations which are "just and proper" within the meaning of section 50-20(c)(12) are "those which are related to the marital economy." *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985). The need of a spouse to occupy the marital residence, unless it involves a spouse with custody of the children, N.C.G.S. § 50-20(c)(4), does not relate to the economic condition of the marriage and is not properly considered as a distributional factor.[2] This error requires remand for reconsideration of whether an equal distribution is equitable.

III

[3] Defendant argues that because evidence was presented that plaintiff possessed the marital residence subsequent to the date of separation, the trial court was required to consider this as a factor in determining the proper distribution. We agree.

If evidence is presented as to any one of the factors in section 50-20(c), the trial court must make findings that the factor was considered. *McIver v. McIver*, 92 N.C. App. 116, 127, 374 S.E.2d 144, 151 (1988). A party's exclusive use of the marital residence subsequent to the date of separation is a relevant distributional factor, *Becker v. Becker*, 88 N.C. App. 606, 608, 364 S.E.2d 175, 177 (1988), and must be considered by the trial court. On remand this evidence must be considered by the trial court in its determination of the proper distribution of the marital property.

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2. It does appear that a need to occupy the marital residence based on the age or physical health of a spouse would be a valid distributional factor, *see* N.C.G.S. § 50-20(c)(3), but the trial court did not specify the need in this case and we cannot speculate.

On remand the trial court must also correct two errors which the plaintiff concedes were made with respect to the valuation of Lot 15 and the treatment of the mortgage on the marital residence. Because the nature of these errors is not in dispute we do not address them more specifically.

Reversed and remanded.

Judges MARTIN, John C., and WALKER concur.

IN THE MATTER OF THE ESTATES OF GEORGE SHELLY BARROW, JR. AND SASHA BARROW

No. COA95-1027

(Filed 18 June 1996)

1. **Judgments § 20 (NCI4th)— notation in minutes—valid entry of judgment**

The clerk's notation in the minutes at the direction of the district judge three days before the deaths of the children in question complied with N.C.G.S. § 1A-1, Rule 58 and thus constituted a valid entry of judgment; therefore, the trial court erred in ruling that the district court's written order establishing paternity *nunc pro tunc* which was signed 22 days after the deaths was a nullity.

Am Jur 2d, Judgments § 132.

What constitutes "entry of judgment" within meaning of Rule 58 of Federal Rules of Civil Procedure, as amended in 1963. 10 ALR Fed. 709.

2. **Appeal and Error § 355 (NCI4th)— sufficiency of evidence to support findings—transcript not provided—question not before Court of Appeals**

Where a transcript of the proceedings was not provided to the Court of Appeals, the Court was precluded from addressing appellant's argument that the evidence was insufficient to support the trial court's findings and conclusions that a natural father had abandoned his children and was therefore barred from inheriting from their estate.

Am Jur 2d, Appellate Review § 492.

Appeal by petitioner from order entered 14 July 1995 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 16 May 1996.

Seth H. Edwards, P.A., by Seth H. Edwards and Edward P. Hausle, P.A., by Edward P. Hausle, for petitioner-appellant.

John H. Harmon, for respondent-appellee.

WYNN, Judge.

In early 1994, the Beaufort County Department of Social Services ("DSS") commenced an action to establish the paternity of two minor siblings, Sasha Barrow and George Barrow, Jr. DSS named Alfonza Moore as a defendant because during the time of conception for both children, he had engaged in illicit sexual relations with the children's mother, Caroline Barrow, who was married to and living with the other named defendant, George Barrow, Sr., during the time of conception.

Following a hearing, Judge Samuel G. Grimes of the Beaufort County District Court found as a fact that Moore admitted to being the father of the minor children, that blood tests showed that Moore was more than 99% likely to be the father of the minor children, and that blood tests excluded Barrow as the father of the children. Based on these findings, Judge Grimes found that Moore was the father of the minor children, announced his decision in open court on 17 June 1994, and directed the courtroom clerk to make a record of his decision in the minutes. The clerk did so. On 12 July 1994, Judge Grimes signed a written order establishing paternity *nunc pro tunc*. No appeal was taken from either order.

Tragically, both children, along with their mother, were killed in an automobile accident on 20 June 1994. Barrow qualified as the administrator of the estates of both children. (The wrongful death actions on behalf of the children were settled for $90,000). On 22 September 1994, Moore moved to replace Barrow as administrator of the estates of both children. The Clerk of Superior Court, relying upon the judicial declaration that Moore had fathered the children, granted Moore's motion by removing Barrow as administrator of the estates of the minor children, disqualifying Barrow from taking any share of the estates of the children, finding that Moore had

not abandoned the children, and appointing Moore as the estates' administrator.

Barrow appealed the Clerk's decision to the Superior Court of Beaufort County. In an order dated 14 July 1995, Judge William C. Griffin, Jr., found that the district court's order was a nullity because it was entered following the death of the children. Judge Griffin vacated the clerk's order, ordered the clerk to remove Moore as the administrator of the estates of the children, and ordered the clerk to exercise his discretion to appoint an administrator of the estates of the two children. Alternatively, Judge Griffin found that Moore had abandoned his children for inheritance purposes. From this order, Moore appeals.

On appeal, the issues are whether the Superior Court erred by (I) Setting aside the district court's 12 July 1994 order of paternity as a nullity, and (II) Concluding in the alternative that Moore had abandoned his children. We find the district court's order of 17 June 1994 in open court to be controlling and thus reverse on the first issue. However, we affirm the trial court's finding of abandonment.

I

[1] Appellant first contends that the trial court erred by ruling that the district court's order of 12 July 1994 was void. The Superior Court found that order to be "a nullity" because it was entered following the death of the children. Apparently, the trial judge analogized the entering of a paternity order following the death of the children with the entering of a paternity order following the death of a putative father, a prohibited act. *See Helms v. Young-Woodard*, 104 N.C. App. 746, 411 S.E.2d 184 (1991), *disc. review denied*, 331 N.C. 117, 414 S.E.2d 756, *cert. denied*, 506 U.S. 829, 121 L.Ed.2d 53 (1992) (holding that legitimation action must be reduced to judgment prior to death of putative father in order to legitimate child to inherit under intestate succession).

Although the continuing validity of *Helms* is yet to be examined, either legislatively or judicially, in light of continuing scientific developments in DNA analysis, we do not reach the issue of whether a proceeding to establish paternity may be maintained after the death of the children. Instead, we find that entry of judgment on paternity occurred on 17 June 1994, three days before the death of the children. On that date, the district court rendered judgment in open court,

directed the clerk to note the judgment in the minutes, and the clerk accordingly made the following notation:

> Complaint to est. paternity
> Child Support
> Cont'd from 5/94 so Mr. Barrow Could Consult
> w/ attorney.
>
> Order of
> Paternity
> established
> Mr. Moore

At the time judgment was rendered and entered in this case, N.C.R. Civ. P. 58 (1996), which governs the date of entry of judgment, read as follows:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction from the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing . . . .

This case comes under the second paragraph of Rule 58. As a result, if the clerk made a sufficient notation in the minutes, entry of judgment is deemed to have been made on the date which the judge announced his decision. We find that the clerk's notation in the minutes at the direction of the trial judge complied with Rule 58, and thus constituted a valid entry of judgment. *See Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992).

As a result, we must reverse the portion of the trial court's order which purported to reverse Judge Grimes' order establishing paternity in favor of Moore.

II

[2] Appellant next contends that the trial court erred in its finding of fact that he abandoned his children. We find that this question is not properly before this Court.

In his order, Judge Griffin found as fact the following:

12. Alfonza Moore had not provided any support for George Shelly Barrow, Jr. and Sasha Barrow prior to their deaths.

13. Alfonza Moore had not acknowledged paternity of George Shelly Barrow, Jr. or Sasha Barrow prior to the District Court action [which established paternity].

Based on these findings of fact, Judge Griffin made the following conclusions of law:

6. [A]s a matter of law Alfonza Moore had wilfully abandoned these children.

7. Pursuant to G.S. 31A-2, Alfonza Moore . . . had lost the right to intestate succession and the right to administer the Estates of the two children.

Moore contends that there was no evidence to support finding of fact number 12, that he had abandoned the children. We note that Moore failed to provide this Court with a verbatim transcript of the proceedings pursuant to Rule 9(c) of the North Carolina Rules of Appellate Procedure.

This Court's review is limited to the record on appeal together with a transcript, if submitted. In *Drouillard v. Keister Williams Newspaper Services*, 108 N.C. App. 169, 423 S.E.2d 324 (1992), *disc. review denied*, 333 N.C. 344, 427 S.E.2d 617 (1993), we stated:

> Where evidence is not presented in the record on appeal, we cannot speculate that there was prejudicial error but must assume that the findings of fact are conclusive and supported by competent evidence . . . . For that reason, we are precluded from addressing questions of whether the evidence was sufficient to support the trial court's findings of fact, and the only remaining issue is whether the facts found support the conclusions of law.

Id. at 173, 423 S.E.2d at 327; *See also Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993).

In the instant case, a transcript was not provided to this Court, despite appellant's statements to the contrary in his brief. As a result, we are precluded from addressing appellant's argument that the evidence was insufficient to support the trial court's findings. Appellant does not contend that the trial court's findings of fact do not support its conclusions of law. Accordingly, we affirm the trial court's conclusion that Moore had abandoned his children.

In conclusion, the portion of Judge Griffin's order which declared Judge Grimes' paternity order a nullity is reversed. As a result, the district court's judicial declaration that Moore fathered the children is reinstated. However, the portion of Judge Griffin's order which held in the alternative that Moore abandoned his children and is therefore barred from inheriting from the children's estate is affirmed. Thus, we affirm Judge Griffin's order directing the Clerk of Superior Court of Beaufort County to exercise his discretion to appoint an administrator for the estates of the children.

Finally, we note that our opinion in no way prejudices any rights that Barrow may have by virtue of having acted *in loco parentis* to the deceased children, if such be the case. *See, Liner v. Brown*, 117 N.C. App. 44, 449 S.E.2d 905 (1994), *disc. review denied*, 340 N.C. 113, 456 S.E.2d 315 (1995) (holding that a determination of *in loco parentis* is a question of intent "to assume parental status" and depends on all the facts and circumstances of the case); 3 Robert E. Lee, *North Carolina Family Law* § 238, at 190 (4th ed. 1981) (holding that one who stands *in loco parentis* to a child assumes, in general, the rights and obligations of a natural parent); N.C. Gen. Stat. § 28A-18-2 (Supp. 1995).

Reversed in part, affirmed in part.

Judges EAGLES and SMITH concur.

MOYER v. MOYER

[122 N.C. App. 723 (1996)]

KATHERINE WILLIS MOYER, PLAINTIFF-APPELLEE v. MATTHEW BENNETT MOYER, DEFENDANT-APPELLANT

No. COA95-887

(Filed 18 June 1996)

Parent and Child § 29 (NCI4th)— support of stepchild—written agreement not executed according to statute—support not required

The trial court erred in ordering defendant stepfather to provide child support payments and other benefits for his stepchild based on a voluntary written agreement signed by both spouses, since the written agreement was not executed with the formalities required by law in that it had no acknowledgement and contained an ambiguous agreement to support the child only "until more permanent arrangements were decided upon." N.C.G.S. §§ 50-13.4(b) and 52-10.1.

Am Jur 2d, Parent and Child §§ 41 et seq.

Stepparent's postdivorce duty to support stepchild. 44 ALR4th 520.

Appeal by defendant from order entered 23 May 1995 by Judge Christopher Bean in Pasquotank County, District Court. Heard in the Court of Appeals 4 June 1996.

No brief filed for plaintiff appellee.

Twiford, Morrison, O'Neal & Vincent, L.L.P., by Edward A. O'Neal, for defendant appellant.

SMITH, Judge.

The central issue in this case is whether the trial court properly ordered defendant stepfather to provide child support payments and other benefits such as dental insurance, health insurance, and housing for his stepchild based on a voluntary written agreement signed by both spouses. Since the written agreement was not executed with the formalities required by law, we reverse.

Plaintiff and defendant married on 24 October 1987 in Carteret County. The parties eventually moved to Elizabeth City, North Carolina and purchased a home, titled jointly, with funds from defendant's inheritance.

The couple had a son, Christopher Matthew Moyer, who was born in 1990. In addition, plaintiff had a daughter, Kandace Joy Leann Willis Moyer, born in 1985, from a prior relationship. The information provided for Kandace's birth certificate was supplied without defendant's knowledge and falsely stated that defendant was Kandace's biological father.

During the marriage and after separation, defendant provided support for both his biological child and his wife's child from her prior relationship. The parties separated 12 May 1994.

The parties signed a handwritten agreement dated 19 May 1994, after their separation, in which defendant agreed to pay child support for both children in a total of $400.00 per month. The agreement was not acknowledged and the terms agreed upon were effective only "until more permanent arrangements were decided upon." The court received no evidence concerning the biological father's ability to meet Kandace's financial needs and no effort had been made to locate him.

The district court heard the case on plaintiff's request for alimony pendente lite, child custody, support for both minor children, attorney's fees, and writ of possession for the former marital residence. The court, *inter alia*, awarded plaintiff custody of the children and pursuant to the written agreement of 19 May 1994 and the trial court's conclusion that defendant was *in loco parentis* to Kandace during the marriage, ordered defendant to pay child support for both children in an order dated 23 May 1995. Defendant timely appealed those portions of the order relating to support of Kandace.

At common law, the relationship between stepparent and stepchild does not of itself confer any rights or impose any duties upon either party. *State v. Ray*, 195 N.C. 628, 629, 143 S.E. 216 (1928). In contrast, if a stepfather voluntarily takes the child into his home or under his care in such a manner that he places himself *in loco parentis* to the child, he assumes a parental obligation to support the child which continues as long as the relationship lasts. *In re Dunston*, 18 N.C. App. 647, 649, 197 S.E.2d 560, 562 (1973). This Court has defined a person *in loco parentis* as " 'one who has assumed the status and obligations of a parent without formal adoption.' " *Shook v. Peavy*, 23 N.C. App. 230, 232, 208 S.E.2d 433, 435 (1974) (quoting 67A C.J.S. *Parent and Child* § 153, p. 548 (1978)). However, the fact that a stepfather is *in loco parentis* to a minor child during marriage to the child's mother does not create a legal duty to continue support of the

child after the marriage has been terminated either by death or divorce. *Newman v. Newman*, 64 N.C. App. 125, 129, 306 S.E.2d 540, 543 (citing 3 Robert E. Lee, *North Carolina Family Law* § 238, at 191 (4th ed. 1981)), *disc. review denied*, 309 N.C. 822, 310 S.E.2d 351 (1983). The *Newman* court held that "a stepparent is not under a blanket obligation to support children of his spouse's former marriage." *Id.*; *see also Lee, supra*, § 228.5, at 73 (Cum. Supp. 1995). The manifest intent of the Newman rule is to establish the obligations of a stepfather toward his wife's children which are not his own.

In *Duffey v. Duffey*, 113 N.C. App. 382, 385, 438 S.E.2d 445, 447 (1994), we held that N.C. Gen. Stat. § 50-13.4(b) (1995) requires the natural or adoptive father and mother to be primarily liable for the support of a minor child. Additionally, this statute provides that any other person, agency, organization or institution standing *in loco parentis* is secondarily liable. *Id.* Since defendant was *in loco parentis* to Kandace during the marriage, as found by the lower court, he is at most only secondarily liable for the support of his stepdaughter.

Circumstances that may require a person *in loco parentis* to pay child support may include, but are not limited to: (1) the relative ability of the natural or adoptive parents to provide for the support *or* (2) the inability of one or more of them to provide support, and the needs and estate of the child. *Duffey*, 113 N.C. App. at 385, 438 S.E.2d at 447; N.C. Gen. Stat. § 50-13.4(b). We observe that no evidence exists in the record which might trigger the obligation of this defendant standing *in loco parentis*. Even though the record indicates that plaintiff is in need of child support for the minor children, the record is devoid of any evidence indicating the capability of the natural father to pay for Kandace's support. Since primary responsibility of Kandace's biological father has not been determined and no effort has been made to locate him, secondary liability will not attach to require defendant to pay.

In addition, the court may not order that support be paid by a person standing *in loco parentis* absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. *Duffey*, 113 N.C. App. at 385, 438 S.E.2d at 447; N.C. Gen. Stat. § 50-13.4(b). Although defendant signed a voluntary support agreement until more permanent arrangements could be made, the writing was not executed with the formalities required by law. We believe that N.C. Gen. Stat. § 52-10.1, which deals with separation agreements, and § 50-13.4(b), which con-

cerns primary liability for child support of natural or adoptive parents and secondary liability for persons or entities standing *in loco parentis*, must be construed *in pari materia*. Thus, we conclude that the General Assembly intended that the writing referred to in § 50-13.4(b) be executed in accordance with the requirements of § 52-10.1. Therefore, the written agreement in the case *sub judice* should have met the formalities of § 52-10.1.

Since the formalities required by *Duffey* and N.C. Gen. Stat. § 50-13.4(b) and § 52-10.1 for the writing were ignored, defendant could not be required to pay child support even if both Kandace's natural parents (those primarily liable) were deemed unable to pay. If the rule were otherwise, a stepparent *in loco parentis* could find himself with a legal duty of support without the formalities required to bind a biological or adoptive parent to an identical obligation. Such a result is illogical, not in the interest of public policy, as it places a stricter duty on a stepparent *in loco parentis*, than on a biological or adoptive parent. *See* N.C. Gen. Stat. § 110-133 (1995) (both the current statute, amended effective 1 January 1996, and the predecessor statute require a written support agreement, acknowledged before a certifying officer or notary public and approved by the court, before a biological or adoptive parent is legally bound to pay child support).

A person *in loco parentis* can make themselves liable for child support by signing a written agreement. *Duffey*, 113 N.C. App. at 385, 438 S.E.2d at 447. This case is distinguishable from *Duffey* because the formalities required by N.C. Gen. Stat. § 52-10.1 were present there. The divorce decree incorporated the writing as well. In addition, the husband in *Duffey* clearly agreed in the writing to continue supporting his stepchildren after dissolution of the marriage. In contrast, the voluntary support agreement signed by the parties in this case was not acknowledged. The stepfather ambiguously agreed to support his stepchild only "until more permanent arrangements were decided upon."

For the foregoing reasons, we reverse and remand the trial court's order requiring defendant to pay for child support and provide other benefits for his stepdaughter Kandace Joy Leann Willis Moyer.

Reversed and remanded.

Judges EAGLES and WYNN concur.

