NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vii

District Court Judges xi

Attorney General xvii

District Attorneys xix

Public Defenders xx

Table of Cases Reported xxi

Table of Cases Reported Without Published Opinions xxv

General Statutes Cited and Construed xxxii

Rules of Evidence Cited and Construed xxxv

Rules of Civil Procedure Cited and Construed xxxv

Constitution of the United States Cited and Construed xxxvi

Constitution of North Carolina Cited and Construed xxxvi

Rules of Appellate Procedure Cited and Construed xxxvii

Opinions of the Court of Appeals 1-788

Order Adopting Amendment to the
Rules of Appellate Procedure 791

Analytical Index 803

Word and Phrase Index 846

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OF

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* Appointed by Governor James B. Hunt, Jr. and sworn in 21 February 1997.

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1. Retired 31 August 1997.
2. Appointed and sworn in 8 August 1997.
3. Appointed and sworn in 22 August 1997.
4. Appointed and sworn in 22 August 1997.
5. Appointed and sworn in 27 August 1997.
6. Deceased 22 April 1997.
7. Recalled to the Court of Appeals 1 September 1995.

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1. Appointed and sworn in 29 May 1997 to replace Patricia A. Timmons-Goodson who was appointed to the Court of Appeals.
2. Appointed and sworn in 12 August 1997.
3. Appointed to a new position and sworn in 31 January 1997.
4. Appointed and sworn in 12 August 1997.

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	PAGE
Abitibi-Price Corp., Bullins v.	530
Alcatel, Inc., Allmon v.	341
Allmon v. Alcatel, Inc.	341
Allstate Ins. Co., Hooper v.	185
American Safety Utility Corp., Nicholson v.	59
American Television & Communications Corp., Blair v.	420
AMG Bonding and Ins. Services, Starco, Inc. v.	332
Askew Kawasaki, Inc. v. City of Elizabeth City	453
Autos Unlimited, Inc., Huff v.	410
Bagwell & Bagwell, Inc. v. Blanton	538
Banks v. McGee	32
Banner v. Hatcher	439
Barber v. Continental Grain Co.	310
Bartlett v. Jacobs	521
Benjamin, State v.	734
Bicket v. McLean Securities, Inc.	548
Blair v. American Television & Communications Corp.	420
Blanton, Bagwell & Bagwell, Inc. v.	538
BP Oil Co., Richardson v.	509
Brookwood Unit Ownership Assn. v. Delon	446
Brown, C.C. Mangum, Inc. v.	658
Brown v. Hurley	377
Brown v. S & N Communications, Inc.	320
Browning, In re	190
Broyhill Furniture Industries, Sanders v.	637
Bullins v. Abitibi-Price Corp.	530
Byrd, Chapman v.	13
Caswell Center, Stroud v.	653
Cauble v. Soft-Play, Inc.	526
Caviness, Metropolitan Property and Casualty Ins. Co. v.	760
C.C. Mangum, Inc. v. Brown	658
Central Carolina Bank & Trust, Trull v.	486
Central Carolina Bank v. Wright	477
Central Piedmont Community College, Jordan v.	112
Centura Bank, Taylor v.	661
Chapman v. Byrd	13
Charlotte-Mecklenburg Bd. of Educ., Hallman v.	435
ChemiMetals Processing v. McEneny	194
City of Durham, Parkwood Assn., Inc. v.	603
City of Elizabeth City, Askew Kawasaki, Inc. v.	453
City of Roanoke Rapids v. Peedin	578
City of Wilmington, Gossett v.	777
Cochran, Smith v.	222
Coggins v. Vonhandschuh	405
Commissioner of Labor v. House of Raeford Farms	349
Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.	383
Coniglio, Schronce v.	216
Connecticut Indemnity Co., Hand v.	774
Continental Grain Co., Barber v.	310
Cooke v. Grigg	770
Creech v. Melnik	502
Davis, State v.	93
Delon, Brookwood Unit Ownership Assn. v.	446
Dunn v. N.C. Dept. of Human Resources	158
Eibergen v. Killens	534
Evans, Moore v.	35
Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.	232
Fireman's Fund Insurance Co., Fieldcrest Cannon, Inc. v.	232
First-Citizens Bank and Trust Co., Roberts v.	713
Fisher v. Fisher	442
Fort, Ware v.	613
Garrard, Tierney v.	415
Gossett v. City of Wilmington	777
Grace Hospital, Inc., Howerton v.	199
Green, State v.	269

	PAGE
Grigg, Cooke v.	770
Guilford County Bd. of Comrs. v. Trogdon	741
Hallman v. Charlotte-Mecklenburg Bd. of Educ.	435
Hand v. Connecticut Indemnity Co.	774
Hatcher, Banner v.	439
Helms v. Holland	629
Henderson v. U.S. Fidelity & Guaranty Co.	103
Hendrickson, State v.	150
Hockaday v. Lee	425
Hodge, N.C. Dept. of Transportation v.	515
Holland, Helms v.	629
Hooper v. Allstate Ins. Co.	185
House of Raeford Farms, Commissioner of Labor v.	349
Howerton v. Grace Hospital, Inc.	199
Huff v. Autos Unlimited, Inc.	410
Humphries v. N.C. Dept. of Correction	545
Hurley, Brown v.	377
In re Browning	190
Jacobs, Bartlett v.	521
Jacobsen v. McMillan	128
Jernigan v. N.C. Div. of Parks and Recreation	748
Johnson, State v.	462
Jordan v. Central Piedmont Community College	112
Killens, Eibergen v.	534
King v. Yeargin Construction Co.	396
Kisiah v. W. R. Kisiah Plumbing	72
Laurent v. USAir, Inc.	208
Leader Construction Co., Members Interior Construction v.	121
Lee, Hockaday v.	425
Lone Wolf Publishing Group, VSD Communications, Inc. v.	642
Maggiolo, N.C. State Bar v.	22
Martin, Smith v.	592
McClain v. Walker	765
McCrae, State v.	664

	PAGE
McEneny, Chemimetals Processing v.	194
McGee, Banks v.	32
McLean Securities, Inc., Bicket v.	548
McMillan, Jacobsen v.	128
Melnik, Creech v.	502
Members Interior Construction v. Leader Construction Co.	121
Metropolitan Property and Casualty Ins. Co. v. Caviness	760
Miller v. Randolph	779
Miracle v. N.C. Local Gov't. Employees' Retirement System	285
Moody, Smith v.	203
Moore v. Evans	35
Morgan v. N.C. Dept. of Transportation	180
Nash/Rocky Mount Bd. of Educ., Vester v.	400
National Advertising Co. v. N.C. Dept. of Transportation	620
N.C. Coastal Resources Comm., Walker v.	1
N.C. Dept. of Correction, Humphries v.	545
N.C. Dept. of Human Resources, Dunn v.	158
N.C. Dept. of Human Resources, Retirement Villages, Inc. v.	495
N.C. Dept. of Human Resources, Thomas v.	698
N.C. Dept. of Transportation v. Hodge	515
N.C. Dept. of Transportation, Morgan v.	180
N.C. Dept. of Transportation, National Advertising Co. v.	620
N.C. Dept. of Transportation, Powell v.	542
N.C. Div. of Parks and Recreation, Jernigan v.	748
N.C. Local Gov't. Employees' Retirement System, Miracle v.	285
N.C. Motor Veh. Reinsurance Fac., St. Paul Fire and Marine Ins. Co. v.	450

PAGE

N.C. Rate Bureau, State ex rel. Comr. of Ins. v. 674
N.C. State Bar v. Maggiolo 22
Nicholson v. American Safety Utility Corp. 59

Odom, Raynor v. 724

Parker, Robinson v. 164
Parkwood Assn., Inc. v. City of Durham 603
Peedin, City of Roanoke Rapids v. 578
Powell v. N.C. Dept. of Transportation 542
Pulliam v. Smith 144

Raleigh Community Hospital, Saums v. 219
Randolph, Miller v. 779
Raynor v. Odom 724
Retirement Villages, Inc. v. N.C. Dept. of Human Resources 495
Rhyne, State v. 84
Richardson v. BP Oil Co. 509
Richbourg's Sales and Rentals, Worsham v. 782
Riggs v. Riggs 647
Roberts v. First-Citizens Bank and Trust Co. 713
Robinette, State v. 212
Robinson v. Parker 164
Rogers, State v. 364
Rouse Office Mgmt. of N.C., Computer Decisions, Inc. v. 383

Sanders v. Broyhill Furniture Industries 637
S & N Communications, Inc., Brown v. 320
Saums v. Raleigh Community Hospital 219
Schronce v. Coniglio 216
Scott, U.S. Fidelity and Guaranty Co. v. 224
Sharp v. Sharp 357
Smith v. Cochran 222
Smith v. Martin 592
Smith v. Moody 203
Smith, Pulliam v. 144

PAGE

Smith, State v. 565
Soft-Play, Inc., Cauble v. 526
St. Paul Fire and Marine Ins. Co. v. N.C. Motor Veh. Reinsurance Fac. 450
Starco, Inc. v. AMG Bonding and Ins. Services 332
State v. Benjamin 734
State v. Davis 93
State v. Green 269
State v. Hendrickson 150
State v. Johnson 462
State v. McCrae 664
State v. Rhyne 84
State v. Robinette 212
State v. Rogers 364
State v. Smith 565
State v. Weary 754
State v. Wilder 136
State v. Woody 296
State ex rel. Comr. of Ins. v. N.C. Rate Bureau 674
State of N.C., Times-News Publishing Co. v. 175
Strickland v. Town of Aberdeen 430
Stroud v. Caswell Center 653
Sutton, Wilson v. 170

Tataragasi v. Tataragasi 255
Taylor v. Centura Bank 661
Thomas v. N.C. Dept. of Human Resources 698
Tierney v. Garrard 415
Times-News Publishing Co. v. State of N.C. 175
Tinch v. Video Industrial Services 391
Town of Aberdeen, Strickland v. 430
Trogdon, Guilford County Bd. of Comrs. v. 741
Trull v. Central Carolina Bank & Trust 486

USAir, Inc., Laurent v. 208
U.S. Fidelity & Guaranty Co., Henderson v. 103
U.S. Fidelity and Guaranty Co. v. Scott 224

PAGE

Vester v. Nash/Rocky Mount Bd. of Educ. 400
Video Industrial Services, Tinch v. 391
Vonhandschuh, Coggins v. 405
VSD Communications, Inc. v. Lone Wolf Publishing Group 642

Walker, McClain v. 765
Walker v. N.C. Coastal Resources Comm. 1
Ware v. Fort 613

PAGE

Weary, State v. 754
Wilder, State v. 136
Wilson v. Sutton 170
Wilson v. Wilson 371
Woody, State v. 296
Worsham v. Richbourg's Sales and Rentals 782
Wright, Central Carolina Bank v. . . 477
W. R. Kisiah Plumbing, Kisiah v. . . . 72

Yeargin Construction Co., King v. . . 396

PAGE

Abrams v. Surrette 228
ABTco, Inc., Bullins v. 456
Adams, State v. 786
Airport Center Ltd. Part., City of Charlotte v. 228
Alexander, In re 670
Alston, State v. 230
Andrews, State v. 459
Angold, Warren v. 669
Arnold, Teleflex Information Systems v. 673
Ashton Woods Carolina Homes, Squires Enterprises v. 230
Askin, Hathor v. 785
Ataei-Kachuel, Norwood v. 670

B&P Construction Co., Hemby Bridge Farm & Garden v. 666
Bailey v. Cash Brothers, Inc. 228
Bailey, State v. 459
Bailey, State v. 670
Baker v. Deese 785
Ballew, State v. 786
Barbee, Estate of Burgess v. 457
Barlow v. Barlow 456
Barrineau v. Barrineau 666
Barrow v. Barrow 669
Beam, State v. 667
Beasley, In re 670
Berry, First Financial Ins. Co. v. 666
Bonham v. Conitex USA, Inc. 456
Bowden, Williams v. 229
Bowman, State v. 670
Boyce v. Grove Park Inn. 456
Boyd, State v. 230
Braswell, State v. 671
Brietz v. Plank 456
Bright, State v. 671
Broady, In re 785
Brookshire v. Kerfoot 456
Brown v. Marinakis 785
Brown Shaw v. 667
Brown, State v. 459
Brown, State v. 459
Brown, State v. 786
Bryant, Curtis v. 229
Bryant v. N.C. State Bd. of Elec. Contractors 669
Bryn v. Ford 785

PAGE

Bullard v. Time Ins. Co. 669
Bullins v. ABTco, Inc. 456
Bundy, State v. 671
Burnette, State v. 459

Caldwell v. Yelvington 785
Camp, Sanderson v. 458
Canery, State v. 786
Canton Hardwood Co., Cantrell v. 457
Cantrell v. Canton Hardwood Co. 457
Carolina Coupon Clearing v. Shore 228
Carolina Medicorp, Inc., Parsons v. 458
Carrington v. Wakeman 457
Cash Brothers, Inc., Bailey v. 228
Cassada v. Lay 785
Cauthen v. Russell 666
Chappell, State v. 671
Chavis, State v. 228
Cheek v. Cheek 229
Childress v. N.C. Dept. of Human Resources 669
Cisneros v. Cisneros 666
City of Asheville, Dillingham v. 669
City of Charlotte v. Airport Center Ltd. Part. 228
City of Salisbury, Fairway Outdoor Advertising v. 666
City of Salisbury, Fairway Outdoor Advertising v. 666
Clark, State v. 459
Columbus County Farm Bureau Federation, Haynes v. 669
Compton, State v. 671
Conitex USA, Inc., Bonham v. 456
Cool Springs Lumber Co., Keaton v. 228
County of Wayne ex rel. Graham v. Grice 669
Covington v. Covington 785
Crane, Green v. 457
Cranford v. Hanley 228
Creange, Helms v. 670
Cummings, State v. 671
Cupples, State v. 786
Currie, State v. 667

	Page
Curry, State v.	459
Curtis v. Bryant	229
Dancy, State v.	671
Daniel & Lecroy v. Kincaid	669
Darden, It's Prime Only v.	667
Darden, Harrell v.	666
Darden v. Soules	666
Darden, Soules v.	667
Davis v. Davis	785
Davis, Lee v.	457
Davis, State v.	459
Davis, State v.	671
Decato Brothers, Inc., Morris v.	458
Deese, Baker v.	785
Dial Call Communications v. Durham County Bd. of Adjustment	229
Dillard v. Lawson	228
Dillingham v. City of Asheville	669
D.L.B., In re	666
Dotson v. Estate of Dotson	669
Douglas, Houston v.	230
Douthit, State v.	667
DP Pros of Burlington, Winstead v.	669
Duke v. Duke	666
Dunes East Partnership v. Holley	666
Duquesne, In re	785
Durham County Bd. of Adjustment, Dial Call Communications v.	229
Edmondson, State v.	667
Emerson Phares Lumber Co. v. Gosha	457
Encee Chemical Sales, Federal Kemper Life Assurance Co. v.	229
Estate of Burgess v. Barbee	457
Estate of Dotson, Dotson v.	669
Estate of Watkins, Watkins v.	229
Facon, State v.	459
Fairway Outdoor Advertising v. City of Salisbury	666
Fairway Outdoor Advertising v. City of Salisbury	666
Farley, State v.	459
Farmer v. Lane	669
Farrior, State v.	459
Federal Kemper Life Assurance Co. v. Encee Chemical Sales	229
First Financial Ins. Co. v. Berry	666
Flanders Filters, Huza v.	785
Ford, Bryn v.	785
Ford, State v.	459
Forsyth County DSS, McIntyre v.	230
Forsyth Memorial Hosp., Nolan v.	670
Fortune, State v.	671
Foster v. Harrell	785
Foster v. Suter	457
Four Hunters, Inc., Whitt v.	673
Freeman, State v.	228
Freeman, Thomas v.	668
GAB Business Services, Stevens v.	461
Gaddie, State v.	786
Galan, State v.	786
Garner, State v.	230
Garner, State v.	786
Genuine Parts Co., Hyatt v.	457
Glasgow, State v.	671
Godwin, State v.	460
Golden Corral Corp., Mansfield v.	670
Goraya, In re	228
Gosha, Emerson Phares Lumber Co. v.	457
Graham v. Graham	669
Grant v. Grant	230
Grass v. Spa Health Clubs	230
Green v. Crane	457
Green, State v.	667
Green v. Neill	457
Grice, County of Wayne ex rel. Graham v.	669
Griffith, State v.	671
Grove Park Inn., Boyce v.	456
Gum and Hillier, Malinowski v.	230
Hairston, State v.	460
Hale, State v.	460

	Page
Haney v. Miller	457
Hanley, Cranford v.	228
Hargrove, Vance County DSS v.	669
Harrell v. Darden	666
Harrell, Foster v.	785
Harrelson, State v.	229
Harrison, State v.	671
Hash v. Palm Harbor Homes	457
Hasty, State v.	230
Hathor v. Askin	785
Hayes, Nelson v.	458
Haynes v. Columbus County Farm Bureau Federation	669
Hayzlip, Troutman v.	461
Helms v. Creange	670
Helpmate of Madison, Inc. v. Town of Marshall Zoning Bd. of Adj.	228
Hemby Bridge Farm & Garden v. B&P Construction Co.	666
Hickory Springs Mfg. Co., Spencer v.	786
Holderman, State v.	671
Holley, Dunes East Partnership v.	666
Hollifield v. Watauga Vista Owners Assn.	230
Holloway, State v.	667
Holt v. Sara Lee Corp.	666
Houston v. Douglas	230
Howard, State v.	787
Howard, Treasurer of State of Conn. v.	673
Huffman, State v.	667
Huza v. Flanders Filters	785
Hyatt v. Genuine Parts Co.	457
Hyman, State v.	231
In re Alexander	670
In re Beasley	670
In re Broady	785
In re D.L.B.	666
In re Duquesne	785
In re Goraya	228
In re Jones	666
In re Koonce	666
In re L. R., A Juvenile	228
In re Perry	785
In re Robinson	457
Industrial Risk Insurers, Lemco Mills v.	786
Ingram v. John H. Brinkley, Inc.	667
It's Prime Only v. Darden	667
Jefferson, State v.	671
Jeffries, State v.	668
Jeffries, Van Dyke v.	669
John H. Brinkley, Inc., Ingram v.	667
Johnson, State v.	460
Johnson, State v.	672
Johnston v. Williams	670
Jones, In re	666
Jones v. N.C. A&T State University	670
Jordan, State v.	231
Kearney, Plummer v.	786
Keaton v. Cool Springs Lumber Co.	228
Kerfoot, Brookshire v.	456
Kincaid, Daniel & Lecroy v.	669
King v. Weavil	457
Knowles, State v.	460
Koonce, In re	666
Krauss v. Wayne County DSS	785
Laing v. Lewis	785
Lane, Farmer v.	669
Latham v. McBride	457
Lattimore, State v.	460
Lawson, Dillard v.	228
Lay, Cassada v.	785
Lee v. Davis	457
Lemco Mills v. Industrial Risk Insurers	786
Lewis & Daggett, Steele v.	788
Lewis, Laing v.	785
Lewis, State v.	229
Lewis v. Watauga Hospital	786
Liberty National Life Ins. Co. v. Mitchell	667
Lide, State v.	460
Lipfird, State v.	668
Locklear, Nationwide Mut. Fire Ins. v.	670
Locklear, State v.	787
Lofton, State v.	787

	PAGE
L. R., A Juvenile, In re	228
Lusth, Padilla v.	786
Malinowski v. Gum and Hillier	230
Mansfield v. Golden Corral Corp.	670
Marinakis, Brown v.	785
Marsh, Roy Burt Enterprises v.	458
Martin, State v.	672
Martin v. Villa Capriani Homeowners Assn.	457
Massenburg, N.C. Dept. of Crime Control v.	458
Maxey v. Maxey	457
McBride, Latham v.	457
McCarver v. Presbyterian Hospital	230
McClain, State v.	229
McClamroch, State Auto Ins. Cos. v.	461
McCoy, State v.	672
McIntyre v. Forsyth County DSS	230
McKenzie v. White	670
McQueen, Samuel v.	458
Meads v. N.C. Pesticide Bd.	670
Metts v. Turner	786
Mid-State Oil Co. v. Walton	457
Miller, Haney v.	457
Millsaps v. Yates	670
Mitchell, Liberty National Life Ins. Co. v.	667
Mitchell, State v.	231
Moore, Onslow County v.	670
Moore v. Osborne	667
Moores, State v.	787
Moranco Engineering Co. v. Rankin	786
Moore, State v.	672
Morgan, State v.	229
Morris v. Decato Brothers, Inc.	458
Mutts, State v.	460
Nationwide Mut. Fire Ins. v. Locklear	670
N.C. A&T State University, Jones v.	670
N.C. Dept. of Correction, Smith v.	670
N.C. Dept. of Crime Control v. Massenburg	458
N.C. Dept. of Human Resources, Childress v.	669
N.C. Pesticide Bd., Meads v.	670
N.C. State Bd. of Elec. Contractors, Bryant v.	669
N.C. State University, Vieregge v.	461
Neill, Green v.	457
Nelson v. Hayes	458
Nolan v. Forsyth Memorial Hosp.	670
Norwood v. Ataei-Kachuel	670
O'Connor v. O'Connor	230
Oakwood Homes, Seeley v.	458
Onslow County v. Moore	670
Osborne, Moore v.	667
Osborne, Wagoner v.	461
Owens, State v.	229
Owens v. Wilson	458
Padilla v. Lusth	786
Palm Harbor Homes, Hash v.	457
Parnacher, Tri-Cities Door Corp. v.	673
Parsons v. Carolina Medicorp, Inc.	458
Pate, Reiser v.	230
Pearson, State v.	672
Pegues, State v.	460
Perritt v. St. Pierre	228
Perry, In re	785
Phelps v. Phelps	458
Phelps v. Phelps	458
Phillip, State v.	231
Pierce, State v.	672
Plank, Brietz v.	456
Plummer v. Kearney	786
Powell, State v.	460
Presbyterian Hospital, McCarver v.	230
Provost, State v.	668
Ragsdale, State v.	460
Randolph, State v.	231
Rankin, Moranco Engineering Co. v.	786
Reddick, State v.	461
Reece, State v.	231
Reid, State v.	672