STATE v. ABDEREAZEQ

[122 N.C. App. 727 (1996)]

STATE OF NORTH CAROLINA, APPELLANT, v. SHELIA ABDEREAZE, MACK ARTHUR BOOTH, WILLIAM MICHAEL BRINSON, MICHAEL WAYNE BUNN, KENNETH T. CARTER, TYRONNE ANTHONY CAUDLE, ALLENE COGSWELL, JAMES ED COOPER, ROBERT LEE CYRUS, RODNEY ROMBRA EVANS, MARGARET NORFLEET FAISON, ALLEN PERRIE GAY, JOSEPH A. GRIFFIN, CARLTON MOODY HARRIS, SR., CLINTON LEE HARMON, CALVIN LEE HILL, KELLY LORENZA HINES, MICHAEL LLOYD HOPKINS, PAUL RAY HUGHES, JAMES ALLEN HUNT, TYRONE CLEOPAS JAMES, JERRY JOHNSON, NICOLETTE JOHNSON, ROY JONES, TIMOTHY SCOTT JONES, CHARLES EARL LEWIS, CHARLIE JUNIOR LEWIS, SHELTON KELSEY LILES, JULIUS THOMAS LITTLE, DAVID TIMOTHY LOCKE, WILSON JUNIOUS LYNCH, MILTON AURLANDER LYONS, DANIEL E. McCOLLOUGH, SANDRA WEBB MCKINSEY, JERYL MCWILLIAMS, CAROLYN JEAN MILLS, DENNIS EARL MILLS, IVA NORVESTER PAYTON, DEXTER PITTMAN, JAMES QUINTON PITTMAN, PAUL PRICE III, RICKY LEE ROOK, JOHN BRENT SAPP, BENJAMIN SILVER, ENOCH SILVER, JR., CARLTON F. SMALL, RICKEY ALSTON SPRAGLEY, JOHN ALBERT STALLINGS, DEBRA JEAN STANLEY, JAMES LEROY STATON, JAMES LEROY STATON, ANDREW LEANDER TAYLOR, NATHANIEL THORPE, JR., ELLIS CRAIG VAUGHAN, BENJAMIN WEAVER, BRUCE GRAHAM WEST, JR., JIMMIE DEE WHITFIELD, MICHAEL DEARINE WIGGINS, DEBORAH ANN ZAZZARETTI, DEFENDANT-APPELLEES

No. COA95-1149

(Filed 18 June 1996)

Evidence and Witnesses § 1831 (NCI4th)— DWI defendant informed of rights by charging officer—results admissible

N.C.G.S. § 20-16.2(a) does not require an officer other than the charging officer to advise defendants of their statutory rights in order for the State to admit into evidence at the criminal prosecution for DWI the results of, or refusal to submit to, chemical analysis.

Am Jur 2d, Automobiles and Highway Traffic § 305.

Admissibility in criminal case of blood-alcohol test where blood was taken despite defendant's objection or refusal to submit to test. 14 ALR4th 690.

Admissibility in criminal case of evidence that accused refused to take test of intoxication. 26 ALR4th 1112.

Driving while intoxicated: subsequent consent to sobriety test as affecting initial refusal. 28 ALR5th 459.

Appeal by State from orders entered 22 May 1995 by Judge Richard B. Allsbrook in Halifax County Superior Court. Heard in the Court of Appeals 16 May 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Hux, Livermon & Armstrong, L.L.P., by James S. Livermon, Jr., for defendant-appellees.

MARTIN, Mark D., Judge.

The State of North Carolina appeals from the trial court's orders granting defendants' motions to suppress the results of their intoxilyzer tests, or their refusal to submit to chemical analysis.

In each of the cases the parties stipulated to the following pertinent facts:

1. The charging officer . . . observed the defendant operating a motor vehicle on a public highway . . . .

2. The charging officer had reasonable grounds to believe that defendant had committed an implied consent offense.

3. Defendant was arrested . . . by the charging officer for an implied consent offense.

4. Charging officer transported defendant to a breathalyzer or intoxilyzer room for the purpose of requesting [defendant] to submit to a chemical analysis of his breath.

5. The charging officer advised defendant of his rights enumerated in G.S. 20-16.2(a).

6. The charging officer is a certified chemical analyst in accordance with G.S. 20-139.1.

7. The charging officer requested defendant to submit to a chemical analysis of his breath.

. . . .

Fifty defendants submitted to chemical analysis, while nine defendants refused chemical analysis. It is also stipulated that those defendants who submitted to chemical analysis were tested by the Intoxilyzer Model 5000.

Defendants moved to suppress either the results of, or the refusal to submit to, chemical analysis on the grounds a chemical analyst, other than the charging officer, did not advise defendants of their statutory rights under N.C. Gen. Stat. § 20-16.2(a) (1993) (statutory rights). The trial court granted the motions to suppress.

The sole issue on appeal is whether N.C. Gen. Stat. § 20-16.2(a) requires an officer, other than the charging officer, to advise defendants of their statutory rights in order for the State to admit into evidence, at the criminal prosecution for driving while impaired (DWI), the results of, or refusal to submit to, chemical analysis.

At the outset we note defendants ground their motions to dismiss solely on an alleged procedural defect in the notification of their statutory rights. This alleged procedural defect occurred, if at all, prior to the time defendants elected whether or not to submit to chemical analysis. It follows therefore that the factual distinction between the defendants who submitted to chemical analysis and those who refused such analysis is without legal consequence to the resolution of the present issue.

Section 20-16.2(a), as defendants contend, governs the procedures for notifying a person charged with an implied consent offense of their statutory rights with respect to chemical analysis. *State v. Oliver*, No. 378PA95, slip op. at 13 (N.C. Supreme Court May 10, 1996); *Nicholson v. Killens*, 116 N.C. App. 473, 478, 448 S.E.2d 542, 544-545 (1994), *supersedeas and disc. review denied*, 339 N.C. 614, 454 S.E.2d 256 (1995). Indeed, the Supreme Court recently considered whether section 20-16.2(a) mandates suppression of the results of a defendant's Intoxilyzer 5000 test where the arresting officer, rather than another officer, informed defendant of his statutory rights. *See Oliver*, No. 378PA95, slip op. at 11-16. See also *Bivens v. Cottle*, 120 N.C. App. 467, 468, 462 S.E.2d 829, 830 (1995) (judicial decision is presumed to apply retroactively, especially where it clarifies an area of the law), *disc. review allowed*, 342 N.C. 651, 467 S.E.2d 898 (1996).

In *Oliver*, the charging officer, a certified chemical analyst, advised defendant of his rights as provided under section 20-16.2(a). *Oliver*, No. 378PA95, slip op. at 2. Defendant submitted to chemical analysis of his breath by an Intoxilyzer 5000 which established his alcohol concentration was 0.08. *Id.* At trial, defendant filed a motion to suppress the result of the Intoxilyzer 5000 test on the ground the charging officer, rather than another officer, advised defendant of his rights under section 20-16.2(a). *Oliver*, No. 378PA95, slip op. at 2-3.

The Supreme Court, construing section 20-16.2(a), concluded "that the legislature intended to permit a qualified arresting officer to notify defendant of his rights, orally and in writing, regarding a chemical analysis of the breath . . . ." *Oliver*, No. 378PA95, slip op. at 15. "Indeed, logic dictates that if an arresting officer is duly qualified and authorized to administer a chemical analysis of the breath, such arresting officer should also be duly qualified to notify defendant of his rights regarding that test, and a defendant's rights cannot be impaired by such notification." *Id.*

Likewise, in the present case, the charging officers, each certified chemical analysts, advised the defendants of their statutory rights. Therefore, under *Oliver*, we find no procedural defect in the notification defendants received regarding their statutory rights. Accordingly, we reverse the trial court's orders granting defendants' motions to suppress and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and LEWIS concur.

JAMES McCOY, EMPLOYEE, PLAINTIFF v. OXFORD JANITORIAL SERVICE COMPANY, EMPLOYER; JEFFERSON PILOT FIRE & CASUALTY INSURANCE, CARRIER, DEFENDANT

No. COA95-1095

(Filed 18 June 1996)

Workers' Compensation § 238 (NCI4th)— employee's failure to make reasonable efforts to find work—sufficiency of evidence

The evidence was sufficient to support the Industrial Commission's findings that the injured plaintiff did not intend to return to work, did not make reasonable efforts to find employment, and sabotaged defendants' efforts to help him obtain another job, and such findings supported the Commission's conclusion that plaintiff was not entitled to temporary total disability compensation after a certain date.

Am Jur 2d, Workers' Compensation § 399.

McCOY v. OXFORD JANITORIAL SERVICE CO.

[122 N.C. App. 730 (1996)]

Appeal by plaintiff from Opinion and Award for the Full Commission entered 19 July 1995. Heard in the Court of Appeals 22 May 1996.

Smith, Follin & James, L.L.P., by Seth R. Cohen, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Dayle A. Flammia, for defendant-appellees.

GREENE, Judge.

James McCoy (plaintiff) appeals an Opinion and Award for the North Carolina Industrial Commission (Commission) concluding that after 11 January 1993 he is no longer entitled to temporary total disability compensation.

On 21 June 1991 the plaintiff, Oxford Janitorial Service Company and Jefferson-Pilot Fire and Casualty (defendants) entered into an "Agreement for Compensation for Disability" (I.C. Form 21) (hereinafter Agreement) and the Agreement was approved by the Commission on 26 July 1991. It acknowledged that the plaintiff had sustained, on 30 April 1991, an injury "by accident arising out of and in the course of" his employment with Oxford Janitorial Service Company and that he sustained a disability as a consequence of the injury. At the time of his injury, plaintiff had been earning $240.00 a week, and pursuant to the Agreement, defendant was obligated to pay the plaintiff $160.00 a week. On 11 January 1993, the defendants requested permission to stop payment of compensation, which was denied and defendants thereafter requested a hearing.

At the hearing, James Seitz (Seitz), a senior vocational consultant, gave evidence concerning his attempts to find employment for plaintiff after the accident. The evidence showed that Seitz made numerous attempts to find plaintiff suitable employment, and in fact identified numerous jobs within plaintiff's restrictions. Several employers "indicated [they] would consider the [plaintiff] for job openings." One employer was "definitely" interested in hiring plaintiff at an hourly wage of $6.30. Another employer informed the plaintiff that a part-time "job would be available for him" within thirty days but he was told by Seitz not to depend on it. Plaintiff "show[ed] a lack of motivation to develop a self-directed job search" and made only a "minimal effort" in making contacts with potential employers. Seitz

felt plaintiff was "holding back" in his attempts at obtaining any type of employment. Plaintiff also put his own restrictions on potential jobs, such as where he would work, how much the job had to pay, and on one occasion, not wanting to start work until the first part of the year "because he had plans for the holiday season." Seitz also indicated that plaintiff was "highlight[ing]" certain aspects of his background, including his accident and physical problems, giving the impression to the employer that plaintiff "was not interested in going to work for him." Plaintiff brought out information that was not pertinent to the job, "that would lead an employer to be suspicious about an individual, to leave them with the impression that [he did not] want to work with them for whatever reason."

Dr. Giduz, treating plaintiff for depression, presented evidence that plaintiff remained totally disabled and was unable to work. The Commission, however, found Dr. Giduz's evidence to be not credible.

The Commission found that as of 11 January 1993 "it was clear that [plaintiff] did not intend to return to work. He did not make reasonable efforts to find employment and sabotaged defendants' efforts to help him obtain another job." The Commission concluded that because plaintiff "effectively refused suitable employment by not making a reasonable effort to find employment and by sabotaging defendants' efforts to help him find a different job," he was "not entitled to compensation after" 11 January 1993.

The issue is whether the defendant met its burden of rebutting the presumption that the plaintiff was disabled.

An employee in a workers' compensation claim is required to prove "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 v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Once, however, a "disability is proven there is a presumption that it continues until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred.' " *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994) (quoting *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 476, 374 S.E.2d 483, 485 (1988)). The approval by the Commission of a Form 21 Agreement establishes the employee's disability and that disability continues until the employer shows that the employee is no longer disabled. *Stone v. G & G Builders*, 121 N.C. App. 671, 674, 468 S.E.2d 510, 512 (1996); *Dalton v.*

Anvil Knitwear, 119 N.C. App. 275, 284, 458 S.E.2d 251, 257, *disc. rev. denied and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995).

Once the employee establishes his disability (reduction in earning capacity), the employer has the burden of showing that "suitable jobs are available" and that he is capable of getting one of those jobs. *Tyndall v. Walter Kidde Co.*, 102 N.C. App 726, 732, 403 S.E.2d 548, 551, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991. If the employer presents this evidence, the employee must present either evidence disputing the evidence presented by the employer or "show that [he] had unsuccessfully sought such other employment." *Id.*

In this case, the signing of the Form 21 agreement established a presumption of the plaintiff's disability. The defendant then presented evidence that some jobs were available to the plaintiff and that he was capable of getting those jobs. The Commission concluded that these jobs were suitable and there are findings that support that conclusion in that they show that plaintiff was capable of performing the jobs "considering his age, education, physical limitations, vocational skills, and experience." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994) (defining "suitable" employment). There is also evidence that at least one "suitable" job paid wages equivalent to or more than plaintiff's pre-injury wage of $240.00 a week. Therefore, defendants presented evidence successfully rebutting plaintiff's presumption of disability, and the burden shifted back to the plaintiff.

The Commission found that the plaintiff did not make a "reasonable effort to find employment" and because this finding is supported by the record, the plaintiff failed in his obligation to seek employment opportunities located by the employer and thus failed to satisfy his burden. The Opinion and Award of the Commission denying the plaintiff any section 97-29 compensation is therefore affirmed.

In so holding we reject any suggestion that the plaintiff is not entitled to any further benefits because he has violated section 97-32. The statute does provide that an employee is not entitled to any benefits if he "refuses employment procured [by his employer] for him suitable to his capacity." N.C.G.S. § 97-32 (1991). In this case, however, there is no evidence that the defendant "procured" any job for the plaintiff. There is only evidence that several jobs were identified by the defendant within the plaintiff's restrictions and that several employer's indicated they would consider hiring him.

Affirmed.

Judges MARTIN, John C., and WALKER concur.

KEWAUNEE SCIENTIFIC CORPORATION, Plaintiff-Appellee v. EASTERN SCIENTIFIC PRODUCTS, Inc., Defendant-Appellant

No. COA95-1030

(Filed 18 June 1996)

Discovery and Depositions § 62 (NCI4th)— failure to comply with order compelling discovery—appropriate sanctions

The trial court did not err in imposing sanctions against defendant which, following an order compelling discovery, refused to respond to 16 interrogatories and 18 requests for production of documents where the discovery addressed claims still pending in the case; furthermore, sanctions of striking answers and counterclaims and awarding attorney fees were well within the court's discretion.

Am Jur 2d, Depositions and Discovery §§ 373, 374, 390, 395.

Taxation of costs and expenses in proceedings for discovery or inspection. 76 ALR2d 953.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 ALR4th 9.

Sanctions available under Rule 37, Federal Rules of Civil Procedure, for grossly negligent failure to obey discovery order. 49 ALR Fed. 831.

Appeal by defendant from order entered 1 June 1995 by Judge Herman A. Zimmerman, Jr. and orders entered 10 July 1995 by Judge C. Preston Cornelius in Iredell County Superior Court. Heard in the Court of Appeals 17 May 1996.

Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr.; and Shapiro, Fussell, Wedge, Smotherman & Martin, by David L. Tank and Daniel M. Jennings; for plaintiff-appellee.

Pressly, Thomas & Conley, P.A., by Gary W. Thomas, for defendant-appellant.

WALKER, Judge.

This action arises out of the termination of an agreement between Kewaunee Scientific Corporation (Kewaunee) and Eastern Scientific Products, Inc. (Eastern Scientific). On 18 February 1994, Kewaunee filed suit against Eastern Scientific alleging: (1) breach of contract; (2) money owed on an account; and (3) declaratory judgment. Eastern Scientific filed an answer and counterclaims seeking damages for: (1) a violation of the New Jersey Franchise Practices Act; (2) cancellation of credit; and (3) unpaid commissions and unreimbursed expenses.

On 2 June 1994, the court granted Kewaunee's motion for partial summary judgment and issued a judgment declaring that the agreements between the parties were governed by North Carolina law, and that the agreements were terminated pursuant to the provisions of the agreements. The court, however, did not determine Kewaunee's claim for damages nor did it decide Eastern Scientific's counterclaim for damages. Eastern Scientific appealed the court's order granting partial summary judgment.

On 19 September 1994, Kewaunee served on Eastern Scientific several discovery requests, namely, "Plaintiff's First Interrogatories" and "Plaintiff's First Request for Production of Documents." When Eastern Scientific failed to answer, object, or otherwise timely respond to such requests, Kewaunee filed a motion to compel. On 20 January 1995, a consent order was entered directing Eastern Scientific to respond to the discovery requests within 30 days.

In response, Eastern Scientific served upon Kewaunee "Defendant's Response to Plaintiff's First Interrogatories" and "Defendant's Response to Plaintiff's First Request for Production of Documents." Of the twenty-two (22) interrogatories served, Eastern Scientific refused to answer sixteen (16) of the interrogatories and of the twenty-one (21) separate requests for production of documents, Eastern Scientific refused to comply with eighteen (18) based upon the following objection:

Count III of the Complaint sought a declaratory judgment that the Dealer Agreement and the Agency Agreement are governed by the laws of North Carolina, that plaintiff properly terminated these agreements with defendant and that such termination did not violate the laws of New Jersey.

On or about May 10, 1994, the Superior Court in Iredell County, North Carolina (Judge Melzer A. Morgan, Jr.) issued a Declaratory Judgment that inter alia:

— Under the terms of each Agreement, the Plaintiff had a right to terminate each Agreement.

— The Agency Agreement was terminated by appropriate written notice from the plaintiff to the defendant and was legally terminated.

— The Dealer Agreement was terminated by appropriate written notice from the plaintiff to the defendant after the running of the 120 days and was legally terminated.

On the basis of the court's declaratory judgment (currently on appeal as No. COA94-860), this interrogatory is improper as not related to a pending action, claim or defense. It therefore cannot lead to the discovery of admissible evidence.

In addition, the information sought by this interrogatory may contain trade secret or other confidential research, development or commercial information not to be disclosed or only disclosed in a designated way and subject to an appropriate protective order issued by the court.

Finding such responses to be evasive, incomplete, and generally unresponsive, Kewaunee filed a motion for sanctions based on Eastern Scientific's failure to comply with the court's order of 20 January 1995. Following a hearing, the court made the following relevant findings:

11. The discovery requests by the plaintiff to the defendant go to factual allegations contained in the defendant's Answer and Counterclaim or other relevant discoverable matters and clearly address issues relevant to the claims that are pending in this matter including the claims of the defendant asserted in its counterclaims.

12. The response of the defendant to the discovery requests constitutes a refusal to respond to the discovery requests, which failure to respond was without justification or excuse.

The court then granted Kewaunee's motion for sanctions and ordered that Eastern Scientific's answer and counterclaims be stricken and default be entered against the defendant. Thereafter, the court entered judgment for Kewaunee and assessed partial attorney fees pursuant to the order for sanctions.