	Page
Reiser v. Pate	230
Rhodes, State v.	787
Robinson, In re	457
Rorie, State v.	229
Rowe, State v.	672
Roy Burt Enterprises v. Marsh	458
Russell, Cauthen v.	666
Sabin, State v.	672
Salter, State v.	787
Samuel v. McQueen	458
Samuel, Sheldon v.	667
Sanders, State v.	231
Sanderson v. Camp	458
Sara Lee Corp., Holt v.	666
Scott, State v.	787
Seeley v. Oakwood Homes	458
Settle, State v.	787
Shaw v. Brown	667
Shearin v. State Farm Fire and Casualty Co.	458
Sheldon v. Samuel	667
Shepard, State v.	787
Sherman, State v.	229
Shore, Carolina Coupon Clearing v.	228
Sierra, State v.	668
Sifford, State v.	461
Simmons, State v.	461
Sloan, State v.	672
Slone, State v.	788
Smikle, State v.	229
Smith, State v.	668
Smith, State v.	668
Smith, State v.	788
Smith, Terry v.	461
Smith v. N.C. Dept. of Correction	670
Smith v. Smith	667
Soules, Darden v.	666
Soules v. Darden	667
Spa Health Clubs, Grass v.	230
Speight, State v.	668
Spencer v. Hickory Springs Mfg. Co.	786
Squires, State v.	231
Squires Enterprises v. Ashton Woods Carolina Homes	230
St. Pierre, Perritt v.	228

	Page
Stallings, State v.	672
Stanley, State v.	668
Starks, State v.	672
State v. Adams	786
State v. Alston	230
State v. Andrews	459
State v. Bailey	459
State v. Bailey	670
State v. Ballew	786
State v. Beam	667
State v. Bowman	670
State v. Boyd	230
State v. Braswell	671
State v. Bright	671
State v. Brown	459
State v. Brown	459
State v. Brown	786
State v. Bundy	671
State v. Burnette	459
State v. Canery	786
State v. Chappell	671
State v. Chavis	228
State v. Clark	459
State v. Compton	671
State v. Cummings	671
State v. Cupples	786
State v. Currie	667
State v. Curry	459
State v. Dancy	671
State v. Davis	459
State v. Davis	671
State v. Douthit	667
State v. Edmondson	667
State v. Facon	459
State v. Farley	459
State v. Farrior	459
State v. Ford	459
State v. Fortune	671
State v. Freeman	228
State v. Gaddie	786
State v. Galan	786
State v. Garner	230
State v. Garner	786
State v. Glasgow	671
State v. Godwin	460
State v. Green	667
State v. Griffith	671
State v. Hairston	460
State v. Hale	460

	PAGE
State v. Harrelson	229
State v. Harrison	671
State v. Hasty	230
State v. Holderman	671
State v. Holloway	667
State v. Howard	787
State v. Huffman	667
State v. Hyman	231
State v. Jefferson	671
State v. Jeffries	668
State v. Johnson	460
State v. Johnson	672
State v. Jordan	231
State v. Knowles	460
State v. Lattimore	460
State v. Lewis	229
State v. Lide	460
State v. Lipfird	668
State v. Locklear	787
State v. Lofton	787
State v. Martin	672
State v. McClain	229
State v. McCoy	672
State v. Mitchell	231
State v. Moore	672
State v. Moores	787
State v. Morgan	229
State v. Mutts	460
State v. Owens	229
State v. Pearson	672
State v. Pegues	460
State v. Phillip	231
State v. Pierce	672
State v. Powell	460
State v. Provost	668
State v. Ragsdale	460
State v. Randolph	231
State v. Reddick	461
State v. Reece	231
State v. Reid	672
State v. Rhodes	787
State v. Rorie	229
State v. Rowe	672
State v. Sabin	672
State v. Salter	787
State v. Sanders	231
State v. Scott	787
State v. Settle	787

	PAGE
State v. Shepard	787
State v. Sherman	229
State v. Sierra	668
State v. Sifford	461
State v. Simmons	461
State v. Sloan	672
State v. Slone	788
State v. Smikle	229
State v. Smith	668
State v. Smith	668
State v. Smith	788
State v. Smyer	231
State v. Speight	668
State v. Squires	231
State v. Stallings	672
State v. Stanley	668
State v. Starks	672
State v. Staten	672
State v. Thomas	672
State v. Walker	788
State v. Wallace	672
State v. Walter	668
State v. Waters	788
State v. Wayne	673
State v. Weatherington	673
State v. Williams	673
State v. Williams	788
State v. Wilson	788
State v. Woodard	673
State v. Wynn	788
State v. Yancey	673
State Auto Ins. Cos. v. McClamroch	461
State Farm Fire and Casualty Co., Shearin v.	458
Staten, State v.	672
Steele v. Lewis & Daggett	788
Stevens v. GAB Business Services	461
Sturgill, United Foods v.	788
Surrette, Abrams v.	228
Suter, Foster v.	457
Sutton, Williams v.	673
Taylor v. Walton League of America	788
Teleflex Information Systems v. Arnold	673
Terry v. Smith	461

	PAGE
Thomas v. Freeman	668
Thomas, State v.	672
Thomas, Travis v.	673
Thompson v. Whitley & Company Real Estate	461
Time Ins. Co., Bullard v.	669
Town of Marshall Zoning Bd. of Adj., Helpmate of Madison, Inc. v.	228
Travis v. Thomas	673
Treasurer of State of Conn. v. Howard	673
Tri-Cities Door Corp. v. Parnacher	673
Troutman v. Hayzlip	461
Turner, Metts v.	786
United Foods v. Sturgill	788
Van Dyke v. Jeffries	669
Vance County DSS v. Hargrove	669
VanHook, Watson v.	231
Vieregge v. N.C. State University	461
Villa Capriani Homeowners Assn., Martin v.	457
Wagoner v. Osborne	461
Wakeman, Carrington v.	457
Walker, State v.	788
Wallace, State v.	672
Walter, State v.	668
Walton League of America, Taylor v.	788
Walton, Mid-State Oil Co. v.	457
Warren v. Angold	669
Watauga Hospital, Lewis v.	786
Watauga Vista Owners Assn., Hollifield v.	230
Waters, State v.	788
Watkins v. Estate of Watkins	229
Watson v. VanHook	231
Wayne County DSS, Krauss v.	785
Wayne, State v.	673
Weatherington, State v.	673
Weavil, King v.	457
White, McKenzie v.	670
Whitley & Company Real Estate, Thompson v.	461
Whitt v. Four Hunters, Inc.	673
Williams v. Bowden	229
Williams, Johnston v.	670
Williams v. Sutton	673
Williams, State v.	673
Williams, State v.	788
Wilson, Owens v.	458
Wilson, State v.	788
Winstead v. DP Pros of Burlington	669
Woodard, State v.	673
Wynn, State v.	788
Yancey, State v.	673
Yates, Millsaps v.	670
Yelvington, Caldwell v.	785

G.S.	
1-21	Laurent v. USAir, Inc., 208
	Tierney v. Garrard, 415
1-52(1)	Miller v. Randolph, 779
1-55(1)	Miller v. Randolph, 779
1-75.4	Tierney v. Garrard, 415
1-75.4(3)	Tierney v. Garrard, 415
1-75.4(5)	Starco, Inc. v. AMG Bonding and Ins. Services, 332
1-567.12	Hooper v. Allstate Ins. Co., 185
1-567.13	Hooper v. Allstate Ins. Co., 185
1A-1	See Rules of Civil Procedure, infra
6-19.1	Walker v. N.C. Coastal Resources Comm., 1
	Morgan v. N.C. Dept. of Transportation, 180
6-21.2	Trull v. Central Carolina Bank & Trust, 486
6-21.2(2)	Brookwood Unit Ownership Assn. v. Delon, 446
6-21.5	VSD Communications, Inc. v. Lone Wolf Publishing Group, 642
7A-544	In re Browning, 190
7A-596	State v. Green, 269
7A-608	State v. Green, 269
7A-610	State v. Green, 269
8-58.1	Jacobsen v. McMillan, 128
8C-1	See Rules of Evidence, infra
14-254	State v. Weary, 754
15A-1235	State v. Woody, 296
15A-1340.14	State v. McCrae, 664
20-4.01(32)(b)	State v. Robinette, 212
20-16.3(b)	State v. Rogers, 364
20-16.5	State v. Rogers, 364
20-28.1(b)(1)	Eibergen v. Killens, 534
20-71.4	Wilson v. Sutton, 170
20-138.1	State v. Rogers, 364
20-138.1(a)	State v. Robinette, 212

20-279.21(b)(4)	Metropolitan Property and Casualty Ins. Co. v. Caviness, 760
25-2-210(1)	Richardson v. BP Oil Co., 509
25-2-210(2)	Richardson v. BP Oil Co., 509
25-9-502	Roberts v. First-Citizens Bank and Trust Co., 713
25-9-504	Roberts v. First-Citizens Bank and Trust Co., 713
28A-18-1	Schronce v. Coniglio, 216
29-9-504(3)	Roberts v. First-Citizens Bank and Trust Co., 713
47-18	National Advertising Co. v. N.C. Dept. of Transportation, 620
47C-4-117	Brookwood Unit Ownership Assn. v. Delon, 446
50-13.1(a)	Fisher v. Gaydon, 442
50-13.2(b1)	Fisher v. Gaydon, 442
50-13.5	Raynor v. Odom, 724
50-13.5(i)	Raynor v. Odom, 724
50.13.7	Raynor v. Odom, 724
50-131.1(a)	Sharp v. Sharp, 357
50A-3	Tataragasi v. Tataragasi, 255
50A-3(a)(1)	Tataragasi v. Tataragasi, 255
50A-3(a)(3)	Tataragasi v. Tataragasi, 255
58-2-90(e)	State ex rel. Comr. of Ins. v. N.C. Rate Bureau, 674
58-2-165	State ex rel. Comr. of Ins. v. N.C. Rate Bureau, 674
58-36-10	State ex rel. Comr. of Ins. v. N.C. Rate Bureau, 674
58-36-70(d)	State ex rel. Comr. of Ins. v. N.C. Rate Bureau, 674
58-37-25(b)	St. Paul Fire and Marine Ins. Co. v. N.C. Motor Veh. Reins. Fac., 450
58-37-25(1)	St. Paul Fire and Marine Ins. Co. v. N.C. Motor Veh. Reins. Fac., 450
58-63-15(11)	Members Interior Construction v. Leader Construction Co., 121
Ch. 75	Huff v. Autos Unlimited, Inc., 410
75-1.1	Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C., 383
	Richardson v. BP Oil Co., 509