On appeal, Eastern Scientific contends that the discovery deals with issues raised on appeal and that the trial court abused its discretion by imposing sanctions. As support for this argument, Eastern Scientific relies on a decision by our Supreme Court, *Willis v. Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). In *Willis*, the Court held that if a party files answers or objections to interrogatories no sanctions under Rule 37(d) may be obtained and the proper procedure for the party seeking discovery is to obtain an order compelling discovery. *Willis*, 291 N.C. at 35, 229 S.E.2d at 201.

A similar issue was addressed by this Court in *Cheek v. Poole*, 121 N.C. App. 370, 465 S.E.2d 561, *cert. denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). In *Cheek*, the Court held that "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." *Id.* at 373, 465 S.E.2d at 563-564 (emphasis in original).

We find *Cheek* and *Willis* distinguishable from the present case in that Kewaunee had obtained an order compelling discovery prior to Eastern Scientific's response. Following such response, Kewaunee then made a motion for sanctions on the basis that Eastern Scientific failed to comply with the court's order compelling discovery. The court found that Eastern Scientific's response constitutes a refusal to respond and "a flagrant refusal to obey . . . [the order] of January 20, 1995, compelling the response to the discovery requests."

The evidence shows that following the order compelling discovery, Eastern Scientific refused to respond to sixteen (16) interrogatories and eighteen (18) requests for production of documents. Moreover, Eastern Scientific objected to such discovery on the basis that the information sought did not relate to a pending claim or defense and may contain a trade secret or other privileged information. However, we find sufficient evidence in the record to support

the court's finding that the discovery addressed claims still pending in the case and that Eastern Scientific's responses were a flagrant refusal to comply with Kewaunee's discovery requests. To permit a party to provide such evasive and incomplete responses following an order compelling discovery would prolong the discovery process by unreasonably requiring the opposing party to file an additional motion to compel.

Eastern Scientific also contends that the choice of sanctions in this case was inappropriate. We disagree.

Sanctions such as striking answers and/or counterclaims and awarding attorney fees are well within the court's discretion in cases involving an abuse of discovery rules by one party. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 36, 392 S.E.2d 663, 667 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991). Accordingly, we uphold the order denying Eastern Scientific's motion to set aside the entry of default and affirm the imposition of sanctions in this case.

Affirmed.

Judges GREENE and MARTIN, JOHN C. concur.

STATE OF NORTH CAROLINA, v. SEAN DERRICK WARREN

No. COA95-999

(Filed 18 June 1996)

Kidnapping and Felonious Restraint § 18 (NCI4th)— restraint or removal of victims separate from robbery—sufficiency of evidence of first- and second-degree kidnapping

The removal of the victims of a convenience store armed robbery to a storage area and hallway at the rear of the store was not an inherent part of the robbery and supported defendant's convictions of first-degree and second-degree kidnapping where the areas to which the victims were removed did not contain safes, cash registers or lock boxes which held property to be taken in the robbery, and the victims were exposed to greater danger than that inherent in the armed robbery itself and were subjected to

the kind of danger and abuse the kidnapping statute was designed to prevent.

Am Jur 2d, Abduction and Kidnapping § 49.

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

Appeal by defendant from judgment entered 6 April 1995 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 14 May 1996.

Michael F. Easley, Attorney General, by John C. Sullivan, Associate Attorney General, for the State.

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

WYNN, Judge.

Sean Derrick Warren appeals from convictions of first and second degree kidnapping. We find no error.

The evidence at trial tended to show that defendant, Steven Boyd, and two females entered the Handy Pantry on Spring Garden Street in Greensboro, North Carolina and attacked the store clerk, Charles Sicola, Jr., and a customer, William Linton. During this encounter, defendant punched Mr. Sicola in the face, breaking his nose. Defendant and Boyd then forced the victims to the rear of the store where Mr. Sicola was forced into a storage area in front of the district manager's office and Mr. Linton was "put . . . in the hallway." Subsequently, the assailants hit Mr. Sicola on top of his head with a gun and choked him around his neck with a chain causing him to temporarily lose consciousness. Once Mr. Sicola regained consciousness, one of the assailants placed a gun to his head and stated:

> Can you feel this? Do you know what it is? You can see we ain't playing now, so just shut up. I don't want to even hear you breathe.

While defendant and Boyd were in the rear of the Handy Pantry, the two female accomplices took money and six thousand dollars in money orders from the cash register at the front of the store. After the robbery, defendant and Boyd ran out the back door.

At trial, the jury rendered verdicts of guilty of one count of first degree kidnapping, one count of second degree kidnapping, and one count of robbery with a dangerous weapon. From a sentence of eighty years in prison, the defendant appeals.

The issue on appeal is whether defendant's first and second degree kidnapping convictions must be overturned because the element of restraint or removal of the victims in this case was an inherent part of the robbery conviction. We find no error.

N.C. Gen. Stat. § 14-39 (1988) sets forth the essential elements of kidnapping:

> a) Any person who shall unlawfully confine, restrain or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

Our Supreme Court has held that a conviction for kidnapping requires restraint or removal more than that which is an inherent, inevitable part of the commission of another felony. *State v. Irwin*, 304 N.C. 93, 102-03, 282 S.E.2d 439, 446 (1981). The Court construed N.C.G.S. § 14-39 in this manner so as to avoid "punish[ing a defendant] twice for essentially the same offense, violating the constitutional prohibition against double jeopardy." *Id.* at 102, 282 S.E.2d at 446.

In determining whether the restraint present in a given case is more than that which is an inherent or inevitable part of another

felony, "[t]he key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or 'subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994), quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446.

In *State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992), this Court in upholding the denial of defendant's motion to dismiss kidnapping charges stated:

> All victims in the case at bar were moved from one room to another room where they were confined. The removals were not an integral part of the crime nor necessary to facilitate the robberies, since the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken.

Id. at 567, 410 S.E.2d at 521; *see also State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), *cert. denied*, 315 N.C. 393, 338 S.E.2d 882 (1986) (holding that there was sufficient evidence to establish kidnapping where perpetrators forced victims at gunpoint to the rear of the store where none of the property was kept and it was not necessary to move victims there in order to commit the robbery).

We find the case *sub judice* closely akin to *Joyce* and *Davidson*. Here, the removals by defendant were not an integral part of the crime nor necessary to facilitate the robbery. Indeed, as in *Joyce*, the rooms where the victims were ordered to go did not contain safes, cash registers or lock boxes which held property to be taken. 104 N.C. App. 567, 410 S.E.2d 521.

Moreover, the victims in this case were exposed to greater danger than that inherent in the armed robbery itself and subjected to the kind of danger and abuse the kidnapping statute was designed to prevent. *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. The record on appeal indicates that defendant and his accomplice forced Mr. Sicola and Mr. Linton to storage areas in the rear of the store; defendant broke Mr. Sicola's nose; defendant or his accomplice choked Mr. Sicola with a chain until he was unconscious (defendant also testified at trial that Mr. Sicola was stabbed with a knife); and defendant hit Mr. Sicola so severely on the head that he had fourteen to twenty staples placed in his head to stitch up his wounds.

We find this evidence sufficient to withstand a motion to dismiss the first and second degree kidnapping charges. Accordingly, we find no error.

No error.

Judges JOHNSON and SMITH concur.

CYNTHIA C. LAWRENCE AND FRANKLIN E. LAWRENCE, PLAINTIFFS-APPELLANTS V. JEAN MAY BURY, DEFENDANT-APPELLEE

No. COA95-911

(Filed 18 June 1996)

Compromise and Settlement § 7 (NCI4th)— plaintiffs' pleading of settlement between insurer and defendant —plaintiffs' action barred

Where defendant accepts a settlement by plaintiffs' insurer and files a counterclaim, plaintiffs who reply that such a settlement is a bar to the counterclaim may not maintain their action against that defendant, since such a reply operates to ratify the settlement between plaintiffs' insurer and defendant and thus forecloses any suit by plaintiffs against defendant for damages arising out of the accident; furthermore, the trial court did not err in refusing to permit plaintiffs to withdraw their reply, since they made an irrevocable choice when they elected to plead full settlement.

Am Jur 2d, Compromise and Settlement § 45.

Appeal by plaintiffs-appellants from order entered 15 May 1995 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 28 March 1996.

Reid C. James for plaintiffs-appellants.

Stott, Hollowell, Palmer & Windham, L.L.P., by James C. Windham, Jr., for defendant-appellee.

WYNN, Judge.

In April 1994, a vehicle driven by defendant Jean May Bury collided with a vehicle driven by plaintiff Cynthia C. Lawrence and owned by plaintiff Franklin E. Lawrence. Plaintiffs sued defendant in tort alleging that the accident caused personal injury and property damage. In response, defendant denied negligence; pled as an alternative defense, contributory negligence; and counterclaimed for $1,200.00 for damage to her car.

Plaintiffs replied to defendant's counterclaim denying negligence, alternatively pleading contributory negligence, and alleging that their insurance company, without their prior knowledge or consent, paid defendant $1,135.00 in settlement of her property damage claim. Plaintiffs further alleged that defendant accepted the check from their insurance company "in full satisfaction and discharge" of her counterclaim, and that her receipt of the payment constituted a bar to recovering against the plaintiffs.

Following plaintiff's reply, defendant moved to dismiss plaintiffs' action, alleging that plaintiffs' reply ratified the compromise settlement and thereby barred plaintiffs from seeking any recovery from the defendant. Shortly thereafter, plaintiffs sought to "dismiss, without prejudice, . . . their reply to counterclaim" which stated that defendant accepted the check from plaintiffs' insurance company in full settlement of any claim defendant may have had against plaintiffs.

Upon full consideration of the matter, Superior Court Judge Timothy L. Patti granted defendant's motion to dismiss plaintiffs' entire action with prejudice. Plaintiffs appeal.

The issue on appeal is where defendant accepts a settlement by plaintiffs' insurer and files a counterclaim, may plaintiffs who reply that such settlement is a bar to the counterclaim maintain their action against that defendant? The answer given by Justice Rodman in *Keith v. Glenn*, 262 N.C. 284, 136 S.E.2d 665 (1964) is the same now as it was then: No.

In *Keith*, plaintiff sued defendant for $20,500.00 to recover for personal injuries and property damage sustained in an automobile accident. Defendant denied negligence and counterclaimed for $5,000.00 for personal injuries and property damage. *Id.* at 285, 136 S.E.2d at 666. In reply, plaintiff asserted that his insurance carrier,

against his wishes, paid defendant $1,250.00 in full settlement of defendant's claim against plaintiff. *Id.* Plaintiff specifically alleged that the settlement barred defendant's right to claim damages from him. *Id.*

The defendant in *Keith*, responding to plaintiff's reply, moved for summary judgment on pleadings alleging that the reply pled by plaintiff ratified the settlement and barred plaintiff's action. *Id.* The trial court agreed and our Supreme Court affirmed, holding that the plaintiff could not rely on defendant's acceptance of payment from plaintiffs' insurer to defeat defendant's counterclaim on the one hand, and proceed with suit on the other. *Id.* at 286-87, 136 S.E.2d at 667-68. The Court stated:

> [Plaintiff] could not follow paths leading in opposite directions. He deliberately elected to plead: "That the receipt of the sum of $1,250.00 and the execution of said release was in compromise and settlement of a disputed claim and the execution of the aforesaid release constitutes a bar to the counterclaim now being asserted by defendant." He has deliberately elected to ratify his insurance carrier's settlement with defendant. He must, when he accepts the benefits of the settlement, bear its burdens.

Id. at 287, 136 S.E.2d at 667.

In the instant case, plaintiffs' reply to defendant's counterclaim included the following:

> **THIRD DEFENSE**
>
> . . .
>
> 11. That an agent of the Plaintiffs in this action paid the sum of $1,135.00 to the Defendant, without the consent of the Plaintiffs, in full settlement of the factual basis forming the claim set forth within her counterclaim, and the defendant accepted said sum in full satisfaction and discharge of the claim set forth in said counterclaim, and said payment therefore constitutes a bar to any further recovery by the Defendant against the Plaintiffs.

The language used by plaintiffs in paragraph eleven is indistinguishable from that in *Keith*. Here, as in *Keith*, plaintiffs moved the trial court to dismiss defendant's counterclaim, relying on the defendant's acceptance of money from the plaintiffs' insurer in *full satisfaction*

of defendant's claim against plaintiffs. As a result, we are bound by *Keith* to hold that plaintiffs' third defense operated to ratify the settlement between plaintiffs' insurer and defendant, and foreclosed any suit by the plaintiffs against the defendant for damages arising out of the accident. As stated in *Keith*, "[a] consummated agreement to compromise and settle disputed claims is conclusive and binding on the parties to the agreement and those who knowingly accept its benefits." *Id.* at 286, 136 S.E.2d at 667.

Plaintiffs contend that the instant case is distinguishable from the rule in *Keith* because there is no evidence in the record that defendant signed a release barring her from further recovery against plaintiffs. Plaintiffs are mistaken in their contention. The major rationale cited by the *Keith* Court in its holding that a plaintiff may not recover from a defendant after pleading an agreement between an insurer and defendant is that a plaintiff "[may] not follow paths leading in opposite directions." *Id.* at 287, 136 S.E.2d at 668.

Plaintiffs further contend that this case is distinguishable because they withdrew their third defense before the time of hearing. In *Keith*, the trial court likewise declined to permit plaintiff to withdraw his reply which alleged that defendant's receipt of the money from his insurance company was in full settlement of all claims defendant had against him. *Keith* upheld this determination by its holding that plaintiff made an irrevocable choice when he elected to plead full settlement. Similarly, the plaintiffs in this case made an irrevocable decision when they included their third defense in their reply. Their later attempt to withdraw this defense was ineffectual.

The decision of the court below is,

Affirmed.

Judges JOHNSON and WALKER concur.

BARBARA ANN NEWTON LANKFORD v. THOMAS H. WRIGHT AND THELMA IRENE WHITE, ADMINISTRATORS OF THE ESTATE OF LULA NEWTON; THOMAS H. WRIGHT, INDIVIDUALLY; THELMA IRENE WHITE, INDIVIDUALLY; WILLIAM PAUL WRIGHT; JAY CORNELIUS KNIGHT, JR.; JAMES ROBERT COFFEY; AND PATRICIA COFFEY NORTHERN COATES

No. COA95-1166

(Filed 18 June 1996)

Adoption or Placement for Adoption § 1 (NCI4th)— equitable adoption not recognized in North Carolina

Since plaintiff was not adopted in accordance with the statutes, N.C.G.S. §§ 48-1 to -38, and equitable adoption is not recognized in this State, the trial court properly dismissed plaintiff's action for a declaratory judgment establishing "her rights and status as an heir of the estate of" the woman who raised her and held her out as her natural daughter.

Am Jur 2d, Adoption § 3.

Modern status of law as to equitable adoption or adoption by estoppel. 97 ALR3d 347.

Judge WALKER concurring.

Appeal by plaintiff from order entered 12 September 1995 in Watauga County Superior Court by Judge James U. Downs. Heard in the Court of Appeals 24 May 1996.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III, and Douglas W. Greene, for plaintiff-appellant.

Di Santi Watson, by Anthony S. di Santi, for defendant-appellees.

GREENE, Judge.

Barbara Ann Newton Lankford (plaintiff) appeals an Order granting summary judgment for Thomas H. Wright and Thelma Irene White, as Administrators of the Estate of Lula Newton and individually, and William Paul Wright, Jay Cornelius Knight, Jr., James Robert Coffey and Patricia Coffey Northern Coates (defendants).

Plaintiff was born to Mary M. Winebarger. When plaintiff was a child her mother entered into an agreement with Clarence and Lula Newton whereby they agreed to adopt and raise plaintiff as their own

child. Although plaintiff was raised by the Newtons, known to the community as Barbara Ann Newton, and held out to the public by the Newtons as their natural child, the Newtons did not fulfill the statutory adoption requirements. Clarence Newton died in 1960. Lula Newton died in 1994.

Plaintiff's complaint requests a declaratory judgment "of her rights and status as an heir of the estate of Lula Newton," claiming that she should be "treated as the adopted daughter of Lula Newton." Defendants filed a motion to dismiss, which was considered by the trial court as a motion for summary judgment pursuant to the plaintiff's request. The trial court found that because North Carolina does not recognize the doctrine of equitable adoption, there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

The issue is whether North Carolina recognizes equitable adoption.

In *Ladd v. Estate of Kellenberger*, 64 N.C. App. 471, 307 S.E.2d 850 (1983), *aff'd on other grounds*, 314 N.C. 477, 334 S.E.2d 751 (1985), this Court refused to recognize the doctrine of equitable adoption, stating its "reluctance to interfere in legislative matters." *Id.* at 476, 307 S.E.2d at 853. Our Supreme Court, in affirming *Ladd* on other grounds, acknowledged that the Court of Appeals had "correctly observed" that North Carolina "has not recognized the doctrine of equitable adoption." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 754 (1985). Indeed, our Supreme Court has held that because adoption "is a status unknown to common law," it "can be accomplished only in accordance with provisions of statutes enacted by the legislative branch." *Wilson v. Anderson*, 232 N.C. 212, 215, 59 S.E.2d 836, 839, *petition for reh'g dismissed*, 232 N.C. 521, 61 S.E.2d 447 (1950).

In this case the plaintiff was not adopted in accordance with the statutes, N.C.G.S. §§ 48-1 to -38 (1991), and because equitable adoption is not recognized in this State, the trial court correctly dismissed the plaintiff's action.

Affirmed.

Judge MARTIN, John C., concurs.

Judge WALKER concurs with separate opinion.

Judge WALKER concurring.

Plaintiff asks this Court to recognize the doctrine of equitable adoption. While I agree with the majority's decision in this case that we are bound by the decision in *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985), I believe this is a matter for the legislative branch. I therefore write separately to urge the legislature to take action in recognizing this doctrine.

At least twenty-five states have recognized a need for the doctrine of equitable adoption so as to avoid the harsh result in cases such as this. *See, Equitable Adoption: They Took Him into Their Home and Called Him Fred*, 58 Va. L. Rev. 727, 728 (1972). But for the absence of a formal adoption proceeding, Barbara Ann Newton Lankford was in all respects the child of Lula Newton. At age three, Charles and Lula Newton agreed to adopt plaintiff and raise her as their child. Thereafter, the Newtons held plaintiff out to the public as their natural child until their deaths. Charles and Lula Newton had no other children. Until Lula Newton's death, Barbara Newton maintained a close and loving relationship with her mother as evidenced by the abundant correspondence and her involvement in her mother's medical care. The facts in this case so poignantly demonstrate a need for action to ensure that the plaintiff and persons similarly situated will receive the legal rights commensurate with adoption to which they are entitled.

STATE OF NORTH CAROLINA v. CURTIS BERNARD STEWART

No. COA95-821

(Filed 18 June 1996)

Criminal Law § 757 (NCI4th)— jury instructions on reasonable doubt—explanation of "beyond"—no error

The trial court's instructions on reasonable doubt, taken from the Pattern Jury Instructions, were a clear and fair representation of the law to the jury, and the court's further explanation of the word "beyond" in instructing the jury on the concept of beyond a reasonable doubt did not alter the State's burden of proof and ultimately did nothing more than restate the analysis the jury was

to undertake in determining whether the State met its burden of proof.

Am Jur 2d, Trial §§ 1370 et seq.

Appeal by defendant from judgment and commitment entered 20 February 1995 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 March 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender, Julie Ramseur Lewis, for defendant-appellant.

McGEE, Judge.

The State's evidence at trial tended to show that on the afternoon of 22 March 1994, David Ozodigwe, a taxicab driver, picked up four males, ages sixteen to twenty-four, whom he had never seen before. Three of the males got into the back seat and one sat in the front seat of the cab. After driving the passengers to the Wilmore section of Charlotte, Ozodigwe was directed to drive to Dunkirk Street. When Ozodigwe stopped his cab, the passenger in the right corner of the back seat placed a small gun to Ozodigwe's head and said, "Give it up." Ozodigwe took $25.00 to $30.00 from his pocket and the front seat passenger snatched the money out of his hand and took the car keys. The four passengers then ran away from the scene. Two police officers arrived thirty to sixty minutes later and as part of his investigation, Officer R.S. Crosby showed a computer-generated photographic lineup to Ozodigwe, who "immediately and confidently" identified the gunman.

Defendant, Curtis Bernard Stewart, was indicted for felonious robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87. At trial, Ozodigwe identified defendant as being the rear seat passenger who had held the gun to his head. Defendant was found guilty of robbery with a dangerous weapon and was sentenced to a term of imprisonment of nineteen years. From this judgment and commitment, defendant appeals arguing the trial court erred in its instructions to the jury on reasonable doubt. We disagree.

Over defendant's objections, the trial court initially gave the following jury instruction:

> The burden of proof in criminal cases is on the State of North Carolina to prove to you that the Defendant is guilty beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense arising out of some, or all, of the evidence that has been presented, or the lack, or insufficiency, of the evidence as the case may be.
>
> Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the Defendant's guilt.
>
> Now, one further instruction on the burden of proof. Occasionally the term "beyond" in the phrase "beyond a reasonable doubt" creates confusion among jurors because that word is not being used in its most common sense. Most commonly the word beyond means more than or farther than, but that is not the way the word is being used in that phrase. What it means is to the exclusion of. To put it more simply, if you have a reasonable doubt of the Defendant's guilt of the crime for which he is charged, then it is your duty to return a verdict of not guilty. On the other hand, if you do not have a reasonable doubt as to the Defendant's guilt of the crime for which he is charged, and therefore the State has proven his guilt beyond a reasonable doubt, then it is your duty to return a verdict of guilty.

After beginning deliberations, the jury returned to the courtroom and requested that the trial court give a "clarification of reasonable doubt." The trial court then reinstructed the jury as follows:

> As I said earlier, reasonable doubt is a doubt based on reason and common sense that arises from some, or all, of the evidence that has been presented during the trial, or on the lack, or insufficiency, of the evidence.
>
> Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the Defendant's guilt.
>
> It is the burden of proof in criminal cases in the State of North Carolina for the State to prove to you that the Defendant is guilty beyond a reasonable doubt of the offense for which he has been charged, and each and every element of that offense.
>
> . . .
>
> So, you have to be fully satisfied or entirely convinced that the Defendant committed each and every element of the offense of which he has been charged. If you are fully satisfied or entirely

> convinced that the Defendant committed the offense, the State has met its burden of proof beyond a reasonable doubt.

Defendant contends the instructions given by the trial court were confusing and misled the jury. In particular, the court's definition of the word "beyond" was an unnecessary addendum which was not "in substantial accord" with definitions approved by our Courts and complicated the entire instruction.

In *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971) our Supreme Court said:

> A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal.

McWilliams, 277 N.C. at 684-85, 178 S.E.2d at 479 (citations omitted). In this case, the trial court properly used language taken from the Pattern Jury Instructions to state the law on reasonable doubt. These instructions were given twice, once during the initial charge to the jury and later when the jury returned with a request for clarification of reasonable doubt. In addition, during the initial charge to the jury the trial court offered a more complete definition of the word "beyond" in instructing the jury on the concept of beyond a reasonable doubt. This addendum, while extraneous, did not alter the State's burden of proof and ultimately it did nothing more than restate the analysis the jury was to undertake in determining whether the State met its burden of proof required to convict defendant.

We find as a whole, the jury instructions at issue here constituted a clear and fair representation of the law to the jury. This error is overruled.

No error.

Judges EAGLES and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 JUNE 1996

ADAMS v. MOORE No. 95-874	Buncombe (93CVD2649)	Affirmed
FURR v. FONVILLE No. 95-1022	Wake (92CVS10208)	Appeal Dismissed
HAPPOLDT v. IMPACT FURNITURE CO. No. 95-400	Ind. Comm. (257655)	Affirmed
HEFLEY v. HEFLEY No. 94-1041	Durham (92CVD3137)	Vacated and Remanded
HINE v. HINE No. 95-185	Guilford (93CVD1790)	Vacated
HOLDSCLAW v. BENNETT No. 95-195	Forsyth (93CVS3324)	Appeal Dismissed
IN RE FRENCH No. 95-1112	Lee (92J56)	Vacated and Remanded
IN RE LONG No. 95-11	Person (94J14)	Affirmed in Part and Reversed in Part
IN RE TURNER No. 95-825	Onslow (94J205)	Affirmed
IN RE WILLIS No. 95-1009	Mecklenburg (91-J-900) (92-J-692) (94-J-345) (94-J-346)	Affirmed
IN RE WILSON No. 95-1366	Lee (93J49)	Vacated and Remanded
IN RE WOOD No. 95-823	Johnston (95J29)	Reversed and remanded for proceedings consistent with this opinion
KING v. BENNETT No. 95-787	Forsyth (95CVS484)	Affirmed
KOSTEK v. AMERICAN NATIONAL CAN CORP. No. 95-916	Ind. Comm. (204122) (331851)	Affirmed
LUSK v. RANKIN No. 95-842	Rowan (95CVD1175)	Dismissed

MILK HOUSE v. BARTLETT MILLING CO. No. 95-750	Yadkin (93CVS328)	Affirmed in Part, Reversed in Part, and Remanded
MOORE v. FLORIDA POWER & LIGHT CO. No. 95-988	Mecklenburg (92CVS13573)	Reversed
PEACE v. PHILLIPS FIBERS CORP. No. 95-252	Ind. Comm. (025270)	Affirmed
PHELPS v. NUCKLES No. 95-1182	Guilford (94CVS4129)	New Trial
PHILLIPS v. GRAND UNION CO. No. 95-220	Forsyth (93CVS3892)	Affirmed
RYDER v. BB&T FINANCIAL CORP. No. 95-383	Buncombe (94CVS04009)	Affirmed
STATE v. BELL No. 95-1292	Guilford (95CRS20484) (95CRS37199)	No Error
STATE v. COLLINS No. 95-1194	Guilford (94CRS53635) (94CRS53637) (94CRS59218)	As to the convictions for trafficking in cocaine by transportation, trafficking in cocaine by possession, and maintaining and keeping a motor vehicle for transporting cocaine, no error. As to the purported appeal from the conviction of conspiracy to traffic in cocaine, appeal dismissed.
STATE v. EALEY 95-1109	Vance (94CRS8448)	No Error
STATE v. ELLIOTT No. 92-3	Henderson (90CRS10281) (90CRS10282)	No Error

STATE v. FLEMING No. 95-834	Dare (94CRS3974) (94CRS4498) (94CRS5051) (94CRS5052) (94CRS5053) (94CRS5057) (94CRS5058) (94CRS3976) (94CRS4499) (94CRS5040) (94CRS5041) (94CRS5042) (94CRS5046) (94CRS5047) (94CRS3977) (94CRS4496) (94CRS5073) (94CRS5074) (94CRS5075) (94CRS5079) (94CRS5080)	No Error
STATE v. FRANKLIN No. 95-1204	Richmond (94CRS5511) (94CRS5512)	No Error
STATE v. GOODE No. 95-1424	Wake (94CRS61705)	No Error
STATE v. HAYES No. 95-881	Guilford (94CRS38610)	New Trial
STATE v. HOWARD No. 95-1156	Durham (92CRS28349) (92CRS28350) (92CRS28352)	No Error
STATE v. PURVIS No. 95-742	Beaufort (93CRS6282)	No Error
STATE v. ROBERTS No. 95-284	Onslow (93CRS21677)	No Error
STATE v. TAYLOR No. 95-1113	New Hanover (95CRS0600)	Affirmed
WATKINS v. WILLIAMS No. 95-812	Alamance (94CVS1361)	Affirmed

APPENDIX

AMENDMENT TO RULES OF
APPELLATE PROCEDURE

AMENDMENT TO INTERNAL OPERATING
PROCEDURES PRINTING DEPARTMENT

Order Adopting
Amendment to Rules of Appellate Procedure

Appendix F. Fees and Costs of the North Carolina Rules of Appellate Procedure, paragraph 6, is hereby amended to read as follows:

> Costs for printing documents are $1.75 per printed page. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28 (b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

This amendment shall be effective 1 July 1996.

Adopted by the Court in Conference this 9th day of May, 1996. This amendment shall be promulgated by publication in the Advance sheets of the Supreme Court and the Court of Appeals.

Orr, J.
For the Court

Order Adopting
Amendment to Internal Operating Procedures
Printing Department

The Internal Operating Procedures of the Supreme Court Printing Department, published as the Internal Operating Procedures Mimeographing Department at 295 N.C. 743, and amended and republished as the Internal Operating Procedures Printing Department at 327 N.C. 729, are hereby amended as follows:

Rule 8 shall be amended as follows:

8. Until such time as the Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be reproduced shall be printed at a cost of **$1.75** per printed page.

This amendment shall become effective on the 1st day of July 1996.

Adopted by the Court in Conference this 9th day of May, 1996. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Orr, J.
For the Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

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ACCOUNTANTS

§ 20 (NCI4th). Liability to third party for negligent misrepresentation

Since there was no contractual duty between plaintiffs and defendant accountants, plaintiffs' claim was for negligent misrepresentation and was governed by the statute of limitations in G.S. 1-52(5), and their claim was not barred by the statute of limitations where their forecast of evidence showed that they discovered the harm from defendants' actions in 1990 and filed their complaint in 1992. **Barger v. McCoy Hillard & Parks,** 391.

ADMINISTRATIVE LAW AND PROCEDURE

§ 51 (NCI4th). Judicial review by certiorari

North Carolina Central University's petition for a writ of certiorari filed in the superior court should have been denied in toto because it failed to allege or show that no appeal from the administrative law judge's denial of summary judgment was provided by law. **N.C. Central University v. Taylor,** 609.

§ 54 (NCI4th). Judicial review under Administrative Procedure Act generally; jurisdiction

The State Board of Education's decision not to amend a rule to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes was a rulemaking decision not subject to judicial review. **N.C. Chiropractic Assn. v. N.C. State Bd. of Educ.,** 122.

ADOPTION OR PLACEMENT FOR ADOPTION

§ 1 (NCI4th). Purpose of adoption statutes; protection of parties to adoption, generally

Since plaintiff was not adopted in accordance with the adoption statutes, and equitable adoption is not recognized in this State, the trial court properly dismissed plaintiff's action for a declaratory judgment establishing her rights and status as an heir of the estate of the woman who raised her and held her out as her natural daughter. **Lankford v. Wright,** 746.

APPEAL AND ERROR

§ 75 (NCI4th). Criminal appeals; defendant entering plea of guilty

Where defendant pled guilty to criminal charges in superior court and he did not petition for a writ of certiorari, his notice of appeal was a nullity and the appellate court acquired no jurisdiction. **State v. Waters,** 504.

§ 93 (NCI4th). Appealability of particular orders; discovery orders generally

The denial of a motion to quash an administrative search warrant was not immediately appealable because administrative search warrants are analogous to discovery requests and orders compelling discovery are generally not appealable until entry of a final order. **In re Galvan Industries,** 628.

§ 111 (NCI4th). Appealability of particular orders; orders denying motion to dismiss generally

The denial of a motion to dismiss based upon the defense of sovereign immunity is immediately appealable. **Southern Furniture Co. v. Dept. of Transportation,** 113.

APPEAL AND ERROR — Continued

§ 113 (NCI4th). Appealability of particular orders; orders denying motion to dismiss; process and service

An appeal from the denial of a motion to dismiss in a domestic action was dismissed as interlocutory because it pertained merely to the process of service used to bring the party before the court. **Cook v. Cinocca,** 642.

§ 118 (NCI4th). Appealability of particular orders; summary judgment denied

Defendant highway contractor was not entitled to share in the state's immunity in a negligence claim arising out of the performance of its contract with the state, and the trial court's denial of defendant's motion for summary judgment on the basis of sovereign immunity did not deprive defendant of a substantial right absent an immediate appeal. **Knighten v. Barnhill Contracting Co.,** 109.

When a case has been decided on the merits, a denial of a motion for summary judgment is not reviewable on appeal. **Chaney v. Young,** 260.

§ 119 (NCI4th). Appealability of particular orders; summary judgment granted

Defendants' appeal was dismissed as interlocutory where the trial court granted partial summary judgment on the issue of liability in favor of plaintiffs and set the damages action for hearing. **Snyder v. First Union National Bank,** 101.

§ 122 (NCI4th). Appealability of particular orders; multiple claims or parties; danger of inconsistent verdicts; right to trial before same trier of fact

The order allowing plaintiffs' motion for partial summary judgment against three of defendants' counterclaims was immediately appealable where plaintiff's claims and defendants' fourth counterclaim remain viable, since different juries could reach different results. **Jenco v. Signature Homes, Inc.,** 95.

§ 147 (NCI4th). Reserving question for appeal generally; necessity of request, objection, or motion

Defendant failed to preserve the admission of certain evidence for appellate review where defendant failed to specifically object on the ground he asserted on appeal, and it was not apparent from the context that defendant was objecting on the ground he asserted on appeal. **State v. Pope,** 89.

§ 150 (NCI4th). Preserving constitutional issues for appeal

Where defendant never raised the unconstitutionality of the income tax statute as a defense to charges of failure to file state income tax returns, the constitutional question was not properly presented to the appellate court. **State v. Houston,** 648.

§ 155 (NCI4th). Preserving question for appeal; effect of failure to make motion, objection, or request; criminal actions

Where defendant raised no objection to the trial court's declaration of a mistrial on its own motion, defendant failed to preserve this issue for appellate review. **State v. Sanders,** 691.

§ 292 (NCI4th). Availability of writ of certiorari; review of nonappealable interlocutory orders

There is no appeal from an interlocutory order of the superior court granting or denying a writ of certiorari to an administrative agency, and appellant should have

APPEAL AND ERROR — Continued

filed a petition for a writ of certiorari with the Court of Appeals. **N.C. Central University v. Taylor,** 609.

§ 355 (NCI4th). Effect of omission of necessary part of record

Where a transcript was not provided to the Court of Appeals, the Court was precluded from addressing appellant's argument that the evidence was insufficient to support the court's determination that a natural father had abandoned his children and was barred from inheriting from them. **In re Estates of Barrow,** 717.

§ 367 (NCI4th). Amendments and additions to record

The Court of Appeals did not take judicial notice of a check which was not properly part of the record but was physically attached to plaintiff's brief. **Horton v. New South Ins. Co.,** 265.

§ 426 (NCI4th). Form and content of brief; page limitations

The rule requiring that all printed matter submitted to the Court of Appeals be in 11 point type and permitting no more than 27 lines of double spaced text and no more than 65 characters per line on a properly formatted 8.5 x 11 inch page will be applied to all briefs, petitions, notices of appeal, responses and motions filed after 2 April 1996. **Lewis v. Craven Regional Medical Center,** 143.

§ 555 (NCI4th). Law of case and subsequent proceedings generally

A prior decision in this case established the law of this case as it related to the sufficiency of plaintiffs' pleadings by holding that plaintiffs correctly maintained a valid claim for wrongful autopsy against defendant county medical examiner in his individual capacity as a public officer. **Epps v. Duke University,** 198.

A 1993 declaratory ruling that plaintiff was not barred from filing a protest to an additional dealership because a reasonable time had passed from the signing of a 1990 consent order and no new dealership had been built became the law of the case. **Al Smith Buick Co. v. Mazda Motor of America,** 429.

APPEARANCE

§ 1 (NCI4th). Generally; general appearance defined

Defendants were not estopped from contesting jurisdiction and service of process because they filed and served an answer containing the defense of lack of personal jurisdiction and engaged in discovery since such actions alone are not considered a general appearance. **Ryals v. Hall-Lane Moving and Storage Co.,** 242.

ASSAULT AND BATTERY

§ 115 (NCI4th). Particular circumstances requiring submission of lesser degrees of offenses

A defendant on trial for aggravated assault was entitled to an instruction on the lesser included offense of simple assault where evidence was presented that defendant struck the victim with his fists but that the victim was cut by another perpetrator. **State v. Andrews,** 274.

ASSIGNMENTS

§ 2 (NCI4th). Validity of assignments; rights and interests assignable

Claims against an automobile insurer for unfair and deceptive trade practices, bad faith refusal to settle, breach of fiduciary duty, and tortious breach of contract were not assignable to the estate of a person killed in an accident. **Horton v. New South Ins. Co.**, 265.

ATTACHMENT AND GARNISHMENT

§ 13 (NCI4th). Attachment procedures; notice requirements

Defendant's due process rights were not violated because he did not receive notice and hearing prior to attachment of his property where defendant was a nonresident who had refused to accept service several times at an address he had verified. **Miltland Raleigh-Durham v. Mudie**, 168.

ATTORNEY GENERAL

§ 6 (NCI4th). Duty to consult and advise

Petitioner's constitutional rights were not violated because respondent university was represented before the State Personnel Commission by a senior deputy attorney general and an assistant attorney general served as legal advisor to the Commission. **Dorsey v. UNC-Wilmington**, 58.

ATTORNEYS AT LAW

§ 17 (NCI4th). Unauthorized practice of law generally

The respondent in a proceeding to terminate parental rights was not prejudiced when the evidence was presented by a law student working with the guardian ad litem program who had not been properly certified to practice law pursuant to the State Bar Rules, instead of by the student's supervising attorney who was present at the hearing. **In re Joseph Children**, 468.

AUTOMOBILES AND OTHER VEHICLES

§ 141 (NCI4th). Driving license suspended or revoked

Defendant's argument in a prosecution for driving with a revoked license that he had rescinded his contract with the State by cutting up his license and returning it to the Division of Motor Vehicles and that he should be able to travel freely without having to meet the statutory requirements was without merit. **State v. Ellison**, 638.