90-95.3(b)	State v. Johnson, 462
90-112(a)(2)	State v. Johnson, 462
95-242(a)	Commissioner of Labor v. House of Raeford Farms, 349
97-18	Kisiah v. W. R. Kisiah Plumbing, 72
97-18(e)	Allmon v. Alcatel, Inc., 341
97-29	Brown v. S & N Communications, Inc., 320
97-30	Brown v. S & N Communications, Inc., 320
97-31	Brown v. S & N Communications, Inc., 320
97-47	Blair v. American Television & Communications Corp., 420
99B-2(b)	Nicholson v. American Safety Utility Corp., 59
99B-4(3)	Nicholson v. American Safety Utility Corp., 59
106-662	Barber v. Continental Grain Co., 310
106-662(b)(4)	Barber v. Continental Grain Co., 310
106-662(e)(4)	Barber v. Continental Grain Co., 310
115C-42	Hallman v. Charlotte-Mecklenburg Bd. of Educ., 435
126-4	Dunn v. N.C. Dept. of Human Resources, 158
126-4(11)	Morgan v. N.C. Dept. of Transportation, 180
126-5	N.C. Dept. of Transportation v. Hodge, 515
126-5(b)	N.C. Dept. of Transportation v. Hodge, 515
126-34.1	Dunn v. N.C. Dept. of Human Resources, 158
126-41	Morgan v. N.C. Dept. of Transportation, 180
126-80	Dunn v. N.C. Dept. of Human Resources, 158
126-82(a)	Dunn v. N.C. Dept. of Human Resources, 158
126-82(c)	Dunn v. N.C. Dept. of Human Resources, 158
128-24(5)(c)	Miracle v. N.C. Local Gov't. Employees' Retirement System, 285
130A-139	City of Roanoke Rapids v. Peedin, 578
131E-183(a)(3)	Retirement Villages, Inc. v. N.C. Dept. of Human Resources, 495
131E-183(a)(5)	Retirement Villages, Inc. v. N.C. Dept. of Human Resources, 495
132-1.4(a)	Times-News Publishing Co. v. State of N.C., 175
132-1.4(c)	Times-News Publishing Co. v. State of N.C., 175

136-111	National Advertising Co. v. N.C. Dept. of Transportation, 620
136-126 et seq.	National Advertising Co. v. N.C. Dept. of Transportation, 620
143B-3	N.C. Dept. of Transportation v. Hodge, 515
143B-3(6)	Powell v. N.C. Dept. of Transportation, 542
150B-22 et seq.	Walker v. N.C. Coastal Resources Comm., 1
160A-50(f)	Parkwood Assn., Inc. v. City of Durham, 603
160A-293(b)	Askew Kawasaki, Inc. v. City of Elizabeth City, 453
160A-485(a)	Askew Kawasaki, Inc. v. City of Elizabeth City, 453

RULES OF EVIDENCE CITED AND CONSTRUED

Rule No.	
401	State v. Woody, 296
403	State v. Woody, 296

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4	Robinson v. Parker, 164
	Tataragasi v. Tataragasi, 255
4(j3)	Tataragasi v. Tataragasi, 255
6(c)	Hockaday v. Lee, 425
8(a)(2)	Hallman v. Charlotte-Mecklenburg Bd. of Educ., 435
11(a)	VSD Communications, Inc. v. Lone Wolf Publishing Group, 642
12(b)	Robinson v. Parker, 164
12(b)(6)	Coggins v. Vonhandschuh, 405
	Strickland v. Town of Aberdeen, 430
	Askew Kawasaki, Inc. v. City of Elizabeth City, 453
	Ware v. Fort, 613

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

12(c)	Helms v. Holland, 628
15	Members Interior Construction v. Leader Construction Co., 121
30(b)(1)	Wilson v. Wilson, 371
36	Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co., 232
41	Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co., 232
41(a)	VSD Communications, Inc. v. Lone Wolf Publishing Group, 642
45(d)(1)	Wilson v. Wilson, 371
51(a)	Cooke v. Grigg, 770
56(c)	McClain v. Walker, 765
58	Worsham v. Richbourg's Sales and Rentals, 782
59	Roberts v. First-Citizens Bank and Trust Co., 713
59(a)(4)	Jacobsen v. McMillan, 128
60	Hockaday v. Lee, 425
60(b)(2)	Jacobsen v. McMillan, 128
65(d)	Taylor v. Centura Bank, 661

CONSTITUTION OF THE UNITED STATES CITED AND CONSTRUED

Amendment XIV	Miracle v. N.C. Local Gov't. Employees' Retirement System, 285
Art. I, § 10	Miracle v. N.C. Local Gov't. Employees' Retirement System, 285

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 16	Thomas v. N.C. Dept. of Human Resources, 698
Art. I, § 19	Miracle v. N.C. Local Gov't. Employees' Retirement System, 285
Art. I, § 20	State v. Smith, 565

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
3(d)	Smith v. Moody, 203
10(a)	Raynor v. Odom, 724
10(c)	State v. Benjamin, 734
10(c)(4)	Raynor v. Odom, 724
26	Roberts v. First-Citizens Bank and Trust Co., 713
28	Helms v. Holland, 628
	Roberts v. First-Citizens Bank and Trust Co., 713
28(a)	State v. Benjamin, 734
	Raynor v. Odom, 724
34(a)	Howerton v. Grace Hospital, Inc., 199

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

RICHARD E. WALKER, ET AL, AND ORIENTAL YACHT CLUB, JOSEPH H. COX, ET AL, PETITIONERS v. NORTH CAROLINA COASTAL RESOURCES COMMISSION, RESPONDENT-APPELLANT, AND ORIENTAL HARBOR DEVELOPMENT COMPANY, INC., INTERVENOR-RESPONDENT

No. COA95-1037

(Filed 1 October 1996)

1. Costs § 37 (NCI4th)— contested issuance of CAMA permit for marina—counsel fees—agency position not substantially justified

The trial court did not err in an action in which counsel fees were awarded under N.C.G.S. § 6-19.1 by concluding that the position of the Coastal Resources Commission (CRC) in issuing a development permit without an easement for use of public trust waters and submerged lands was not substantially justified. The fact that the superior court upheld the Commission does not show that CRC's decision was reasonable; the law clearly indicates that a project of this magnitude requires a Department of Administration easement; although the exclusive power to grant easements is that of DOA, the ultimate responsibility for compliance with the law in issuance of a development permit rested with CRC; the record supports the trial court's findings indicating that the position advanced by CRC was contrary to CRC, Department of Environment, Health and Natural Resources and DOA internal study findings and internal policies; a later amendment requiring that an applicant for an easement first obtain the CAMA permit is not a basis for substantial justification because

the focus is on the law known or reasonably believed at the time the claim was pressed and, in view of the clarity of the applicable law and regulations, CRC cannot be said to have reasonably believed otherwise, the later amendment notwithstanding; and *Rusher v. Tomlinson*, 119 N.C. App. 458, cited by CRC for the proposition that an easement is not prerequisite to issuance of a CAMA permit, involved a determination that that project fell within the exception to the general rules requiring easements.

Am Jur 2d, Administrative Law §§ 411, 413; Costs § 63.

What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees against government under Equal Access to Justice Act (28 USCS § 2412(d)(1)(A)). 69 ALR Fed. 130.

2. Costs § 37 (NCI4th)— contested issuance of CAMA permit for marina—counsel fees—no special circumstances making award unjust

The trial court did not err in an action in which attorney fees were awarded under N.C.G.S. § 6-19.1 arising from the granting of a development permit by the Coastal Resources Commission (CRC) without an easement from the Department of Administration for the use of public trust waters by ruling that there were no special circumstances that would make the award of counsel fees unjust. Although CRC contended that it had relied in good faith on DOA's interpretation of DOA's rules that an easement was not necessary, the sole responsibility for granting CAMA permits was that of CRC.

Am Jur 2d, Administrative Law §§ 411, 413.

What constitutes substantial justification of government's position so as to prohibit awards of attorneys' fees against government under Equal Access to Justice Act (28 USCS § 2412(d)(1)(A)). 69 ALR Fed. 130.

3. Costs § 37 (NCI4th)— contested issuance of CAMA permit for marina—counsel fees for administrative review—not allowed

An administrative hearing under N.C.G.S. § 150B-22 *et seq.* is not a civil action and the award for counsel fees and costs applicable to the administrative review portion of a case involving the issuance of a CAMA development permit without an easement for

use of public trust waters was reversed. An action is defined as an ordinary proceeding in a court of justice and an administrative agency is not a part of the general court of justice. Additionally, there has been a consistent clear distinction between allowance of counsel fees under N.C.G.S. § 6-19.1 for fees expended during judicial review of agency rulings and provisions of other statutes for counsel fees accumulated up to an agency's final decision.

Am Jur 2d, Administrative Law §§ 233, 413.

Appeal by respondent North Carolina Coastal Resources Commission from order filed 14 June 1995 by Judge Frank R. Brown in Pamlico County Superior Court. Heard in the Court of Appeals 20 May 1996.

Manning, Fulton & Skinner, P.A., by Howard E. Manning, Sr. and David T. Pryzwansky, for petitioners.

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

JOHN, Judge.

This case is before us for the second time. *See Walker v. N.C. Dept. of E.H.N.R.*, 111 N.C. App. 851, 433 S.E.2d 767, *disc. rev. denied*, 335 N.C. 243, 439 S.E.2d 164 (1993). Respondent North Carolina Coastal Resources Commission (CRC) contends the trial court erred by awarding counsel fees to petitioners pursuant to N.C.G.S. § 6-19.1 (1986). We agree in part and vacate that portion of the award assigned by the trial court to the " 'administrative review' portion of the case."

Pertinent facts and procedural information are as follows: On 26 September 1989, respondent-intervenor Oriental Harbor Development Company, Inc. (Oriental), applied to respondent CRC for a permit under the former Coastal Area Management Act (CAMA), N.C. G.S. § 113A-100, *et seq.*, to build a commercial marina on Smith Creek in Oriental, North Carolina. Following representation to CRC by the Department of Administration (DOA) that no easement was required for the project, CRC issued a permit to Oriental authorizing construction of a marina encircling 5.9 acres of public trust waters. *Walker*, 111 N.C. App. at 852-53, 433 S.E.2d at 768.

Petitioners consequently commenced this action 9 May 1990 by filing two Petitions for Contested Case Hearings with the Office of

Administrative Hearings pursuant to the former N.C.G.S. § 150B-22 *et. seq. Id.* at 853, 433 S.E.2d at 768. Petitioners objected to the permit on grounds, *inter alia*, that issuance was contrary to existing law and regulations because Oriental had not first obtained an easement from the State to use public trust waters and submerged lands. *Id.*

Following a full evidentiary hearing, Administrative Law Judge Fred G. Morrison agreed with petitioners and recommended the permit be revoked and that no CAMA permit be issued to Oriental. *Id.* However, by order dated 19 April 1991, CRC rejected the recommended decision, finding the permit had been properly authorized. *Id.*

Pursuant to N.C.G.S. § 150B-43 *et. seq.*, petitioners sought judicial review in Pamlico County Superior Court. Following a hearing, the trial court entered a 20 December 1991 order upholding issuance of the permit. From this order petitioners appealed to this Court, which reversed. *Id.* at 853-54, 433 S.E.2d at 768.

Specifically, in *Walker* we stated "[o]ur reading of the statute and the regulations leads us to the conclusion that the proposed development required an easement from the DOA," *id.* at 855, 433 S.E.2d at 769, and thus "CRC erred in issuing [the CAMA permit] allowing construction of the marina without the prior granting of an easement by the [DOA], subject to approval by the Governor and the Council of State." *Id.* at 856, 433 S.E.2d at 770. The matter was remanded for resubmission to DOA and "any other proceedings as become necessary." *Id.* at 856, 433 S.E.2d at 770. CRC's motion for discretionary review to the North Carolina Supreme Court was denied. *Walker v. N.C. Dept. of E.H.N.R.*, 335 N.C. 243, 439 S.E.2d 164 (1993).

Thereafter, on 30 December 1993, petitioners filed in Pamlico Superior Court the instant petition for counsel fees pursuant to G.S. § 6-19.1 [Attorney's fees to parties appealing or defending against agency decision]. The statute provides in relevant part as follows:

> In any civil action . . . brought by the State or brought by a party who is contesting State action pursuant to G.S. 150A-43 [now 150B-43] or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

G.S. § 6-19.1. By order dated 14 June 1995, the trial court awarded counsel fees to petitioners in the amounts of $10,500.00 and $33,041.50 for the "administrative review" and "judicial review" portions of the case respectively, and expenses of $450.88 and $2,091.70 likewise applicable to the two phases of the proceedings. From this order, CRC appeals.

CRC attacks the award of counsel fees on grounds the trial court erred in concluding that: (1) CRC's position was not substantially justified; (2) there were no special circumstances which would make an award of counsel fees unjust; and (3) administrative contested case proceedings qualify as civil actions within the purview of G.S. § 6-19.1. We discuss each contention in turn below.

In the case *sub judice*, CRC, the party against whom counsel fees were sought, had the burden of proving substantial justification for its actions in issuing the permit, *Tay v. Flaherty*, 100 N.C. App. 51, 55, 394 S.E.2d 217, 219 (1990), *and* further of showing the presence of circumstances which would make an award of counsel fees unjust. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 114 N.C. App. 75, 80-81, 440 S.E.2d 848, 851 (1994) (*Crowell I*), *reversed on other grounds*, 342 N.C. 838, 467 S.E.2d 675 (1996) (*Crowell II*). For purposes of our review, "[t]he trial court's findings of fact are binding on appeal if there is evidence to support them, even though evidence might sustain findings to the contrary." *Tay*, 100 N.C. App. at 56, 394 S.E.2d at 220.

I.

[1] Our Supreme Court recently construed the meaning of "substantial justification" under G.S. § 6-19.1 as " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Crowell II*, 342 N.C. at 844, 467 S.E.2d at 679, *citing Pierce v. Underwood*, 487 U.S. 552, 565, 101 L. Ed. 2d 490, 504 (1988). Continuing, the Court explained

> [t]his standard should not be so strictly interpreted as to require the agency to demonstrate the infallibility of each suit it initiates. Similarly, this standard should not be so loosely interpreted as to require the agency to demonstrate only that the suit is not frivolous, for "that is assuredly not the standard for Government litigation of which a reasonable person would

> approve." [citing Pierce, 487 U.S. at 566, 101 L. Ed. 2d at 505.] Rather, we adopt a middle-ground objective standard to require the agency to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency.

Id.

CRC asserts several bases for its contention the trial court erred in determining CRC

> acted without substantial justification in granting the permit without the prior grant of an easement from the DOA and subsequently pursuing enforcement of its position through the North Carolina Court of Appeals, contrary to established case law, statutes and regulations providing that an easement is required before a permit may be issued, and contrary to CRC, [DEHNR] and DOA internal study findings and internal policies.

CRC first contends "[t]he fact that the superior court upheld the Commission on every issue on judicial review" shows CRC's "decision to be not only reasonable, but correct." We disagree.

In *Tay*, 100 N.C. App. at 52-53, 394 S.E.2d at 217-18, petitioner sought judicial review of respondent-agency's termination of food stamp benefits. Following the trial court's order affirming respondent's decision, petitioner appealed to this Court, which held the termination wrongful and reversed. The agency later appealed the trial court's subsequent award of counsel fees to petitioner pursuant to G.S. § 6-19.1. This Court held the evidence before the trial court was

> sufficient to allow the court to find that respondent lacked substantial justification in pressing its claim throughout this action regardless of respondent's evidence that the superior court judge . . . agreed that respondent rightfully terminated the benefits.

Id. at 57, 394 S.E.2d at 220. *See also Pierce*, 487 U.S. at 569, 101 L. Ed. 2d at 507 ("fact that one other court agreed or disagreed with the Government does not establish whether its position was substantially justified"); *United States v. Paisley*, 957 F.2d 1161, 1166 (4th Cir.), *cert. denied, Crandon v. United States*, — U.S. —, 121 L. Ed. 2d 38 (1992) ("[c]ompletely unfounded claims sometimes, for a variety of reasons, survive beyond their just desserts"); and

Community Heating & Plumbing v. Garrett, 2 F.3d 1143, 1145-46 (Fed. Cir. 1993) (position of government "is not shown to be substantially justified merely because the government prevailed before a lower tribunal").

CRC next maintains its grant to Oriental of a CAMA permit without an easement was substantially justified because "the proper interpretation and application of [statutes] and rules" outlining the circumstance under which easements are required came within the purview of DOA and "was outside [CRC's] quasi-judicial authority." Therefore, CRC continues, it "had no ability to overrule a decision by the [DOA]," and petitioner should have attacked DOA's decision instead of challenging CRC's issuance of the permit. We remain unpersuaded.

In *Walker*, this court thoroughly discussed the common law, statutes and regulations relevant to the easement issue in the case *sub judice*, and ultimately determined that the law, which excepts only "minor structures" from the easement prerequisite for use of public trust waters and submerged lands, "*clearly* indicate[s] that a project of the magnitude of [Oriental's proposed marina] requires a[] [DOA] easement prior to the issuance of a CAMA and dredge/fill permit." *Walker*, 111 N.C. App. at 854-55, 433 S.E.2d at 769 (emphasis added). It is unnecessary to duplicate herein that discussion highlighting the lack of ambiguity in the applicable law.

Moreover, the ultimate responsibility for compliance with the law in *issuance of a development permit* under CAMA rested with CRC, which in fact issued the instant permit. Thus, although CRC correctly maintains the exclusive power to *grant easements* is that of DOA, *see Walker*, 111 N.C. App. at 854, 433 S.E.2d at 769, petitioners convincingly retort that

> CRC's attempt to 'pass the buck' to DOA makes its actions . . . inexcusable . . . . DOA's failure to grant the easement was one misapprehension of law, but CRC's issuance of the permit compounded DOA's error and [CRC] should be held responsible.

Moreover, CRC's reliance on petitioners' decision to forego a challenge to DOA's decision is untenable. The absence of such action on the part of petitioners is irrelevant to the question of CRC's ultimate responsibility.

Further, we note the record supports the trial court's findings indicating the position advanced by CRC, *i.e.*, that no easement was

mandatory for protection of public trust lands, was "contrary to CRC, Department of Environment, Health and Natural Resources and DOA internal study findings and internal policies." *See Tay*, 100 N.C. App. at 56, 394 S.E.2d at 220 ("trial court's findings of fact are binding on appeal if there is evidence to support them, even though there is evidence which might sustain findings to the contrary"). Indeed, in its current appellate brief, CRC implicitly acknowledges its awareness of the necessity of an easement (CRC "historically has encouraged [DOA] to require easements for marina projects").

We also reject CRC's assertion of substantial justification based upon subsequent amendment of N.C.G.S. § 146-12 by the General Assembly mandating that an applicant for an easement in submerged lands first obtain any necessary CAMA permit. N.C.G.S. § 146-12(f) (effective 1 October 1995). This amendment, contends CRC, reinforces its stance that an easement previously was not obligatory prior to issuance of a permit. This argument is unavailing.

In *Crowell II*, 342 N.C. at 845, 467 S.E.2d at 680, our Supreme Court held without qualification that

> in deciding whether a State agency has pressed a claim against a party 'without substantial justification,' the law and facts known to, or reasonably believed by, the State agency at the time the claim is pressed must be evaluated.

See also Pierce, 487 U.S. at 561, 101 L. Ed. 2d at 502 (issue is "not what the law now is, but what the government was substantially justified in believing it to have been"). Accordingly, the focus is upon the law "known or reasonably believed" by CRC to be applicable at the time "the claim [was] pressed," *Crowell II*, 342 N.C. at 845, 467 S.E.2d at 680, and not upon some subsequent change in the procedural order a developer or other applicant must take to obtain necessary easements and permits. In view of the clarity of the applicable law and regulations noted by this Court in *Walker*, 111 N.C. App. at 854, 433 S.E.2d at 768-69, CRC cannot be said to have "reasonably believed" otherwise, later amendment to G.S. § 146-12 notwithstanding.

In addition, we take note that CRC, with the foregoing argument, is in the unenviable position of asserting that the statutory amendment establishes that no easement was required *prior to* issuance of a permit, and attempting to reconcile this contention with its principal argument that it simply relied in the instance at issue upon DOA's determination that *no easement whatsoever* was required.