There was no merit to a defense argument in a prosecution for driving with a revoked license that defendant was operating a "road machine" and not a motor vehicle and was exempted from having a license under G.S. 20-8 where defendant was driving a 1983 Plymouth. **Ibid.**

§ 181 (NCI4th). Relationship between dealer and manufacturer; granting additional franchises

The Commission of Motor Vehicles erred in concluding that the "relevant market area" required the counting of the entire population in a census tract when only a portion of that tract is located within a designated radius of the proposed site of a new motor vehicle dealership. **Al Smith Buick Co. v. Mazda Motor of America**, 429.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 440 (NCI4th). Negligence of owner in permitting incompetent or reckless person to drive

Plaintiff's forecast of evidence was sufficient on the issue of defendant owner's negligent entrustment of his truck to an incompetent or reckless driver where it tended to show that the owner entrusted his truck for painting to a stranger who walked in from the street without asking to see his driver's license or asking about his driving record, defendant driver's license had been permanently revoked for numerous driving violations including DWI, and defendant driver crossed the centerline while under the influence of alcohol and caused the death of plaintiff's intestate. **Thompson v. Three Guys Furniture Co.,** 340.

§ 441 (NCI4th). Negligence of owner in permitting underage or unlicensed person to operate vehicle

A violation of G.S. 20-34 and negligence per se are not established when it is shown only that defendant owner "authorized" defendant driver to drive the owner's vehicle when he had no license since the statute requires knowledge by the owner. **Thompson v. Three Guys Furniture Co.,** 340.

§ 700 (NCI4th). Vehicle ownership as proof of agency relationship between owner and driver

Plaintiff's forecast of evidence was sufficient on the issue of whether defendant owner was vicariously liable for defendant driver's negligence on the ground he was acting as the owner's agent at the time of an accident where plaintiff submitted affidavits in addition to the prima facie showing of agency provided in G.S. 20-71.1. **Thompson v. Three Guys Furniture Co.,** 340.

§ 833 (NCI4th). Driving under influence of impairing substance; warrantless arrest generally

A highway patrolman had a reasonable and articulable suspicion for stopping defendant's vehicle where he observed defendant driving on the center line and weaving back and forth within his lane for 15 seconds at 2:00 a.m. on a road near a nightclub. **State v. Watson,** 596.

§ 843 (NCI4th). Proof of intoxication or impairment generally; test to withstand nonsuit

There was not a fatal variance in a driving while impaired prosecution concerning events on the 5th of June which the trooper testified occurred on the 25th. **State v. Watson,** 596.

BURGLARY AND UNLAWFUL BREAKINGS

§ 57 (NCI4th). Sufficiency of evidence; first-degree burglary

The evidence was sufficient for submission to the jury in a prosecution for first-degree burglary in which defendant took the victim's purse. **State v. Dalton,** 666.

COMPROMISE AND SETTLEMENT

§ 7 (NCI4th). Pleadings

Where defendant accepts a settlement by plaintiffs' insurer and files a counterclaim, plaintiffs who reply that such a settlement is a bar to the counterclaim may not maintain their action against that defendant since such a reply operates to ratify

COMPROMISE AND SETTLEMENT — Continued

the settlement between the insurer and defendant and forecloses any suit by plaintiffs against defendant for damages arising out of the accident. **Lawrence v. Bury,** 742.

CONSPIRACY

§ 28 (NCI4th). Criminal conspiracy; sufficiency of evidence generally

The evidence was insufficient to support the existence of three separate conspiracies to commit second-degree rape, although defendant and his companions went to three homes in search of a victim. **State v. Dalton,** 666.

CONSTITUTIONAL LAW

§ 92 (NCI4th). Right to equal protection of law; particular nondiscriminatory applications of law

The six-year statute of repose for products liability actions does not violate the equal protection clauses of the state or federal constitutions. **Mahoney v. Ronnie's Road Service,** 150.

§ 94 (NCI4th). Education, generally; funding and tuition

The state school funding system does not violate the "general and uniform" and "equal opportunities" clauses of Article IX, § 2(1) of the N. C. Constitution. **Leandro v. State of North Carolina,** 1.

The fundamental educational right under the N.C. Constitution is limited to one of equal access to education and does not embrace a qualitative standard. **Ibid.**

Plaintiffs' equal protection and due process rights were not violated by the state's educational funding system on the ground that opportunities they received were substantially inferior to those offered to children in wealthy school districts. **Ibid.**

§ 128 (NCI4th). Right to access of courts and legal remedy

The six-year statute of repose for products liability actions does not violate the open courts clause of the N. C. Constitution. **Mahoney v. Ronnie's Road Service,** 150.

§ 264 (NCI4th). Attachment of right of counsel

Defendant mother's Sixth Amendment right to counsel attached in a criminal juvenile abuse proceeding after the filing of a civil abuse petition, even though there had been no formal criminal charge, preliminary hearing, indictment, information or arraignment. **State v. Adams,** 538.

§ 327 (NCI4th). Speedy trial; requirement that delay be negligent or willful and prejudicial; particular circumstances

Defendant was denied his constitutional right to a speedy trial where nearly three years elapsed between defendant's arrest and trial, his case was calendared thirty-one times, and defendant lost the ability to locate a key witness who could have offered exculpating evidence. **State v. Chaplin,** 659.

§ 342 (NCI4th). Presence of defendant at proceedings generally

Defendant's right to be present at every stage of his trial was not violated by his exclusion from a conference in camera which included discussions about replacing

CONSTITUTIONAL LAW — Continued

defendant's court-appointed attorney with a retained attorney and the court's refusal to grant a continuance to allow a privately retained attorney to prepare for trial. **State v. Mundine,** 707.

CONTEMPT OF COURT

§ 31 (NCI4th). Civil contempt; findings and orders

Where plaintiff was granted a deviation from a custody order which allowed her to take the parties' child to Syria on vacation, the trial court erred in finding defendant in civil contempt for filing a custody action in Syria while plaintiff and the child were in that country and by requiring, as punishment, that defendant reimburse plaintiff for expenses resulting from defendant's contempt. **Atassi v. Atassi,** 356.

§ 39 (NCI4th). Appeal generally; right to appeal

A contempt order was civil in nature even though it stated that the court found plaintiff in criminal contempt, and an appeal therefrom was properly before the Court of Appeals, where the contempt order allowed plaintiff to purge the contempt by delivering the parties' child to defendant for his scheduled visitation and by turning a coin collection over to defendant. **Hancock v. Hancock,** 578.

CONTRACTORS

§ 12 (NCI4th). Actions by unlicensed general contractors; where license held by one other than party to contract

The trial court properly entered summary judgment for plaintiffs on defendant's counterclaims for breach of contract, quantum meruit, and foreclosure on a claim of lien for labor and materials where, at the time the parties entered into a contract for the corporate seller to construct a home for plaintiffs, the seller was an unlicensed general construction contractor, even though the individual defendant was a licensed contractor and the president of the corporate defendant. **Jenco v. Signature Homes, Inc.,** 95.

CONTRIBUTION

§ 1 (NCI4th). Nature of contribution doctrine

A party jointly and severally liable on a note may seek contribution from the other party for payment made when the paying party has paid less than half of the entire obligation where each month one party pays more than one-half of the monthly obligation on the note. **Irvin v. Egerton,** 499.

CORONERS AND MEDICAL EXAMINERS

§ 32 (NCI4th). Liability of medical examiner for wrongful autopsy

The trial court properly denied defendant county medical examiner's motion for summary judgment in an action against him in his individual capacity for wrongful autopsy where plaintiffs' forecast of evidence tended to show that defendant exceeded the scope of his official duties during an autopsy when he mutilated the body by removing decedent's eyes, spinal cord and spinal vertebrae. **Epps v. Duke University,** 198.

CORPORATIONS

§ 80 (NCI4th). Effect of transacting business without certificate; limitation on access to courts

Where plaintiff's assignor was never authorized to do business in North Carolina, plaintiff assignee had no authority to maintain an action to enforce its assigned foreign judgment in North Carolina even if it is authorized to do business in this state. **Leasecomm Corp. v. Renaissance Auto Care,** 119.

COSTS

§ 9.1 (NCI4th). Award of costs following voluntary dismissal by plaintiff

In an automobile accident case in which plaintiff took a voluntary dismissal, a trial court order denying defendant's motion for costs "at the present time" and allowing defendant to reapply for approval of costs should plaintiff refile the action was void. **Kearns v. Spann,** 650.

§ 26 (NCI4th). Effect of contractual provision for attorney's fees

The trial court properly awarded attorney's fees to plaintiff where the parties' consent judgment contained a provision in which defendant agreed to pay plaintiff's costs associated with enforcing the consent judgment. **PCI Energy Services v. Wachs Technical Services,** 436.

§ 37 (NCI4th). Attorney's fees in other particular actions or proceedings

Plaintiff was a prevailing party, and the trial court did not err in awarding attorney's fees to plaintiff under G.S. 143-318.16B, where the trial court found that defendant board of education's decision to terminate a construction contract in closed session violated the Open Meetings Law but allowed the termination to stand. **H.B.S. Contractors v. Cumberland County Bd. of Education,** 49.

COURTS

§ 16 (NCI4th). Personal jurisdiction; promise to perform, or performance of, services within State; goods shipped from, or received in, State

The exercise of personal jurisdiction over a California manufacturer did not violate due process, though the manufacturer had no offices, facilities, sales agents, or employees in North Carolina and had never conducted business in this state, since the manufacturer entered into an agreement with a distributor to ship boats to plaintiff in North Carolina, and pursuant to this agreement defendant intentionally injected its boats into the stream of commerce and purposely availed itself of the benefit of North Carolina markets. **Carswell Distributing Co. v. U.S.A.'s Wild Thing, Inc.,** 105.

Defendant South Carolina peach grower made a promise for plaintiff's benefit to pay for services to be performed in this state by plaintiff within the purview of the long-arm statute, G.S. 1-75.4(5)(a), where a contract between the parties gave plaintiff the sole right to market defendant's peaches, and plaintiff marketed and sold defendant's peaches in North Carolina; furthermore, defendant had sufficient minimum contacts to permit North Carolina to exercise personal jurisdiction over him consistent with due process. **Williamson Produce v. Satcher,** 589.

§ 129 (NCI4th). New trial before magistrate; appeal for trial de novo

Dismissal of defendant's appeal from a magistrate to district court for failure to prosecute was not proper where neither the record nor the court's order indicated this

COURTS—Continued

case had been regularly set for trial or that defendant-appellant was called. **Fairchild Properties v. Hall,** 286.

§ 149 (NCI4th). Conflict of laws between states; products liability; actions for breach of warranty

North Carolina's six-year statute of repose, rather than Arizona's twelve-year statute, applied to plaintiffs' breach of warranty claims against the manufacturer of a brake assembly because North Carolina had the most significant relationship to the transaction and the parties. **Mahoney v. Ronnie's Road Service,** 150.

CRIMINAL LAW

§ 47 (NCI4th). Aiders and abettors; necessity of determining guilt of principle in first degree

Defendant's conviction for assault based on aiding and abetting was invalid where the named principal alleged in the indictment was subsequently found not guilty of the crime. **State v. Byrd,** 497.

§ 59 (NCI4th). Jurisdiction; commission of offense within the state

The trial court's acceptance of the jury's special verdict finding that North Carolina had jurisdiction of defendant's first murder trial, prior to declaring a mistrial because of the jury's inability to agree upon the issue of guilt or innocence, precluded defendant from relitigating jurisdiction at his second trial. **State v. Dial,** 298.

§ 146 (NCI4th). Plea of guilty; revocation or withdrawal of plea generally

A defendant who entered a negotiated guilty plea to robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, second-degree sexual offense, and first-degree kidnapping failed to show a fair and just reason for withdrawal of the plea and the trial court properly denied defendant's motion. **State v. Graham,** 635.

§ 266 (NCI4th). Continuance; surprise witness or evidence generally

The trial court did not err in denying defendant's motion for continuance on the ground that testimony by the state's medical examiner at his second trial was different from that at the first trial and he was forced to account for his whereabouts for an additional twelve hours. **State v. Dial,** 298.

§ 382 (NCI4th). Expression of opinion on evidence during trial; examination of witnesses; clarification of testimony

The trial court's questioning of a witness was not an attempt to rehabilitate the witness after a successful cross-examination by defendant's attorney but was an attempt to clarify the witness's testimony and was thus not an improper expression of opinion. **State v. Pope,** 89.

§ 530 (NCI4th). Mistrial; exposure to evidence not formally introduced; newspaper articles or headlines

The trial court did not err in denying defendant's motion for a mistrial due to a news article which appeared during the trial reporting that defendant had rejected a plea bargain. **State v. Dial,** 298.

CRIMINAL LAW—Continued

557 (NCI4th). Mistrial; particular testimony; defendant's other prior criminal activity

The trial court did not err in denying defendant's motion for a mistrial made after his supervisor testified that defendant had told him he had a record where the court instructed the jurors to disregard this statement. **State v. Dial,** 298.

§ 757 (NCI4th). Instructions; approved or nonprejudicial definitions or reasonable doubt, generally

The trial court's Pattern Jury Instructions on reasonable doubt were a fair representation of the law, and the court's further explanation of the word "beyond" in instructing the jury on the concept of beyond a reasonable doubt did not alter the State's burden of proof. **State v. Stewart,** 748.

§ 796 (NCI4th). Instruction as to aiding and abetting generally

The trial court did not err in refusing to give defendant's requested instruction on mere presence where it was clear that defendant was an active participant in the events. **State v. Williamson,** 229.

§ 808 (NCI4th). Instruction on lesser degrees of crime; cure of error

The trial court's error in failing to require a specific intent by defendant separate from that of his accomplices in its instructions on assault with a deadly weapon with intent to kill inflicting serious injury was rendered harmless by the jury's verdict convicting plaintiff of the lesser offense of assault with a deadly weapon inflicting serious injury, which required no finding of specific intent. **State v. Williamson,** 229.

§ 869 (NCI4th). Additional instructions after retirement of jury; requirement of notice; court's discretion to permit additional argument

Where the trial court, in response to the jury's questions, merely repeated and clarified instructions it had previously given in its original charge, the instructions were not "additional instructions" which required the trial court to consult with the parties and given them an opportunity to be heard prior to reinstructing the jury. **State v. Williamson,** 229.

§ 980 (NCI4th). Setting aside verdict generally

It was proper for the trial court to set aside arrested judgments for conspiracy to commit murder and armed robbery and to sentence defendant for those crimes after defendant's death sentence for first-degree murder was reversed and defendant received a life sentence. **State v. Mahaley,** 490.

§ 1054 (NCI4th). Sentencing hearing; continuance

The trial court did not err in denying defendant's request for an overnight continuance of his sentencing hearing. **State v. McKenzie,** 37.

§ 1073.8 (NCI4th). Structured sentencing; prior record level

The trial court did not err when sentencing defendant under the Structured Sentencing Act as an habitual felon by assigning points because the offense for which defendant was being sentenced contained the same elements as a prior offense used in establishing habitual felon status and because defendant committed the offense while on probation for an offense that had been used to establish defendant's status as an habitual felon. **State v. Bethea,** 623.

CRIMINAL LAW—Continued

§ 1079 (NCI4th). Fair Sentencing Act; consideration of aggravating and mitigating factors generally; discretion of trial court

It was within the discretion of the trial court to conclude that the statutory aggravating factor that defendant had a prior criminal record outweighed the nonstatutory mitigating factor that the prior convictions did not consist of any crime of violence and to impose the maximum sentence allowed by statute for each offense. **State v. McKenzie,** 37.

§ 1102 (NCI4th). Fair Sentencing Act; permissible use of nonstatutory aggravating factor

The trial court erred in finding as a nonstatutory aggravating factor for aggravated assault and armed robbery that defendant maintained a dwelling where illegal drug use was occurring on the ground that it created an atmosphere that led up to the commission of the crimes. **State v. Wheeler,** 653.

§ 1143 (NCI4th). Fair Sentencing Act; statutory aggravating factors; offense against persons performing official duties generally

The evidence supported the trial court's finding as an aggravating factor for a second-degree murder that the "offense was committed against a law enforcement officer who was in uniform while in the performance of his employment" where a deputy sheriff accompanied defendant's daughter so that she could take her child from defendant's residence and was shot and killed by defendant. **State v. Pope,** 37.

§ 1177 (NCI4th). Fair Sentencing Act; statutory aggravating factors; position of trust or confidence generally

The trial court did not err in finding as an aggravating factor for larceny of computer equipment from the university in which defendant was enrolled that defendant took advantage of a position of trust where defendant had been given an access code to a laboratory for use of the computers therein. **State v. Carter,** 332.

DAMAGES

§ 53 (NCI4th). Collateral source rule generally

The trial court properly reduced under G.S. 1B-4 plaintiff's $25,000 recovery against the driver and owner of an automobile involved in a collision by the $10,000 pretrial settlement she had received from the driver and owner of a truck which allegedly caused the accident. **Ryals v. Hall-Lane Moving and Storage Co.,** 134.

Based upon the principle that a plaintiff should not be permitted a double recovery for a single injury, the trial court erred in failing to grant defendant a credit for the money previously paid plaintiff by another alleged tortfeasor in this action arising from a multi-car pile-up even though the jury found that the other alleged tortfeasor was not negligent. **Baity v. Brewer,** 645.

§ 178 (NCI4th). Verdict generally; excessive or inadequate award

The trial court did not abuse its discretion by failing to grant a new trial on the ground that $118,000 for the death of a ten-month-old child in an automobile accident was an excessive award. **Chaney v. Young,** 260.

DEEDS

§ 74 (NCI4th). Restrictive covenants in subdivisions; mobile homes

A structure was a mobile home which violated a subdivision's restrictive covenants even though the wheels and axles were removed and the structure was placed on concrete blocks. **Young v. Lomax,** 385.

DISCOVERY AND DEPOSITIONS

§ 62 (NCI4th). Enforcing discovery; sanctions for failure to respond to discovery request

The trial court did not err in striking answers and counterclaims and awarding attorney fees as sanctions for defendant's refusal, following an order compelling discovery, to respond to 16 interrogatories and 18 requests for production of documents. **Kewaunee Scientific Corp. v. Eastern Scientific Products,** 734.

§ 67 (NCI4th). Enforcing discovery; failure to comply with order; sanctions by court in which action is pending

While the trial court properly recognized that defendants were prejudiced by plaintiff's failure to comply with discovery, the trial court abused its discretion when it remitted a portion of the verdict rather than granting defendants' motion for a new trial. **Gardner v. Harriss,** 697.

DIVORCE AND SEPARATION

§ 41 (NCI4th). Separation agreement; enforcement; contempt

The trial court did not err in finding plaintiff in contempt for violating a consent judgment concerning property distribution by failing to return all of a coin collection to defendant. **Hancock v. Hancock,** 518.