Finally, *Rusher v. Tomlinson*, 119 N.C. App. 458, 459 S.E.2d 285 (1995) *affirmed*, 343 N.C. 119, 468 S.E.2d 65 (1996), cited by CRC, is inapposite. CRC insists *Rusher* stands for the proposition that grant of an easement is not prerequisite to issuance of a CAMA permit. To the contrary, the question resolved in *Rusher* was the necessity of an easement concerning the specific project involved. *Id.* at 463-64, 459 S.E.2d at 288. Determining the project fell "squarely within the exception [to the general rules requiring easements] set forth in Rule 6B.0605(a)," this Court distinguished *Walker*, 111 N.C. App. 851, 433 S.E.d 767, on the factual basis that the *Walker* project, including "the size of the public trust waters covered," was not covered by any such exception. *Id.* at 464, 459 S.E.2d at 288-89.

We therefore hold CRC failed to carry its burden to

> demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency,

Crowell II, 342 N.C. at 844, 467 S.E.2d at 679, and that the trial court did not err in concluding that CRC "acted without substantial justification."

II.

[2] CRC next maintains the trial court erred by ruling "there [were] no special circumstances that would make an award of counsel fees unjust." Specifically, CRC contends that

> [i]n issuing the subject CAMA permit, [CRC] relied in good faith on [DOA's] interpretation of [DOA's] rules. It would be unjust to award attorney's fees against [CRC] based on this Court's determination that [DOA] has misapplied <u>its</u> rules. This . . . is particularly unfair since . . . [CRC] had no authority to compel [DOA] to change its easement policies.

As with CRC's argument regarding "substantial justification," this contention likewise cannot be sustained.

Again, although CRC may have lacked authority to compel DOA to change an easement decision, the sole responsibility for granting CAMA permits following fulfillment by an applicant of all necessary prerequisites, including obtaining an easement, was that of CRC. Rather than refusing a permit absent Oriental's obtaining a DOA easement, CRC granted same notwithstanding law and regulations which

"clearly indicate[d]," *Walker*, 111 N.C. App. at 854, 433 S.E.2d at 769, the contrary. The trial court therefore did not err in determining there were no circumstances which would make an award of counsel fees unfair.

III.

[3] Finally, CRC argues

> [t]he trial court erred in holding that administrative contested case proceedings are civil actions for purposes of N.C.G.S. § 6-19.1 and that petitioners are entitled to attorneys fees and costs for the contested case proceedings.

Specifically, the trial court found "[t]he 'administrative review' portion of the case was essential to protect petitioners [sic] rights and to preserve a judicial review." The court then calculated that $10,500.00 in counsel fees and $450.88 in expenses

> were incurred by petitioners in the 'administrative review' portion of the case. These attorney fees [and expenses] were incurred in a civil action within the meaning of N.C. Gen. Stat. § 6-19.1 and are reasonable.

At the outset, we commend as greatly facilitating our review the trial court's separate calculation and award of counsel fees for the "administrative review" and "judicial review portion[s] of the case." However, although petitioners make a compelling argument that awarding counsel fees for the mandatory administrative origins of the instant controversy would be fair and just, we are constrained to agree with CRC that the award of counsel fees and expenses pursuant to G.S. § 6-19.1 "for the 'administrative review' portion of the case" was error.

G.S. § 6-19.1 allows for an award of counsel fees "[i]n any civil action . . . brought . . . by a party who is contesting State action pursuant to G.S. 150A-43 [now 150B-43]." G.S. § 150B-43 [Right to Judicial Review] provides as follows:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute.

G.S. § 150B-43 (1995).

The plain language of G.S. § 6-19.1, *see Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) ("[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning"), limits the award of counsel fees solely to "a civil action."

An "action" is defined in N.C.G.S. § 1-2 (1983) as "an ordinary proceeding *in a court of justice*" (emphasis added). Although an administrative agency may be accorded discretionary authority, that agency is not part of the "general court of justice." *Ocean Hill Joint Venture v. N.C. Dept. of E.H.N.R.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993). Further, there "cannot be an action or proceeding" until a cause of action accrues, that is, when the "right to institute and maintain a suit arises." *Id.* at 323, 426 S.E.2d at 277 (citation omitted) (assessment of civil penalty pursuant to N.C.G.S. § 113A-64(a) of Pollution and Sedimentation Control Act not an "action or proceeding" under N.C. G.S. § 1-54).

In addition, this Court has consistently drawn a distinction between allowance under G.S. § 6-19.1 for counsel fees expended during judicial review of agency rulings and the provisions of other statutes for counsel fees accumulated up to an agency's final decision.

In *N.C. Dept. of Correction v. Harding*, 120 N.C. App. 451, 462 S.E.2d 671 (1995) *cert. granted* 343 N.C. 124, 468 S.E.2d 785 (1996), for example, this Court stated

> [t]he award of attorney fees in back pay matters involving the State Personnel Commission is covered by two complementary statutory sections. N.C. Gen. Stat. § 126-4(11) allows the Commission to award attorney fees for services rendered up to the Commission's final decision. . . . [However,] [f]or attorney services rendered on judicial review of the commission's decision, ... N.C. Gen. Stat. § 6-19.1 grants a trial court discretionary authority to award attorney fees . . . in a Section 150B-43 appeal . . . .

Id. at 454-55, 462 S.E.2d at 674. Although remanding that case "for a determination of . . . how many hours were spent in the judicial review portion in *Harding I*" to facilitate an appropriate award of fees under G.S. § 6-19.1, we concluded plaintiff was not entitled to counsel fees under G.S. § 6-19.1 for judicial review in *Harding II* or

Harding III as she was not the prevailing party. *Id.* at 456, 462 S.E.2d at 674-75. However, our decision was rendered "without prejudice to the plaintiff to seek complementary attorney's fees under N.C.G.S. § 126-4(11) for services rendered before the Commission throughout this entire proceeding." *Id.* at 456, 462 S.E.2d at 675. *Accord N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 442-43, 462 S.E.2d 824, 828 (1995), *cert. granted*, 343 N.C. 307, 469 S.E.2d 556 (1996) (award of attorney's fees "earned on *judicial review* under N.C.G.S. § 6-19.1" (emphasis added) is without prejudice to plaintiff "to seek complementary attorney's fees from the Commission under its discretionary authority under N.C.G.S. § 126-4(11)"); *see also Employment Security Comm. v. Peace*, 115 N.C. App. 486, 488, 445 S.E.2d 84, 86 (1994), *rev'd on other grounds*, 341 N.C. 716, 462 S.E.2d 222 (1995) ("In an action for *judicial review* of a decision made by an administrative agency, the court may award the prevailing party reasonable attorney's fees against the agency only under N.C.G.S. § 6-19.1.") (emphasis added).

Consistent with the clear implication of the above-cited cases and the plain language of G.S. § 6-19.1, therefore, we hold that an administrative hearing under G.S. § 150B-22 *et seq.* is not a "civil action . . . brought . . . pursuant to G.S. 150A-43 [now 150B-43]." *See* G.S. § 6-19.1.

Based on the foregoing, the trial court's award of $12,591.70 to petitioners for counsel fees and costs applicable to the "administrative review" portion of the case is reversed; the award of counsel fees and costs for the "judicial review" portion of the case is affirmed.

Affirmed in part; reversed in part.

Chief Judge ARNOLD and Judge McGEE concur.

CORINNE CHAPMAN, KELLY CHAPMAN, BY AND THROUGH HER PARENT AND GUARDIAN, DONNIE CHAPMAN, HISAE MILES, CAROL GOINS, ROSITA ENGLAND, DONNA McNALLY, STACY OLIPHANT, DOUGLAS FERGUSON, AND TERRY LUDLUM, PLAINTIFFS, v. MITCHELL BYRD, INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF HOKE COUNTY EMERGENCY MEDICAL SERVICES; DJUANA REAVES, INDIVIDUALLY AND AS ASSISTANT DIRECTOR OF HOKE COUNTY EMERGENCY MEDICAL SERVICES; AND HOKE COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA95-996

(Filed 1 October 1996)

1. **Libel and Slander § 12 (NCI4th)— statement that "someone" in building has AIDS—group members not defamed**

Defendants' alleged statements that "someone" in a certain commercial building has AIDS were not statements "of or concerning" the nine employees of businesses in the building and could not provide the basis for a defamation action by those employees.

Am Jur 2d, Libel and Slander § 444.

Class or group defamation as actionable by individual member. 52 ALR4th 618.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation—post-*New York Times* cases. 57 ALR4th 404.

2. **Constitutional Law § 98 (NCI4th)— statement that "someone" in building has AIDS—insufficient to support civil rights action**

Alleged statements by county employees that "someone" who works in a commercial building has AIDS were insufficient to support 42 U.S.C. § 1983 claims by employees of businesses in the building for a violation of their federal due process rights because allegations of damage to business expectations deriving solely from harm to reputation do not establish harm to a protected property or liberty interest.

Am Jur 2d, Libel and Slander § 351.

Proof of injury to reputation as prerequisite to recovery of damages in defamation action. 36 ALR4th 807.

3. Intentional Infliction of Mental Distress § 2 (NCI4th)— statements by EMS officials—sufficiency of complaint

Allegations by nine employees of businesses in a commercial building that defendant county EMS officials repeated false rumors that "someone" in the commercial building has AIDS without investigating the truthfulness of the rumors, and that plaintiffs suffered severe emotional distress, mental anguish, humiliation and ridicule as a proximate result of defendants' statements, were sufficient to state a claim for the intentional infliction of emotional distress against the officials and the county.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 37, 38.

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

4. Negligence § 6 (NCI4th)— negligent infliction of emotional distress—sufficiency of complaint

Allegations by employees of businesses in a commercial building that defendant county EMS officials falsely stated that someone working in the commercial building has AIDS, that defendants breached a duty to take reasonable steps to ascertain the truth of the statements, that injury to plaintiffs was foreseeable, and that plaintiffs suffered severe emotional distress, mental anguish, and ridicule as a proximate result of the statements were sufficient to state a claim for negligent infliction of emotional distress. Plaintiffs were not precluded from bringing such a claim because their emotional distress arose from alleged harm to themselves rather than from plaintiffs' concern for others.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 3.

Appeal by plaintiffs from order entered 13 July 1995 by Judge B. Craig Ellis in Hoke County Superior Court. Heard in the Court of Appeals 24 April 1996.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Richard B. Glazier and Rebecca J. Britton; and Mark T. Jernigan; for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Tyrus V. Dahl, Jr. and Ursula M. Henninger, for defendants-appellees.

LEWIS, Judge.

Plaintiffs appeal the N.C.R. Civ. P. 12(b)(6) dismissal of their claims for defamation, intentional and negligent infliction of emotional distress, and their 42 U.S.C. § 1983 ("Section 1983") claims for violation of their federal due process rights.

On 1 December 1994, these nine plaintiffs filed complaints against defendants. Upon defendants' motion and by order entered 13 July 1995, Judge B. Craig Ellis dismissed all of the claims. Plaintiffs appeal.

In reviewing a N.C.R. Civ. P. 12(b)(6) dismissal, we must take plaintiffs' allegations as true. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981). Plaintiffs allege the following: Plaintiff Douglas Ferguson owns and operates two businesses, The Colonial Florist and the Sub Station Deli, located in a commercial building which he owns called the Colonial House. He also leases space in the building to five other businesses, Corrine's Hair Salon, Corrine's Tanning and Toning, Hava Java Coffee Shop, Nail Dynamics, and the Frame Gallery. The plaintiffs are either employees or owners and operators of these various businesses.

Plaintiffs further allege: On 29 April 1994, several employees of defendant Hoke County, including Deb Walden, Richard Sousa, and Ronald Blackburn, made plans to go to the Sub Station Deli for lunch. Prior to their departure, defendant Mitchell Byrd, the director of the Hoke County Emergency Medical Services ("EMS"), told them "You don't need to be there." When asked why, he replied, "I heard someone over there has AIDs." Reports of this statement subsequently appeared in the Fayetteville *Observer-Times*, in the Raeford *News Journal*, and on a WTVD 11 News Report. As reported in an article published on 1 June 1994, defendant Djuana Reaves, assistant director of the Hoke County EMS, told the Raeford *News Journal* that "Mr. Byrd told Mr. Blackburn, 'there's a rumor going around that someone at the Colonial House has HIV,' as a professional courtesy in case they had to go pick them up or something." A total of nine persons, the plaintiffs here, owned, operated, or were employed at the Colonial House when these statements were made. Plaintiffs allege that, at the time of these events, none of them had been diagnosed with the AIDS virus, *i.e.*, HIV positive.

Defamation Claims

[1] Plaintiffs first assign error to the dismissal of their defamation claims. In these claims, plaintiffs specifically allege that defendants

Byrd's and Reaves' published statements were defamatory per se, false, made with malice, and the proximate cause of significant harm to them and that the County is also liable for their defamatory statements on a theory of respondeat superior.

One of the essential elements of a defamation claim is the allegation that a defendant's statements are "of or concerning" the plaintiff. *Tyson v. L'eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987). In *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452 (1979), our Supreme Court defined this element by stating: "In order for defamatory words to be actionable, they must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them dafamatory [sic]." *Id.* at 539, 251 S.E.2d at 456.

Citing *Carter v. King*, 174 N.C. 549, 94 S.E. 4 (1917), plaintiffs assert that this element is satisfied here because their complaints show that they were defamed as a group. In *Carter*, the plaintiff was a juror who served in a previous trial that resulted in a vote of eleven to one. *Id.* at 551, 94 S.E. at 5. The plaintiff, one of the eleven jurors who voted against an institute for which the defendant was a trustee, alleged that he was defamed when the defendant stated that "there was one man on the jury that was not bribed" and "I note what you say about the jury standing eleven to one; this was due entirely to whiskey and the appeal made to their prejudice." *Id.* at 551-52, 94 S.E. at 5. The Supreme Court concluded that the plaintiff could maintain his cause of action even though the defendant's defamatory statements did not make direct reference to him because all eleven jurors (including the plaintiff) were implicated in the statements. *Id.* at 552-53, 94 S.E. at 6.

In *Carter*, eleven of the jurors were accused of misconduct; so all of them had potential causes of action. In contrast, here the statements concern only one person in a group of nine, *i.e.*, the statements referred to "some*one*." Plaintiffs have not cited nor have we found any North Carolina case holding that any one person of a group of nine may bring a defamation action based on statements made about a single unidentified member of the group.

Plaintiffs also rely on cases from other states and on the Restatement (Second) of Torts section 564A (1976). These cases recognize group defamation claims: (1) where some or most members of a group are defamed, *e.g.*, *Farrell v. Triangle Publications, Inc.*, 159

A.2d 734 (Pa. 1960), *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); (2) where all members of a group are defamed, *e.g.*, *Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786 (N.Y. App. Div. 1981), *Montgomery Ward & Co. v. Skinner*, 25 So. 2d 572 (Miss. 1946); and (3) where one of a group of two are defamed, *e.g.*, *American Broadcasting-Paramount Theaters, Inc. v. Simpson*, 126 S.E.2d 873 (Ga. Ct. App. 1962) ("Simpson").

We find none of these cases on point. Since the alleged statements referred only to "someone" in a group of nine, they clearly do not refer to some, most or all of the group. Plaintiffs' allegations also do not involve defamation of one of two as in the *Simpson* case.

Plaintiffs further rely on *Ball v. White*, 143 N.W.2d 188 (Mich. Ct. App. 1966) and *Columbia Sussex Corp. Inc. v. Hay*, 627 S.W.2d 270 (Ky. Ct. App. 1981). In *Ball*, "someone" of a group of six workers was accused in a letter of stealing a watch. *Id.* at 189. The letter also stated that "there is no question about the disappearance [of the watch] occurring through some of your workmen." *Id.* In allowing the claim, the Michigan Court stated that the libel was directed "at one or more" of the workers. *Id.* at 190. In addition, since all the workers were working together at one location when the purported theft occurred, *see id.* at 190, they were all implicated by the accusations. Given these factual distinctions, we find *Ball* to be most akin to the "some or most" group defamation cases and inapplicable to the case at bar. For similar reasons, we also find *Columbia Sussex Corp. Inc.* distinguishable.

In a case strikingly like this one, the First Circuit Court of Appeals held, as a matter of law, that a defamatory statement referring to one unidentified member of a group of twenty-one police officers did not give rise to a cause of action in favor of members of the group. *Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163, 1165 (1st Cir. 1977).

We note that section 564A of the Restatement (Second) of Torts does not provide persuasive authority for plaintiffs' position. In Section 564A, comment C, a hypothetical with facts similar to those stated in plaintiffs' claims is cited as an example that warrants dismissal. *See* Restatement (Second) of Torts section 564A, cmt. c. (1976) (stating that "the assertion that one man out of a group of 25 has stolen an automobile may not sufficiently defame any member of the group").

We find no controlling or persuasive precedent to support plaintiffs' contentions. We conclude that plaintiffs have failed to state claims for defamation because their allegations, as a matter of law, fail to allege facts sufficient to show that the alleged defamatory statements were made "of or concerning" them.

Section 1983 Claims

[2] In their second assignment of error, plaintiffs assert that the trial court erred by dismissing their Section 1983 due process claims. In these claims, plaintiffs allege that defendants Byrds' and Reaves' defamatory statements, made individually and as agents for the County, deprived them of constitutionally protected property and liberty interests in their businesses and reputation without due process of law.

Statements by public officials that result only in injuries to personal reputation do not support a Section 1983 claim for violation of due process. *Paul v. Davis*, 424 U.S. 693, 712, 47 L. Ed. 2d 405, 420 (1976). In *Paul*, the U.S. Supreme Court stated that previous caselaw did not establish that " . . . reputation alone, *apart from some more tangible interests such as employment*, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul*, 424 U.S. at 701, 47 L. Ed. 2d at 414 (emphasis added).

Plaintiffs acknowledge this limitation. However, they assert that statements, by government officials, that inflict harm to a plaintiff's reputation are sufficient to support a Section 1983 due process claim when the statements result in tangible injury to business goodwill. Under the facts alleged, we disagree.

We conclude that plaintiffs have not alleged harm to a protected property or liberty interest. Allegations of damage to business expectations deriving solely from harm to reputation do not suffice. A plaintiff "must have more than a 'unilateral expectation' of a property interest; he must have a 'legitimate claim of entitlement to it.' " *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 241, 371 S.E.2d 302, 306 (1988) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 561 (1972)).

In a similar Section 1983 due process claim based on defamation, the D.C. Circuit Court stated:

> . . . that financial harm is caused by government imposed stigma does not transform an interest in reputation into a liberty interest . . . . the Court [in *Paul v. Davis*] held that defamation alone is not enough to give rise to a due process right; "other governmental action" is required. Proof of damages caused by a defamation does not meet that requirement. The Court was well aware of the "frequently drastic effect of the 'stigma' which may result from defamation by the government," . . .; it was also aware that actual monetary damages are often proved . . . in defamation actions . . . .'

Mosrie v. Barry, 718 F.2d 1151, 1158 (D.C. Cir. 1983) (internal citations omitted).

This approach has recently been reinforced by the U.S. Supreme Court in *Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277 (1991). In *Siegert*, the Court held that a former employee of a federal hospital had failed to state a 1983 due process claim where he alleged that his reputation and future employment prospects were damaged as a result of statements made by his former supervisor. *Id.* at 234, 114 L. Ed. 2d at 288. The Court stated:

> The facts alleged by Siegert cannot, in the light of our decision in Paul v. Davis, be held to state a claim for denial of a constitutional right. . . . Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. *But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law* . . . .

Id.

In accord with *Paul* and *Siegert*, we hold that plaintiffs have not stated Section 1983 claims based on their federal due process rights. Given our disposition of this issue, we do not address defendants' assertion that they are entitled to qualified immunity on these claims.

Intentional Infliction of Emotional Distress Claims

[3] To state a claim for intentional infliction of emotional distress ("IIED"), a plaintiff must allege facts showing that the defendant engaged in "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). The second element may also be stated by allegations that the

defendant acted with "reckless indifference to the likelihood" that his or her acts "will cause severe emotional distress." *Id.*

In their IIED claims, plaintiffs allege that defendants Byrd and Reaves, individually and as agents for the County, displayed extreme and outrageous behavior by repeating rumors that someone at the Colonial House had AIDS and/or was HIV positive and by failing to investigate the truth and falsity of the alleged rumors prior to repeating them and that they did so with reckless indifference to the likelihood of causing plaintiffs severe emotional distress, and that plaintiffs suffered severe emotional distress, mental anguish, humiliation and ridicule as a proximate result of the statements.

The determination of what constitutes extreme and outrageous conduct is a question of law. *Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 198, 402 S.E.2d 155, 161 (1991). Here, the statements were allegedly made by the Director and Assistant Director of the Hoke County EMS, persons whose statements would be highly credible in the eyes of the citizens of the area, particularly in matters of public health. Given this credibility, the likelihood of harm caused by false assertions by EMS officials that "someone" has the AIDs virus was extremely high. Given these circumstances, we hold that the statements made by defendants Byrd and Reaves can, as a matter of law, constitute extreme and outrageous conduct.

On review of plaintiffs' allegations, we conclude that the complaints do not reveal an insurmountable bar to recovery. Although their allegations regarding severe emotional distress are somewhat conclusory, our courts have not required detailed fact pleading on this element. *E.g.*, *Dixon v. Stewart*, 85 N.C. App. 338, 340-41, 354 S.E.2d 757, 758-59 (1987). The trial court erred by dismissing this claim.