§ 119 (NCI4th). Marital property, generally

Property titled in the name of a person other than the parties to the marriage can be "marital property" within the meaning of G.S. 50-20. **Upchurch v. Upchurch,** 172.

The trial court's findings were insufficient to support its conclusion that bonds and notes titled either partly or wholly in the names of third parties were marital properties. **Ibid.**

§ 121 (NCI4th). Distribution of marital property; classification of property; inheritances and gifts

The trial court erred in classifying a lot as marital property where the lot was transferred to defendant from his mother during the marriage and no consideration was given. **Burnett v. Burnett,** 712.

§ 144 (NCI4th). Distribution factors generally

The need of a spouse to occupy the marital residence is not properly considered as a distributional factor unless it involves a spouse with custody of the children. **Burnett v. Burnett,** 712.

The trial court was required to consider the fact that plaintiff possessed the marital residence subsequent to the date of separation as a factor in determining the proper equitable distribution. **Ibid.**

DIVORCE AND SEPARATION—Continued

§ 172 (NCI4th). Equitable distribution; practice and procedure; filing of action

When a third party holds title to property claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with the participation of such party being limited to the issue of the ownership of that property. **Upchurch v. Upchurch,** 172.

§ 350 (NCI4th). Particular considerations in awarding custody; miscellaneous circumstances

Dismissal of the father's claim for child custody was an appropriate remedy where the father exercised his Fifth Amendment right against self-incrimination in response to questions concerning his alleged involvement with illegal drug activity. **Qurneh v. Colie,** 553.

§ 357 (NCI4th). Sufficiency of findings and evidence to support award of custody to grandparent

Though plaintiff's claim for custody had been dismissed at the time the trial court entered an order awarding custody to the intervenor grandparents, it was appropriate for the court to make findings related to plaintiff's fitness for custody. **Qurneh v. Colie,** 553.

§ 359 (NCI4th). Modification of custody order generally

The rule that a fit natural parent not found to have neglected the child has a right to custody superior to third persons applies only to initial custody proceedings and not to a custody modification proceeding. **Speaks v. Fanek,** 389.

§ 384 (NCI4th). Enforcement of visitation rights

The evidence was insufficient to support a finding that plaintiff willfully refused to allow defendant his visitation with the parties' child, and the trial court erred in holding plaintiff in contempt. **Hancock v. Hancock,** 518.

The trial court's order attempting to force visitation by sentencing plaintiff to jail but allowing her to purge herself of contempt by delivering the child over to defendant each time he was entitled to visitation failed because there were no findings that the incarceration of plaintiff was reasonably necessary to protect the best interests of the child. **Ibid.**

§ 431 (NCI4th). Modification of child support order; findings required

The presumption allowing modification of a child support order which is at least three years old when there is a disparity of 15% or more between the amount of support payable under the original order and the amount owed under the Child Support Guidelines eliminates the necessity that the moving party show a change of circumstances by other means when there is evidence which satisfies the requirements of the presumption. **Garrison v. Connor,** 702.

EASEMENTS

§ 59 (NCI4th). Easements by express grant or agreement

An express easement was not shown where plaintiff failed to produce evidence to fix the location of easements granted in a conveyance to plaintiff's predecessor and to establish the intentions of the parties at the time of that conveyance. **Wiggins v. Short,** 322.

EASEMENTS—Continued

§ 60 (NCI4th). Implied easements; ways of necessity

No implied easement by necessity was shown since plaintiff had adequate and proper access to his property without the use of the path in question. **Wiggins v. Short,** 322.

§ 61 (NCI4th). Easements implied from prior use

No implied easement from prior use was shown where plaintiff failed to show that at the time of his conveyance, the path in question was an obvious and apparent path across the land of his predecessors, that it was necessary for the benefit of his property, that a map existed showing the property or the paths running through it at the time of plaintiff's conveyance, or that before separation of the property, the use giving rise to the alleged easement was so continued and obvious as to show that it was meant to be permanent. **Wiggins v. Short,** 322.

EJECTMENT

§ 14 (NCI4th). Jurisdiction of District Court on review from decision of magistrate

The district court erred in dismissing defendant tenant's appeal from a magistrate's ejectment judgment for failure to make the additional undertaking under G.S. 42-34(c) or, in the alternative, to file an in forma pauperis affidavit. **Fairchild Properties v. Hall,** 286.

ELECTIONS

§ 13 (NCI4th). Particular offenses against elective franchise

Members of county boards of elections are "election officers" for the purpose of applying the statute prohibiting the intimidation of such officers. **State v. Hines,** 545.

Even if the misdemeanor of interfering with the performance of any legal duty of any election officer or member of any board of elections is a lesser included offense of the felony of threatening or intimidating an election officer in the discharge of his duties, the evidence did not require the trial court to charge on the misdemeanor. **Ibid.**

The statute which prohibits anyone from intimidating or attempting to intimidate in any manner someone who is conducting an election is not unconstitutionally vague or overbroad. **Ibid.**

EMINENT DOMAIN

§ 123 (NCI4th). Compensation in regard to particular matters; loss of business which renders land less valuable

The trial court did not err in denying plaintiff's motion to exclude the landowner's testimony as to loss of profits by his gas station lessee and loss of rent where the testimony did not represent an attempt to recover lost rents as an element of damages from the taking, but was an attempt to show that the value of the remaining property would be diminished because of the impact of the taking on the rental income generated by the property. **City of Fayetteville v. M. M. Fowler, Inc.,** 478.

EMINENT DOMAIN—Continued

§ 259 (NCI4th). Jury instructions; traffic regulations

The evidence did not entitle plaintiff condemnor to an instruction that defendant landowner was not entitled to compensation for circuity of travel because of plaintiff's exercise of its right to restrict the flow of traffic on the public street which abutted defendant's property. **City of Fayetteville v. M. M. Fowler, Inc.,** 478.

ENERGY

§ 5 (NCI4th). Service in municipalities; relationship between primary and secondary suppliers

In deciding which electric supplier had the right to serve a commercial customer, the "determination date" was when the customer's premises were annexed by plaintiff city in 1986 rather than when the area that included defendant power company's line within 300 feet of the customer's premises was annexed in 1992, and plaintiff city had the exclusive right to provide electric service to the customer. **City of Concord v. Duke Power Co.,** 248.

ESTOPPEL

§ 13 (NCI4th). Equitable estoppel; conduct of party to be estopped generally

Plaintiff liability insurer was not equitably estopped from relying on the automatic termination clause of its policy to deny coverage for a negligence action against the insured by its actions in initially defending the insured after it learned that the insured had obtained other insurance for the covered vehicle. **State Farm Mut. Auto. Ins. Co. v. Atlantic Indemnity Co.,** 67.

A decedent who acquired fee simple title through the merger doctrine for lands for which she had been devised a life estate by her husband was not estopped from devising these lands to plaintiffs by decedent's alleged representations to defendants that they owed inheritance taxes on the land as remaindermen. **Tarlton v. Stidham,** 77.

EVIDENCE AND WITNESSES

§ 123 (NCI4th). When evidence of sexual behavior is relevant generally

Testimony of two witnesses in a rape trial that they exchanged crack cocaine for sex with the prosecutrix during the same incident but prior to the time that defendant allegedly exchanged crack cocaine for sex with the prosecutrix did not reveal a pattern of sexual behavior by the prosecutrix so as to be admissible on the issue of consent under Rule 412(b)(3). **State v. Ginyard,** 25.

§ 124 (NCI4th). Evidence of sexual behavior between complainant and defendant

Testimony in a rape case that complainant consented to sexual relations with two men not on trial but charged with the same crime as defendant based on the same set of facts is not evidence of sexual behavior between "complainant and the defendant" so as to be admissible under Rule 412(b)(1). **State v. Ginyard,** 25.

§ 132 (NCI4th). Rape victim's sexual behavior; false accusations

The trial court in a rape case erred by not allowing defendant to question the complainant regarding an allegation of rape made by complainant five months earlier and subsequently withdrawn. **State v. Ginyard,** 25.

EVIDENCE AND WITNESSES—Continued

§ 154 (NCI4th). Telephone conversations; identification of caller; voice recognition

Circumstantial evidence with regard to the identity of defendant's voice was sufficient to permit a police officer to testify concerning statements made by defendant during a telephone conversation with the officer. **State v. Dial,** 298.

§ 160 (NCI4th). Settlement, generally

Defendants Williams and Mahoney were not unduly prejudiced by the trial court's refusal to suspend the normal rule prohibiting evidence of settlements and to allow evidence of plaintiff's pretrial settlement with defendants Jensen and Hall-Lane to come before the jury, although Jensen and Hall-Lane remained in the case. **Ryals v. Hall-Lane Moving and Storage Co.,** 134.

§ 165 (NCI4th). Threats made by defendant; admissibility to prove state of mind; malice, premeditation, and deliberation

Testimony that defendant told a witness that "if he were pulled over, that he would take out whoever pulled him over" and that "something had gone south and that he had to off two people" was admissible to establish a motive for killing the victim and his intent to elude capture and went to the issue of premeditation and deliberation. **State v. Dial,** 298.

§ 210 (NCI4th). Violation of statute; failure to wear seat belt

Plaintiff mother's placement of a ten-month-old child in her lap and buckling the seat belt around both of them was tantamount to nonuse of a child restraint system, and statutory provisions prohibiting evidence of failure to use a seat belt in a civil action were applicable. **Chaney v. Young,** 260.

§ 222 (NCI4th). Events following crime; flight

Defendant's failure to appear for trial was admissible as evidence of flight. **State v. Williamson,** 229.

§ 569 (NCI4th). Facts relating to particular types of civil actions; termination of parental rights

The respondent in a proceeding to terminate parental rights was not prejudiced by the admission of evidence of prior court orders in which respondent's four older children had been adjudicated to be neglected. **In re Allred,** 561.

§ 878 (NCI4th). Hearsay evidence; statements offered to show physical and mental condition

The trial court did not err in refusing to allow testimony concerning statements made by plaintiff to a third party concerning pain he had suffered as a result of his injuries where the witness could not testify to specific statements or complaints he had heard, and there was other significant testimony with regard to plaintiff's statements about his pain. **Bowers v. Olf,** 421.

§ 1012 (NCI4th). Admissions or declarations against interest generally

Assuming that claim estimates by the unnamed defendant UIM carrier constituted admissions by a party opponent, the trial court properly excluded these estimates as evidence of the value of plaintiff's injuries under Rule of Evidence 403. **Braddy v. Nationwide Mutual Liability Ins. Co.,** 402.

EVIDENCE AND WITNESSES—Continued

§ 1240 (NCI4th). Confessions and other inculpatory statements; custodial interrogation; statements made during general investigation at police station

The trial court's findings supported a conclusion that a reasonable person in defendant's position would not have believed himself to be in custody and that his statement to officers after he accompanied them to the police station was voluntary. **State v. Sanders,** 691.

§ 1432 (NCI4th). Real or demonstrative evidence; admission to corroborate testimony

A rape kit and emergency room record were properly admitted to corroborate the victim's testimony. **State v. McKenzie,** 37.

§ 1453 (NCI4th). Circumstances where proof of chain of custody not required; item otherwise sufficiently identified

It was not necessary to show a detailed chain of custody where the packaging and contents of the evidence were identified by both the arresting officer and the SBI chemist who tested it as being substantially the same as when they sealed it. **State v. Carr,** 369.

§ 1693 (NCI4th). Photographs of homicide victims generally

Photographs of the victim's body taken during the autopsy were properly admitted for illustrative purposes. **State v. Dial,** 298.

§ 1767 (NCI4th). Experiments and tests; similarity of circumstances or conditions generally

The trial court erroneously excluded testimony from an accident reconstruction expert regarding experiments he performed to illustrate that, in conformity with the law of inertia, bundles of empty burlap tobacco sheets continued to move forward when they fell from defendant's truck, that is, away from plaintiff's following vehicle, because the experiments were conducted in Nash County rather than in Wilson County where the accident in question occurred. **Addison v. Moss,** 569.

§ 1812 (NCI4th). Showing intoxication by chemical analysis; what information chemical analyst must record

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress the results of his chemical analysis where defendant argued that the trooper did not record the printed results of the test or provide defendant with a copy prior to trial but the required information was supplied on the test card printed by the machine. **State v. Watson,** 596.

§ 1830 (NCI4th). Showing intoxication by chemical analysis; proof of matters relating to maintenance of machine

The trial court did not err in a driving while impaired prosecution by admitting breathalyzer results where defendant argued that the State did not present sufficient evidence of instrument calibration. **State v. Watson,** 596.

§ 1831 (NCI4th). Showing intoxication by chemical analysis; necessity of advising defendant of right to refuse test

G.S. 20-16.2(a) does not require an officer other than the charging officer to advise a defendant of his statutory rights in order for defendant's refusal to submit to

chemical analysis to be admitted into evidence in a criminal DWI prosecution. **State v. Abdereazeq,** 727.

§ 1832 (NCI4th). Showing intoxication by chemical analysis; sufficiency of evidence to show defendant had been advised of rights

A defendant stopped for driving while impaired was adequately notified of his rights. **State v. Watson,** 596.

§ 1958 (NCI4th). Medical records and other medical documents

A rape kit and emergency room record were properly allowed to be published to the jury since they were relevant to corroborate the victim's testimony. **State v. McKenzie,** 37.

§ 2047 (NCI4th). Opinion testimony by lay persons generally

The trial court in a murder prosecution did not err in allowing testimony of defendant's co-worker that, after seeing a news report that an unidentified body bearing a rose tatoo had washed onto the beach at Nags Head, he said to his girlfriend, "Mike, he killed his girlfriend," and that he told his employer that he did not want to work with defendant because he thought defendant had killed his girlfriend. **State v. Dial,** 298.

§ 2135 (NCI4th). Description or characterization of natural process

A Coast Guard officer's testimony as to ocean currents was relevant to show that the victim's body had drifted from an area with which defendant was familiar. **State v. Dial,** 298.

§ 2148 (NCI4th). Opinion testimony by experts generally; when allowed; requirement of relevancy

The trial court did not err in excluding expert testimony regarding the value of plaintiff's personal injury claim. **Braddy v. Nationwide Mutual Liability Ins. Co.,** 402.

§ 2211 (NCI4th). DNA analysis

The trial court did not err in admitting DNA evidence which indicated that the samples of semen taken from the victim matched the samples of body fluid taken from defendant. **State v. McKenzie,** 37.

§ 2403 (NCI4th). Testimony by witness omitted from list provided

The addition of a police detective as a potential witness less than a week before trial did not deny plaintiff a meaningful opportunity to depose the witness or adequately prepare for cross-examination where plaintiff was given the detective's name and a summary of his potential testimony prior to trial, and plaintiff's counsel communicated with the witness and obtained information for cross-examination. **Qurneh v. Colie,** 553.

§ 2485 (NCI4th). Violation of sequestration order; admissibility of testimony generally

The trial court did not err in refusing to allow defendant to present testimony by his girlfriend because of her extended presence in the courtroom in violation of a sequestration order and her discussion of the testimony of defendant's accomplices with defendant's sister. **State v. Williamson,** 229.

EVIDENCE AND WITNESSES—Continued

§ 2593 (NCI4th). **Competency of persons having particular status or relation to case; attorney, generally**

Even if the trial court erred in admitting the affidavit of plaintiffs' counsel over defendant's objection without requiring the attorney to withdraw from representation, defendant was not prejudiced thereby. **H.B.S. Contractors v. Cumberland County Bd. of Education,** 49.

§ 3229 (NCI4th). **Credibility of witnesses; prior inconsistent or contradictory statements**

Defendant was not entitled to question a rape victim regarding her alleged attempt to have the charges against him dismissed since that attempt was not a prior inconsistent statement reflecting on her credibility. **State v. Ginyard,** 25.

EXECUTION AND ENFORCEMENT OF JUDGMENTS

§ 31 (NCI4th). **Property subject to execution; effect of exemptions**

A party may not post a cash bond to stay execution of a money judgment and then avoid forfeiture of the bond after default by claiming debtor's exemptions. **Barrett v. Barrett,** 185.

GAMES, AMUSEMENTS, AND EXHIBITIONS

§ 24 (NCI4th). **Liability for injuries; proximate cause; contributory negligence**

The trial court properly entered summary judgment for defendant in an action to recover for injuries sustained by a child who was playing in an inflated "moonwalk" operated by defendant where nothing in the record allowed an inference that a shifting of the moonwalk was a proximate cause of the accident. **Young v. Fun Services-Carolina, Inc.,** 157.

HIGHWAYS, STREETS, AND ROADS

§ 11 (NCI4th). **Streets and highways in and around municipalities generally**

The trial court did not err in concluding that a path crossing defendant's property and leading to plaintiff's house was not a public road where a town maintained the road only for its access to a water drain easement. **Wiggins v. Short,** 322.

HOMICIDE

§ 319 (NCI4th). **Sufficiency of evidence; voluntary manslaughter; death resulting from shooting generally**

The evidence was sufficient to be submitted to the jury on a charge of voluntary manslaughter. **State v. McCoy,** 482.

§ 329 (NCI4th). **Sufficiency of evidence; involuntary manslaughter generally**

The evidence was sufficient to be submitted to the jury on a charge of involuntary manslaughter. **State v. McCoy,** 482.

HOMICIDE—Continued

§ 361 (NCI4th). Lesser offenses to second-degree murder; voluntary manslaughter

There was no merit to defendant's contention that voluntary manslaughter cannot be a lesser included offense of second-degree murder when premised on the doctrine of acting in concert. **State v. McCoy,** 582.

HOSPITAL AND MEDICAL FACILITIES OR INSTITUTIONS

§ 14 (NCI4th). Certificate of need; decision and issuance of certificate; procedure

Petitioner's application failed to show that it satisfied the mandatory staffing criteria, and the Director of the Division of Facility Services thus did not err in concluding as a matter of law that petitioner should be denied a certificate of need. **Presbyterian-Orthopaedic Hosp. v. N.C. Dept. of Human Resources,** 529.

The Director of the Division of Facility Services inappropriately granted summary judgment in favor of respondent Mercy Hospital where Mercy's application was conditionally approved by downsizing the application from twenty to ten beds, and a genuine issue of material fact existed as to the financial feasibility of the downsized project. **Ibid.**

The Director of the Division of Facility Services erred in awarding a certificate of need to Stanly Memorial Hospital where Stanly unlawfully amended its application by dismissing its management company. **Ibid.**

HUSBAND AND WIFE

§ 52 (NCI4th). Alienation of affections; sufficiency of evidence; summary judgment

Plaintiff's forecast of evidence was insufficient to support his claim against defendant for alienation of affections. **Coachman v. Gould,** 443.

§ 58 (NCI4th). Criminal conversation; sufficiency of evidence; summary judgment

Plaintiff's forecast of evidence was insufficient to support his claim for criminal conversation. **Coachman v. Gould,** 443.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 43 (NCI4th). Discretionary denial of motion for bill of particulars; review

The trial court did not err by denying defendant's motion for a bill of particulars in a prosecution for intimidating an election officer in the discharge of his duties. **State v. Hines,** 545.

INFANTS OR MINORS

§ 15 (NCI4th). Child abuse generally

Defendant mother's Sixth Amendment right to counsel attached in a criminal juvenile abuse proceeding after the filing of a civil abuse petition, and where counsel had been appointed to represent defendant in the civil abuse proceeding, a statement given without defendant's attorney being present or without an express waiver of the

INFANTS OR MINORS—Continued

right to counsel must be suppressed in the criminal abuse prosecution. **State v. Adams,** 538.

INSURANCE

§ 527 (NCI4th). Underinsured coverage generally

The family member exclusion in an automobile policy did not exclude UIM coverage for injuries sustained by the insured while occupying a vehicle owned by the insured which is not listed in the policy. **Harper v. Allstate Ins. Co.,** 297.

The trial court did not err in ordering that plaintiff's claim for UIM coverage be tried as a personal injury action rather than a contract action. **Braddy v. Nationwide Mutual Liability Ins. Co.,** 402.

§ 528 (NCI4th). Extent of underinsured coverage

The trial court did not err in determining that no UIM benefits were provided through decedent's business auto policy because the covered vehicle was not a "private passenger motor vehicle" as required for interpolicy stacking. **N.C. Farm Bureau Mut. Ins. Co. v. Stamper,** 254.

§ 532 (NCI4th). Effect of policy provisions being in conflict with underinsured motorist statutes

The family-owned vehicle exclusion in a policy insuring a vehicle not involved in the accident is void as against public policy. **N.C. Farm Bureau Mut. Ins. Co. v. Stamper,** 254.

The family member exclusion in an automobile policy did not exclude underinsured motorist coverage for injuries sustained by the insured while occupying a vehicle owned by the insured which is not listed in the policy. **Buchanan v. Atlantic Indemnity Co.,** 393.

§ 533 (NCI4th). Underinsured coverage; effect of policy provisions being in conflict with underinsured motorist statutes; where policy fails to provide underinsured coverage

An underinsured highway vehicle can include a vehicle owned by the named insured, and policy provisions attempting to exclude such coverage are invalid. **State Farm Mut. Auto. Ins. Co. v. Young,** 505.

§ 621 (NCI4th). Automobile insurance; method of cancellation of coverage; when effective

A clause in an automobile liability policy which provided for automatic termination if the insured obtained any similar insurance on the covered vehicle was not ambiguous and violative of public policy as unconscionable and permitting the unjust enrichment of plaintiff insurer. **State Farm Mut. Auto. Ins. Co. v. Atlantic Indemnity Co.,** 67.

Plaintiff liability insurer was not equitably estopped from relying on the automatic termination clause of its policy to deny coverage for a negligence action against the insured by its actions in initially defending the insured after it learned that the insured had obtained other insurance for the covered vehicle. **Ibid.**

INSURANCE—Continued

§ 652 (NCI4th). Automobile insurance; determining whether insurer is obligated to defend when claiming notice not timely; notice not given as soon as practicable

Plaintiff automobile insurer's claim for contribution against defendant trailer insurer was improperly dismissed for lack of prompt notice of the accident absent findings as to whether notice of the accident was given as soon as practicable, whether plaintiff acted in good faith, and whether defendant was materially prejudiced by the delay. **Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.**, 449.

The rule that an unexcused delay in giving notice of an accident does not relieve the insurer of the duty to defend and indemnify unless the delay materially prejudiced the insurer's ability to investigate and defend was applicable to a claim for contribution by plaintiff automobile insurer against defendant trailer insurer. **Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.**, 449.

§ 692 (NCI4th). *Pro rating of recovery of injured party between insurers*

Plaintiff automobile insurer stated a viable claim for contribution against defendant insurer of the trailer the automobile was towing at the time of an accident for defendant's share of the defense costs (including attorney's fees) incurred and settlement payments made in defense of the driver and the owner of the vehicle involved in the accident. **Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.**, 449.

§ 881 (NCI4th). Employee theft or embezzlement policies

Where a policy provided that defendant would pay up to $5,000 for any one occurrence of employee embezzlement, and "occurrence" was defined as "a single act, or series of related acts," an employee's embezzlement of $32,760 by issuing 24 separate checks to himself over a one-year period was a "series of related acts" which constituted only one occurrence under the policy so that defendant was responsible only for coverage in the amount of $5,000. **Christ Lutheran Church v. State Farm Fire and Casualty Co.**, 614.

§ 1109 (NCI4th). Parties generally

The trial court did not err by allowing defendant UIM carrier to remain an unnamed defendant after plaintiff voluntarily dismissed the tortfeasor as a party defendant prior to trial. **Braddy v. Nationwide Mutual Liability Ins. Co.**, 402.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 2 (NCI4th). Sufficiency of claim

Plaintiff's forecast of evidence created a genuine issue of material fact as to whether one defendant's behavior was so extreme or outrageous so as to result in serious emotional harm based on both sexual and nonsexual incidents at work. **Ruff v. Reeves Brothers, Inc.**, 221.

JUDGES, JUSTICES, AND MAGISTRATES

§ 26 (NCI4th). Disqualification from proceedings generally

A contempt order was not required to be reversed because of bias on the part of the trial judge where, at the close of the evidence, the judge accused the minor child of being a "spoiled brat" and of manipulating his parents and sisters, gave plaintiff a tongue lashing about the child's manipulation and her failure to punish him, and accused plaintiff of beating defendant out of his coin collection where the remarks were based upon the evidence presented at trial. **Hancock v. Hancock**, 518.

JUDGMENTS

§ 20 (NCI4th). Entry and rendition of judgment generally

The clerk's notation in the minutes at the direction of the district judge three days before the deaths of the children in question constituted a valid entry of judgment, and the district court's written order establishing paternity nunc pro tunc which was signed 22 days after the death was not a nullity. **In re Estates of Barrow,** 717.

§ 138 (NCI4th). Sufficiency of evidence to show compliance with consent judgment

The record supported the trial court's findings and conclusions that defendants violated the parties' consent judgment by writing a press release with regard to confidentiality, its admission of wrongdoing, and its ability to offer welding services which violated the consent judgment. **PCI Energy Services v. Wachs Technical Services,** 436.

§ 139 (NCI4th). Consent judgment as basis for contempt

A consent judgment was a court order enforceable by contempt where the court did not merely "rubber stamp" the parties' private agreement but explicitly approved, adopted, and incorporated the settlement agreement. **PCI Energy Services v. Wachs Technical Services,** 436.

§ 154 (NCI4th). Propriety of entry of default judgment against state, state officer, or state agency

The Industrial Commission is not required by Rule 55(f) to conduct a full evidentiary hearing prior to entering a default judgment against the State in a claim under the Tort Claims Act, but the Commission must make findings of fact to support the conclusion that a right to relief has been established by the evidence. **Parker v. State Dept. of Transp.,** 279.

§ 205 (NCI4th). Res judicata and collateral estoppel generally

The trial court's acceptance of the jury's special verdict finding that North Carolina had jurisdiction of defendant's first murder trial, prior to declaring a mistrial because of the jury's inability to agree upon the issue of guilt or innocence, precluded defendant from relitigating jurisdiction at his second trial. **State v. Dial,** 298.

§ 215 (NCI4th). Res judicata and collateral estoppel; judgments of federal courts; particular cases

Free speech and due process claims asserted by plaintiff in the state court on the basis of the North Carolina Constitution were not identical to free speech and due process claims asserted by plaintiff in the federal court on the basis of the United States Constitution, and dismissal of plaintiff's state claims on the basis of res judicata was error. **Evans v. Cowan,** 181.

§ 237 (NCI4th). Res judicata and collateral estoppel; persons regarded as privies; units of government

Respondent DMV was collaterally estopped from relitigating the existence of probable cause to arrest petitioner for DWI in an action for review of petitioner's license revocation based on his refusal to submit to chemical analysis of his breath where the trial court in a criminal DWI case concluded that the arresting officer had insufficient probable cause to arrest petitioner since the DMV in this case was in privity with the prosecution in the criminal case. **Brower v. Killens,** 685.

KIDNAPPING

§ 16 (NCI4th). Sufficiency of evidence; confinement, restraint, or removal generally

Evidence that defendant took the victim from a hallway to a bedroom where he raped her was sufficient to support defendant's conviction of second-degree kidnapping. **State v. McKenzie,** 137.

§ 18 (NCI4th). Sufficiency of evidence; confinement, restraint, or removal as inherent and inevitable feature of another felony

The removal of the victims of a convenience store armed robbery to a storage area and hallway at the rear of the store was not an inherent part of the robbery and supported defendant's convictions of first-degree and second-degree kidnapping. **State v. Warren,** 738.

LABOR AND EMPLOYMENT

§ 63 (NCI4th). Employment terminable at will

Plaintiff's employment by defendant was terminable at the will of either party for any reason where the terms of the employment agreement did not expressly state or imply that the employment was to be permanent or that the plaintiff could be discharged only for cause. **Mortensen v. Magneti Marelli U.S.A.,** 486.

§ 82 (NCI4th). Covenants not to compete; requirement that covenant be for protection of legitimate business interest

A covenant not to compete which prohibited defendant insurance agent, for a period of five years after termination of his employment with plaintiff insurance agency, from directly or indirectly contacting or soliciting business from plaintiff's clients was valid and enforceable. **Professional Liability Consultants v. Todd,** 212.

§ 89 (NCI4th). Remedies for breach of covenant not to compete

Plaintiff insurance agency established that it is likely to succeed on the merits of its claim for breach of a covenant not to compete so that the trial court did not err by issuing a preliminary injunction in favor of plaintiff. **Professional Liability Consultants v. Todd,** 212.

§ 121 (NCI4th). Employment discrimination; claimant's burden of proof

Evidence in the record supported the Personnel Commission's determination that petitioner had not been discriminated against because of her race in a promotion decision at UNC-W under either "disparate treatment" or "disparate impact" analysis. **Dorsey v. UNC-Wilmington,** 58.

LARCENY

§ 68 (NCI4th). Variance and effect of variance; ownership of property generally

There was no fatal variance between the indictment and proof as to ownership of computers stolen from a university where a professor's use of the word "my" in reference to the computers did not indicate that they were his own personal property. **State v. Carter,** 332.

LARCENY—Continued

§ 110 (NCI4th). Sufficiency of evidence; defendant's possession of stolen property generally

The evidence was sufficient to be submitted to the jury in a prosecution for felonious larceny of computers and other items from a university under the theory of possession of recently stolen property. **State v. Carter,** 332.

LIENS

§ 21 (NCI4th). Liens of mechanics, laborers, and materialmen; entitlement and extent of lien

Attorney's fees may not be enforced as part of a Chapter 44A lien on defendant's property. **Paving Equipment of the Carolinas v. Waters,** 502.

LIMITATIONS, REPOSE, AND LACHES

§ 27 (NCI4th). Defective goods or products generally

The six-year statute of repose for products liability actions does not violate the equal protection clauses of the state or federal constitutions or the open courts clause of the N. C. Constitution. **Mahoney v. Ronnie's Road Service,** 150.

§ 29 (NCI4th). Improvements to real property generally

Defendant flooring manufacturer was not a materialman within the meaning of the real property improvement statute of repose, G.S 1-50(5), and the claim of plaintiff hospital owners for willful and wanton conduct in supplying floor coverings containing asbestos used in the construction of additions to plaintiffs' hospital was barred by the products liability statute of repose set forth in G.S. 1-50(6). **Forsyth Memorial Hospital v. Armstrong World Industries,** 413.

§ 98 (NCI4th). Breach of fiduciary duty

The trial court erred in holding that plaintiffs' claim against defendant trustee for breach of fiduciary duty by cancelling of record a deed of trust was barred by the statute of limitations where there was a genuine issue of material fact as to whether plaintiffs exercised due diligence in investigating the status of the indebtedness secured by the deed of trust. **Dawn v. Dawn,** 493.

MUNICIPAL CORPORATIONS

§ 208 (NCI4th). Acquisition of property generally

In an action alleging breach of a contract to purchase land, the city official who signed the contract to purchase land was not vested with actual authority to bind the city to a contract and plaintiff was charged with notice of all limitations upon the authority of the official to enter into a contract because the scope of such authority is a matter of public record. Even if the official had the authority to bind the city, the contract is invalid and unenforceable because plaintiff has failed to show that a preaudit certificate of compliance authorizing the alleged contract exists. **L & S Leasing, Inc. v. City of Winston-Salem,** 619.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 33 (NCI4th). Attempt or conspiracy to commit controlled substances offense

The evidence was sufficient to be support defendant's conviction of attempt to possess cocaine where she gave undercover officers money for what she thought was cocaine. **State v. Gunnings,** 294.

§ 114 (NCI4th). Possession of controlled substances with intent to sell or deliver; cocaine

The evidence was sufficient to support defendant's conviction of possession of cocaine with intent to sell and deliver where pill bottles containing cocaine were found in the area of a car occupied solely by defendant. **State v. Carr,** 369.

NOTICE

§ 4 (NCI4th). Mode of giving notice

Notice of a motions hearing was properly given to plaintiff estate's attorney where the motion calendar listing the hearing date and time for defendant's motion was delivered to the estate's attorney by placement in his box at the courthouse. **Horton v. New South Ins. Co.,** 265.

PARENT AND CHILD

§ 24 (NCI4th). Factors to be considered in determining custody; sufficiency of evidence

Dismissal of the father's claim for child custody was an appropriate remedy where the father exercised his Fifth Amendment right against self-incrimination in response to questions concerning his alleged involvement with illegal drug activity. **Qurneh v. Colie,** 553.

A custody dispute between a natural parent and a person who received a minor child into his home and openly held out that child as his biological child, but who was excluded as the father by a paternity test, is not to be determined according to the "best interests of the child" standard; rather, the court should apply the rule that, absent a finding that the natural parent is unfit or has neglected the welfare of the child, the constitutionally protected paramount right of the parent to custody must prevail. **Price v. Howard,** 674.

§ 25 (NCI4th). Parent's right to custody and control; custody to third persons; other relatives

The rule that a fit natural parent not found to have neglected the child has a right to custody superior to third persons applies only to initial custody proceedings and not to a custody modification proceeding. **Speaks v. Fanek,** 389.

§ 29 (NCI4th). Scope of parental duty to support child, generally

The trial court erred in ordering defendant stepfather to provide child support payments and other benefits for his stepchild based on a voluntary written agreement which was not executed with the formalities required by law in that it had no acknowledgement and contained an ambiguous agreement to support the child only "until more permanent arrangements were decided upon." **Moyer v. Moyer,** 723.

PARENT AND CHILD—Continued

§ 99 (NCI4th). Termination of parental rights; neglect, generally

The respondent in a proceeding to terminate parental rights was not prejudiced by the admission of evidence of prior court orders in which respondent's four older children had been adjudicated to be neglected. **In re Allred,** 561.

§ 101 (NCI4th). Termination of parental rights; neglect; evidence held sufficient

The evidence was sufficient to support the trial court's order terminating respondent's parental rights based on neglect of the child. **In re Young,** 163.

The evidence supported the trial court's termination of respondent's parental rights for neglect of a child who had multiple handicaps and special needs. **In re Allred,** 561.

§ 115 (NCI4th). Termination of parental rights; summons

Even though service of notice by publication in a proceeding to terminate parental rights did not specifically comply with G.S. 7A-289.27(b) in that it failed to state that the "parents may contact the clerk immediately to request counsel" and that the proceeding is a "new case" for which a new appointment of counsel will be required, such error was not prejudicial to respondent. **In re Joseph Children,** 468.

PLEADINGS

§ 374 (NCI4th). Amendment to elaborate on or make clear basis of claim or defense; addition of new legal theory

The trial court did not abuse its discretion by allowing defendant to amend her pleadings in a child custody action to allege plaintiff's unfitness. **Qurneh v. Colie,** 553.

PROCESS AND SERVICE

§ 37 (NCI4th). How service and filing of pleadings must be made

Plaintiff's service of a "Delayed Service of Complaint" form did not constitute valid service on defendant since that form did not notify defendant of an obligation to appear at a certain place to answer the complaint and was thus not a substitute for a summons. **Hennings v. Green,** 191.

§ 195 (NCI4th). Burden of showing lack of service

The trial court did not err in admitting three affidavits offered by defendants to support their Rule 12(b) defenses made in their answer as to the insufficiency of process and service of process. **Ryals v. Hall-Lane Moving and Storage Co.,** 242.

PROFESSIONS AND OCCUPATIONS

§ 1 (NCI4th). Occupational licensing boards; licensing of new professions

An exemption from the Licensure Act for Speech and Language Pathologists allowing non-licensed speech pathologists to be employed by the Department of Public Instruction (DPI) was dependent upon the DPI's issuance of a well-grounded credential to the person hired to render speech pathology services, and there was insufficient evidence in the record concerning the DPI's speech credentialing standard from

which the trial court could have measured whether DPI's speech pathology certification was a valid and current credential under the Licensure Act. **N.C. Bd. of Exam. for Speech Path. v. N.C. State Bd. of Educ.**, 15.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Civil liability generally; negligence

A plaintiff bringing an individual capacity suit against an official must allege and prove more than mere negligence, but also some action performed under color of authority which falls within one of the exceptions rendering an official liable individually or personally, and cases using "mere negligence" language comport with those cases correctly stating North Carolina's official immunity doctrine. **Epps v. Duke University**, 198.

Plaintiff could proceed with her action against defendant director of the Buncombe County DSS in his official capacity pursuant to either G.S. 143-291(a) or G.S. 153A-435 depending upon the liability insurance policy limits maintained by the DSS, and a suit against the director must proceed in the same forum as plaintiff's suit against the DSS. **Meyer v. Walls**, 507.

Defendant director of the Buncombe County DSS was a public officer, and the trial court properly dismissed plaintiff's suit against the director in his individual capacity for mere negligence in the performance of his duties, but plaintiff could proceed with portions of her suit against the director in his individual capacity which were based on allegations of willful and wanton conduct. **Ibid.**

The supervisor of the adult protective services unit of a county DSS and a social worker for DSS were public employees, not public officers, and the trial court erred in dismissing plaintiff's claims against them in their individual capacities based upon either negligence or willful and wanton conduct. **Ibid.**

§ 42 (NCI4th). Employees subject to state personnel system

A former city police officer was not a state or local employee within the meaning of G.S. Ch. 126 and thus was not entitled to petition OAH in order to challenge her dismissal based on alleged sex and creed discrimination. **Conran v. New Bern Police Dept.**, 116.

§ 59 (NCI4th). Compensation and salaries generally

A determination that the State Retirement System was entitled to an offset in disability benefits for the gross amount of petitioner's Social Security disability benefits rather than the net amount after attorney fees was erroneous. **Smith v. Bd. of Trustees of State Employees' Ret. Sys.**, 631.

The superior court erred in concluding that petitioner's long-term disability benefits payable by the State Retirement System were subject to a reduction in the amount of petitioner's widow's insurance benefits. **Ibid.**

§ 66 (NCI4th). Disciplinary actions involving career state employees generally

The Personnel Commission properly required the employing state agency to carry the burden of proving petitioner was terminated for good cause. **Employment Security Comm. v. Pearce**, 313.

PUBLIC OFFICERS AND EMPLOYEES—Continued

§ 67 (NCI4th). Disciplinary actions involving career state employees; what constitutes "just cause"

A permanent state employee was not dismissed for just cause where he was dismissed for unacceptable personal conduct because he brought criminal charges against a supervisor who threatened to scald him with a cup of coffee if he again obtained coffee from the personnel file room without paying for it. **Employment Security Comm. v. Pearce,** 313.

RAPE AND ALLIED OFFENSES

§ 120 (NCI4th). Attempt to commit rape generally; first-degree rape

The evidence was sufficient to be submitted to the jury in a prosecution for attempted first-degree rape. **State v. Dalton,** 666.

ROBBERY

§ 5 (NCI4th). Robbery with firearms or other dangerous weapons generally

The common law rule exempting spouses from prosecution in larceny cases in order to preserve family unity did not apply to armed robbery prosecutions. **State v. Mahaley,** 490.

§ 32 (NCI4th). Ownership of property generally; necessity that indictment negative idea that accused took own property

An individual may be indicted and convicted of robbery with a dangerous weapon against his or her spouse. **State v. Mahaley,** 490.

§ 65 (NCI4th). Sufficiency of evidence; robbery with dangerous weapon where weapon was knife

The evidence was insufficient to support defendant's conviction of armed robbery where there was evidence that defendant may have been in possession of a knife but there was no evidence that he used it or threatened to use it to harm the victim during the taking of her purse while the victim was sleeping. **State v. Dalton,** 666.

§ 84 (NCI4th). Sufficiency of evidence; attempted armed robbery generally

The evidence was sufficient for the jury in a prosecution for attempted armed robbery of a guest in defendant's house. **State v. Wheeler,** 653.

SCHOOLS

§ 16 (NCI4th). Access to public records; open meetings

Defendant board of education's decision to terminate a construction contract in closed session violated the Open Meetings Law, but the trial court did not abuse its discretion in declining to void the board's termination of the contract because of such violation. **H.B.S. Contractors v. Cumberland County Bd of Education,** 49.

§ 51 (NCI4th). State School Fund

The state has not violated certain provisions of G.S. Ch. 115C by failing to provide necessary resources for instructional purposes on an equal basis. **Leandro v. State of North Carolina,** 1.

SCHOOLS—Continued

§ 140 (NCI4th). School teachers generally

An exemption from the Licensure Act for Speech and Language Pathologists allowing non-licensed speech pathologists to be employed by the Department of Public Instruction (DPI) was dependent upon the DPI's issuance of a well-grounded credential to the person hired to render speech pathology services, and there was insufficient evidence in the record concerning the DPI's speech credentialing standard from which the trial court could have measured whether DPI's speech pathology certification was a valid and current credential under the Licensure Act. **N.C. Bd. of Exam. for Speech Path. v. N.C. State Bd. of Educ.,** 15.

SEARCHES AND SEIZURES

§ 80 (NCI4th). Stop and frisk procedures; reasonable suspicion of criminal activity

The incriminating character of an item seized from defendant's person during a pat-down search was immediately apparent to the officer so that the item was admissible into evidence where the item fell onto the officer's hand through respondent's pants, and the officer immediately believed that it was some type of illegal substance. **In re Whitley,** 290.

§ 82 (NCI4th). Stop and frisk procedures; reasonable suspicion that person may be armed

An officer had reasonable grounds to believe that defendant, the driver of a lawfully detained vehicle, might be armed and dangerous so that a pat-down of defendant for weapons was lawful where defendant was under investigation by the arresting officer for drug trafficking, and the officer knew defendant was a convicted felon. **State v. McGirt,** 237.

There was reasonable suspicion to justify an officer's pat-down search of respondent juvenile upon arriving at the scene of reported drug sales. **In re Whitley,** 290.

§ 100 (NCI4th). Issuance of search warrants; sufficiency of affidavits containing erroneous, inaccurate, or false information

Although a search warrant was based in part on a rape victim's identification of defendant which was found by the trial court to be impermissibly suggestive, other information in the affidavit provided probable cause for issuance of the search warrant, and clothing, hair and blood samples seized from defendant pursuant to the warrant were properly admitted into evidence. **State v McKenzie,** 37.

§ 143 (NCI4th). Administrative search and inspection warrants; warrants to conduct inspections authorized by law, generally

The denial of a motion to quash an administrative search warrant was not immediately appealable because administrative search warrants are analogous to discovery orders and the validity of administrative search warrants is not generally a matter for the appellate courts except upon a showing that a substantial right is affected. **In re Galvan Industries,** 628.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 22 (NCI4th). Civil liability; death or injury caused by other individual

Plaintiff's complaint was insufficient to state a claim for breach of duty or negligence on the part of defendant police officers where plaintiff did not allege any facts

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS—Continued

tending to show that a special relationship existed between him and defendants or that defendants created a special duty by promising him protection which was not forthcoming. **Parker v. Turner,** 381.

A city owed no greater duty to protect its police officer from criminal acts of others while he was executing his duties than the duty owed to the general public, and the public duty doctrine was thus a defense to defendant contractor's claim that the city's negligence concurred with defendant's negligence to cause the death of an officer when a trespasser drove a grader from defendant's construction site onto a public street and then onto deceased's patrol car. **Tise v. Yates Construction Co.,** 582.

STATE

§ 26 (NCI4th). Actions against state; insurance as waiver of sovereign immunity

Claims against the state pursuant to the general waiver of immunity provisions of G.S. 143-291(a) are within the exclusive jurisdiction of the Industrial Commission, while claims brought in cases where immunity has been waived by the purchase of liability insurance are within the jurisdiction of the superior court. **Meyer v. Walls,** 507.

The Tort Claims Act no longer controls with regard to jurisdiction once a governmental entity has procured liability insurance equal to or greater than the $100,000 cap provided for in G.S. 143-291(a), and jurisdiction is then controlled by the statute authorizing the governmental entity to purchase liability insurance. **Ibid.**

Where the record was silent as to the precise amount of liability insurance purchased by the Buncombe County DSS, the cause is remanded to determine whether the policy or policies in question have liability limits equal to or greater than $100,000. **Ibid.**

§ 27 (NCI4th). Sovereign immunity; entry into contract as implied consent to suit

Defendant DOT implicitly consented to be sued for breach of its right-of-way agreement which required that defendant maintain a secondary road and a median crossover. **Southern Furniture Co. v. Dept. of Transportation,** 113.

§ 38 (NCI4th). Industrial Commission as court for negligence claims against state

Claims against the state pursuant to the general waiver of immunity provisions of G.S. 143-291(a) are within the exclusive jurisdiction of the Industrial Commission, while claims brought in cases where immunity has been waived by the purchase of liability insurance are within the jurisdiction of the superior court. **Meyer v. Walls,** 507.

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Where the record was silent as to the precise amount of liability insurance purchased by the Buncombe County DSS, the cause is remanded to determine whether the policy or policies in question have liability limits equal to or greater than $100,000. **Ibid.**

Plaintiff could proceed with her action against defendant director of the Buncombe County DSS in his official capacity pursuant to either G.S. 143-291(a) or G.S.

STATE—Continued

153A-435 depending upon the liability insurance policy limits maintained by the DSS, and a suit against the director must proceed in the same forum as plaintiff's suit against the DSS. **Ibid.**

TAXATION

§ 234 (NCI4th). Failure to file tax return or pay tax or license fee

The trial court properly submitted to the jury charges against defendant for willful failure to file state income tax returns where the evidence was conflicting as to whether defendant's failure to file his returns was the result of a misunderstanding of the law or a disagreement with the law. **State v. Houston,** 648.

TORTS

§ 11 (NCI4th). Release from liability; covenant not to sue, generally

The right of plaintiff passenger's UIM carrier, as unnamed defendant, to pursue a claim against the third-party defendant who was the owner/driver of the car in which plaintiff was injured could not be defeated by third-party defendant's action of executing a release in favor of defendants, the driver and owner of the truck which collided into the rear of the car in which plaintiff was a passenger. **Johnson v. Hudson,** 188.

TRIAL

§ 23 (NCI4th). Grounds for continuance; unavailability of witness

The trial court did not err in denying plaintiff's two motions to continue because he was unprepared to present all the necessary medical testimony concerning his treating physician's prognosis for his future condition. **Bowers v. Olf,** 421.

§ 64 (NCI4th). Entry of judgment prior to completion of discovery

The trial court did not abuse its discretion by granting summary judgment when discovery was incomplete. **Young v. Fun Services-Carolina, Inc.,** 157.

§ 70 (NCI4th). Matters considered on motion for summary judgment; unpleaded defenses

The trial court did not err by granting summary judgment for defendant in an action in which plaintiff contends on appeal that defendant improperly raised affirmative defenses for the first time at a summary judgment hearing; it has been held that the nature of summary judgment and liberal pleading rules require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on a motion for summary judgment. **L & S Leasing, Inc. v. City of Winston-Salem,** 619.

§ 120 (NCI4th). Separate trials generally

The trial court did not err in severing for trial plaintiff's claims for UIM coverage and for bad faith refusal to settle and punitive damages. **Braddy v. Nationwide Mutual Liability Ins. Co.,** 402.

TRIAL—Continued

§ 302 (NCI4th). Request for jury instructions; granting request in part; instructions substantially covering request

The trial court did not err in refusing to instruct pursuant to plaintiff's request where the jury was properly instructed, and the court included the substance of plaintiff's instruction. **Bowers v. Olf,** 421.

UTILITIES

§ 2 (NCI4th). Excavation; prevention of damage to underground equipment

Pursuant to the Underground Damage Prevention Act, plaintiff telephone utility could not charge defendant water utility for marking its underground cable lines for defendant after business hours. **Lexington Telephone Co. v. Davidson Water, Inc.,** 177.

WILLS

§ 100 (NCI4th). Devise of life estate and remainder

Where decedent's husband devised her a life estate in his real property, his will did not provide a testamentary disposition either specifically or through a residuary clause for the four parcels of land in dispute, and the husband died without lineal heirs or parents, the remainder interests in the four parcels passed to decedent via intestacy, and the doctrine of merger gave decedent a fee simple estate in the four parcels which passed, pursuant to her will, to plaintiffs. **Tarlton v. Stidham,** 77.

§ 137 (NCI4th). Residuary clauses

An item of testator's will was a residuary clause where it stated that "I will, devise, and bequeath all of my property of every sort, kind, and description, both real and personal" and there were no prior devises or bequests. **Moore v. Stern,** 270.

§ 152 (NCI4th). Dissent from will by surviving spouse generally

A wife who was devised a life interest in the husband's lands was not required to dissent from the husband's will in order to take a remainder interest in the lands under intestate succession. **Tarlton v. Stidham,** 77.

§ 164 (NCI4th). Effect of anti-lapse statute

A lapsed one-half share of a residuary gift to testator's deceased brother-in-law passed to the qualified issue of testator's brother, the other residuary beneficiary who would have taken the lapsed share had he survived the testator. **Moore v. Stern,** 270.

WORKERS' COMPENSATION

§ 80 (NCI4th). Jury's determination of joint or concurrent negligence; reduction of award against third party

Defendant's allegations were insufficient to state a claim for negligence by a city, through the actions of its police officers, which joined and concurred with the corporate defendant's negligence to cause an officer's death so as to bar the city's subrogation rights and to require a reduction of damages under G.S. 97-10.2(e) for workers' compensation benefits paid to the deceased officer's estate. **Tise v. Yates Construction Co.,** 582.

WORKERS' COMPENSATION—Continued

§ 162 (NCI4th). Back injuries; relation of injury to employment

There was competent evidence in the record to support the Industrial Commission's finding that plaintiff's treating physician "could not relate plaintiff's lumbar spinal stenosis to any specific hour or event in plaintiff's work life or daily life." **Pittman v. Thomas & Howard,** 124.

§ 165 (NCI4th). Back injury as injury by accident generally; specific traumatic incident causing back injury

The Industrial Commission erred in finding that plaintiff's massive herniated disc was not caused by a specific traumatic incident on 23 June 1993. **Glynn v. Pepcom Industries,** 348.

§ 171 (NCI4th). Compensability of leg and foot injuries

Even if plaintiff police officer's preexisting knee condition contributed to his injury, plaintiff's fall while pursuing a fleeing suspect at night was a risk attributable to his employment and thus would be compensable. **Mills v. City of New Bern,** 283.

§ 209 (NCI4th). Occupational diseases; other conditions

The evidence was insufficient to support recovery for an occupational disease where it failed to show any correlation between plaintiff's work as a janitor and his development of tuberculosis. **Higgs v. Southeastern Cleaning Service,** 456.

§ 221 (NCI4th). Treatment required to effect cure or give relief

The Industrial Commission did not err in denying payment for medical treatment offered by one of plaintiff's doctors where the Commission found that the treatment would not give relief to plaintiff's exaggerated pain. **Lewis v. Craven Regional Medical Center,** 143.

§ 235 (NCI4th). Presumptions arising from employee's return, or failure to return, to work

The Industrial Commission did not err by failing to apply the presumption of Watkins v. Motor Lines that her temporary total disability continued until she returned to work at the same wage earned prior to injury where the parties stipulated that plaintiff was paid compensation for temporary total disability for a period not specifically identified in the record, and the record did not reveal whether the payments made by defendants pursuant to approved agreements were payable during disability. **Hoyle v. Carolina Associated Mills,** 462.

§ 238 (NCI4th). Plaintiff's duty to seek employment

The evidence was sufficient to support findings by the Industrial Commission that the injured plaintiff did not intend to return to work, did not make reasonable efforts to find employment, and sabotaged defendants' efforts to help him obtain another job, and such findings supported a conclusion that plaintiff was not entitled to temporary total disability compensation after a certain date. **McCoy v. Oxford Janitorial Service Co.,** 730.

§ 258 (NCI4th). Partial disability; rate and period of compensation

The plain meaning of G.S. 97-30 is that the term of partial disability, not the term of total and partial disability combined, is to last no longer than 300 weeks less the period of total disability. **Brown v. Public Works Comm.,** 473.

WORKERS' COMPENSATION—Continued

§ 260 (NCI4th). Calculation of average weekly wages, generally

The Industrial Commission properly determined that compensation for plaintiff's silicosis should be calculated based upon plaintiff's wages during the 52-week period immediately preceding the date of diagnosis rather than the 52-week period preceding his removal from the industry within which silicosis was contracted. **Moore v. Standard Mineral Co.,** 375.

§ 263 (NCI4th). Approximation of average weekly wage under exceptional circumstances

A public school employee's average weekly wages should have been calculated by aggregating her wages from defendant employer with her wages earned from other employment during the summer vacation period and dividing that sum by 52. **McAninch v. Buncombe County Schools,** 679.

§ 296 (NCI4th). Employee's conduct subsequent to injury as bar to compensation; refusal of medical treatment

There was competent evidence in the record to support the Industrial Commission's determination that plaintiff employee unjustifiably refused to cooperate with defendants' rehabilitation efforts. **Sanheuza v. Liberty Steel Erectors,** 603.

The employer's provision of vocational rehabilitation services to plaintiff employee in an attempt to assist him in finding suitable employment is an appropriate attempt to "lessen the period of disability" and comes within the purview of G.S. 97-25 so that plaintiff's unjustified refusal to cooperate with the employer's rehabilitation efforts supported the suspension but not the termination of plaintiff's right to receive future disability benefits. **Ibid.**

§ 339 (NCI4th). Voluntary settlements between employer and employee generally; requirement of approval by Industrial Commission

The Industrial Commission did not err in approving I.C. Form 26 giving plaintiff 30 weeks of 10% permanent partial disability compensation pursuant to G.S. 97-31 where there was no evidence in the medical records submitted to the Commission which supported awarding permanent total disability benefits under G.S. 97-29. **Salaam v. N.C. Dept. of Transportation,** 83.

§ 372 (NCI4th). Discovery; depositions and production of records

The Industrial Commission erred by admitting the deposition of plaintiff's treating physician in light of the nonconsensual ex parte contact between defendant's counsel and the physician. **Salaam v. N.C. Dept. of Transportation,** 83.

§ 406 (NCI4th). Sufficiency of Industrial Commission's findings of fact; necessity of finding as to each issue

The Industrial Commission erred in failing to make a determination as to whether plaintiff's current injury aggravated a preexisting condition so that it contributed in some reasonable degree to her current disability. **Hoyle v. Carolina Associated Mills,** 462.

§ 414 (NCI4th). Appeal of initial award to full commission; scope of review generally

The Industrial Commission fulfilled its duty under G.S. 97-85 to review the determination of the deputy commissioner by stating that plaintiff had not shown good ground to reconsider the evidence, receive further evidence, rehear the parties or their

representatives or amend the opinion and award. **Lewis v. Craven Regional Medical Center**, 143

§ 426 (NCI4th). What constitutes change of condition

The Industrial Commission's finding that "plaintiff's worsening condition is due to severe lumbar spinal stenosis, which was not caused by the incident of 25 August 1987" was both a finding of fact and conclusion of law which sustained its decision to reject plaintiff's claims for further compensation for change of condition and additional medical treatment. **Pittman v. Thomas & Howard,** 124.

The evidence supported the Industrial Commission's conclusion that plaintiff did not sustain a material change for the worse in his back condition since scar tissue was not a change of condition and plaintiff's exaggerated complaints of pain could not support a change of condition based upon increased pain. **Lewis v. Craven Regional Medical Center,** 143.

§ 478 (NCI4th). Discretion to award attorney's fees in connection with appeal to appellate court

Plaintiff is entitled to recover his costs, including attorney's fees, incurred in this appeal by defendant employer of the order of the Full Commission where the appellate court affirmed the directive that defendant pay additional benefits to plaintiff, and plaintiff was not required to show that defendant's appeal was "without reasonable ground" in order to recover such costs. **Brown v. Public Works Comm.,** 473.

ZONING

§ 19 (NCI4th). Approval and recordation of subdivision plats

The evidence did not support the trial court's conclusion that a plat map of plaintiff's 231-acre tract was not exempt from county subdivision regulations on the ground that a series of private driveway easements by which plaintiff intended to provide access to its subdivision lots and which were to be maintained pursuant to a driveway maintenance agreement were for all intents and purposes "open for public use." However, the evidence supported the trial court's determination that the county was not required to approve plaintiff's plat map on the ground that plaintiff's planned subdivision would endanger the public health, safety, and welfare because access to the lots for such county services as law enforcement, fire, or rescue operations would be prohibitive or inadequate. **Three Guys Real Estate v. Harnett County,** 362.

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