Negligent Infliction of Emotional Distress Claims

[4] In *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990), we stated that a plaintiff, in order to state a claim for negligent infliction of emotional distress ("NIED"), must allege that: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Id.* at 304, 395 S.E.2d at 97.

Citing *Gardner v. Gardner*, 334 N.C. 662, 665, 435 S.E.2d 324, 327 (1993), defendants assert that plaintiffs' claims for NIED were properly dismissed because plaintiffs allege harm to themselves and that this cause of action only lies for emotional distress that arises from a plaintiff's concern for others, not for his own welfare. In *Gardner*, our Supreme Court stated the following:

> In *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, we concluded that an action for negligent infliction of emotional distress had its roots in one hundred years of North Carolina jurisprudence, beginning with *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890). We noted that *Young* and, subsequently, *Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916), *permitted a cause of action for emotional distress arising not from a plaintiff's concern for his own welfare, but from his concern for that of another.*

Id. at 665, 435 S.E.2d at 327. Defendants cite the above italicized language in *Gardner* as the sole authority for their position.

We disagree with defendants' reading of *Gardner*. After reviewing *Gardner* and the cases cited in the portion of the opinion quoted above, we conclude that the Court in *Gardner* did not, by this language, preclude a plaintiff from bringing a NIED claim when the emotional distress arises from concern for his or her own welfare. Rather, we read *Gardner* as simply clarifying that concern for one's own welfare is not essential to a claim for NIED when the emotional distress arises from concern for the welfare of another.

Defendants also contend that plaintiffs have failed to allege facts showing that it was reasonably foreseeable that their conduct would cause plaintiffs severe emotional distress. They further assert that this issue should be resolved by reference to the factors set forth in *Gardner*. *See Gardner*, 334 N.C. at 666, 435 S.E.2d at 327. We disagree with both of these assertions.

The factors set out in *Gardner* logically apply only when a plaintiff brings a negligent infliction of emotional distress claim based on concern for the welfare of another. In addition, the Court stated in *Gardner* that these factors were "neither requisites nor exclusive determinants in an assessment of foreseeability" and stressed that " '[q]uestions of foreseeability and proximate cause must be determined under *all* the facts presented' in each case." *Id.* (quoting *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98). Here, we con-

clude that a jury could legitimately find it reasonably foreseeable that plaintiffs would suffer severe emotional distress as a result of public statements by defendants, given their positions as public health officials, that "someone" at the Colonial House has AIDs or is HIV positive.

In their NIED claims, plaintiffs allege that defendants Byrd and Reaves, individually and as agents of the County, negligently breached a duty to take reasonable steps to ascertain the truth of the statements made, that injury to plaintiffs was foreseeable, and that plaintiffs suffered severe emotional distress, mental anguish, and ridicule as a proximate result of the statements. We hold that these allegations are sufficient to satisfy the pleading requirements set forth in *Johnson* and that the trial court therefore erred by dismissing plaintiffs' NIED claims.

We affirm the trial court's dismissal of plaintiffs' defamation and Section 1983 claims and reverse its dismissal of their IIED and NIED claims.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and McGEE concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF-APPELLEE v. ROBERT MAGGIOLO, ATTORNEY, DEFENDANT-APPELLANT

No. COA95-1232

(Filed 1 October 1996)

1. Attorneys at Law § 78 (NCI4th)— disbarment—conflict of interest—evidence sufficient

The findings and conclusions made by the Disciplinary Hearing Commission of the North Carolina State Bar in disbarring appellant were supported by substantial evidence where the interests of a real estate buyer, Oak Hollow Development Corporation, in which appellant was a shareholder, conflicted with those of a seller, the Laws; appellant failed to advise the Laws to seek the advice of independent counsel; appellant stipulated that an attorney-client relationship existed between himself and the Laws at least to the extent of preparing the deed; appellant failed to advise the Laws regarding the consequences of

accepting an unsecured note; appellant answered the Laws' questions and therefore advised them concerning the sales agreement; and the DHC found that the interest of appellant's client, the buyer, conflicted with the interests of the seller.

Am Jur 2d, Attorneys at Law §§ 48-50.

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

Disciplinary proceeding based upon attorney's direct or indirect purchase of client's property. 35 ALR3d 674.

2. **Attorneys at Law § 78 (NCI4th)— disbarment—conflict of interest—evidence sufficient**

The Disciplinary Hearing Commission of the North Carolina State Bar did not err in finding that appellant had knowledge that promissory notes prepared by a realtor would be used to perpetrate a fraud or deceit on the Real Estate Commission where the parties stipulated that appellant advised a realtor, Darst, to prepare notes for a purchaser to sign to indicate that earnest money had been paid by promissory notes; the parties stipulated that the realtor gave copies of the backdated promissory notes to an investigator with the intent to deceive the Real Estate Commission; and testimony from the realtor supports the finding that copies were given to the investigator with knowledge and advice from appellant, although appellant presented contrary testimony.

Am Jur 2d, Attorneys at Law § 43.

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

Conduct in connection with malpractice claim as meriting disciplinary action. 14 ALR4th 209.

3. **Attorneys at Law § 78 (NCI4th)— disbarment—conflict of interest—evidence sufficient**

There was sufficient evidence to support findings by the Disciplinary Hearing Commission of the North Carolina State Bar that appellant did not disclose to a bank the existence of a sales agreement and notes prior to the bank advancing funds to a

development company in which appellant was a shareholder and that the misrepresentation was of a material fact which was necessary for the bank's consideration in determining whether to advance funds. The record indicates that appellant was under a duty to update the information he provided to the bank and, additionally, appellant stipulated that although he represented to the bank that the loan would be used to purchase and develop the Laws Farm property, none of the amount advanced was paid as the purchase price. Appellant's contention that the bank was not harmed by his statements and that DHC erred in finding that the misrepresentations were material is directly contradicted by the testimony of a loan officer for the bank.

Am Jur 2d, Attorneys at Law §§ 31, 48.

False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense. 53 ALR2d 1215.

Appeal by defendant from order of the Disciplinary Hearing Commission entered 15 June 1995. Heard in the Court of Appeals 27 August 1996.

A. Root Edmonson, Deputy Counsel for the North Carolina State Bar, plaintiff-appellee.

Browne, Flebotte, Wilson and Horn, P.L.L.C., by Daniel R. Flebotte, for defendant-appellant.

WALKER, Judge.

On 24 February 1994, the North Carolina State Bar filed a complaint against defendant, Robert Maggiolo, alleging that Maggiolo had violated the North Carolina Code of Professional Responsibility. The allegations stem from Maggiolo's involvement in a series of real property transactions as a fifty percent (50%) shareholder and Vice President of Oak Hollow Development Corporation, a real estate development company. The other shareholder was Glenn A. Darst, President of Oak Hollow Development Corporation.

Evidence presented by stipulation of the parties tended to show the following: On 11 August 1989, Oak Hollow entered into a sales agreement with Thomas F. Laws to purchase approximately 70 acres of real estate owned by the Laws. The purchase price for the Laws Farm was $199,810.00. The sales agreement required $2,500.00 of the

purchase price to be paid at the signing of the agreement and the remaining amount to be paid pursuant to an unsecured promissory note.

An attorney-client relationship existed between Maggiolo and the Laws at least to the extent of preparing the deed for the Laws to sign. However, at the closing, Maggiolo did not advise the Laws regarding the consequences of failing to have their promissory note secured. In addition, Maggiolo failed to advise the Laws to consult with an independent attorney for advice concerning the terms of the sales agreement.

In September 1989, Maggiolo applied for a loan at The Village Bank in Chapel Hill, North Carolina. Maggiolo represented to the bank that the loan was going to be used to purchase the Laws Farm property and prepare the property for development. The loan amount was a maximum of $175,000.00 of which $132,500.00 was represented to be the purchase price of the property.

As a guarantor of the loan, Maggiolo presented a financial statement to the bank which did not disclose the unsecured promissory note to the Laws in the schedule relating to the assets and liabilities of Oak Hollow. On 20 September 1989, Maggiolo signed a promissory note to the bank and executed a deed of trust for the $175,000.00 loan. None of the $132,500.00 advanced by the bank was paid to the Laws as part of the purchase price.

Prior to the purchase of the Laws Farm property, Oak Hollow owned property known as Rougemont Retreat in Durham County. On 12 December 1988, Rick Ladd signed an Offer to Purchase property from Oak Hollow located at 3510 Moriah Road and 3617 Red Mountain Road in Rougemont Retreat subdivision. Each Offer to Purchase indicated that Ladd paid $1,000.00 as an earnest money deposit, although no earnest money deposit was required. Maggiolo prepared closing statements indicating that Ladd paid $1,000.00 in earnest money for each of the lots and mailed copies of the statements to Ladd's lender, Financial First Federal.

On 12 January 1989, Ladd signed another Offer to Purchase property from Oak Hollow located at 3623 Red Mountain Road. The contract indicated that Ladd paid $2,500.00 as an earnest money deposit when in fact no deposit was received. On 17 March 1989, Maggiolo prepared the closing statement for the property and listed $2,500.00 as having been paid in earnest money.

Between March 1991 and June 1991, the North Carolina Real Estate Commission questioned Darst about the handling of the Ladd earnest money deposits. Darst sought advice from Maggiolo who advised him to prepare notes for Ladd to sign indicating that the earnest money in each of the transactions had been paid by promissory notes. Darst had his secretary prepare three promissory notes for Ladd's signature which were back dated to the dates that the Offer to Purchase contracts were signed. In order to obtain Ladd's signature, Darst agreed to mark Ladd's copies "satisfied in full." However, the copies which Darst turned over to the Real Estate Commission were not marked satisfied.

The Disciplinary Hearing Commission (DHC) made findings of fact and concluded that:

. . .

> (a) By reading the Sales Agreement to the Laws and answering their questions about the document, and by advising the Laws to sign the Sales Agreement, the promissory note, and the deed he had prepared for them to sign at the August 11, 1989 closing without advising the Laws to seek independent counsel, Maggiolo gave advice to a person who was not represented by counsel, other than the advice to seek counsel, when the interest of that person were [sic] in conflict with the interest of Maggiolo's client, Oak Hollow, in violation of Rule 7.4(B).
>
> (b) By advising the bank's representatives that $132,500.00 of the loan proceeds were to be used to purchase the Laws Farm property when it was not, by failing to advise the bank's representatives about the transaction that Oak Hollow had already entered into with the Laws for the purchase of the Laws Farm property, and by failing to advise the bank's representatives about the promissory note that had been entered into with the Laws prior to the bank advancing the $132,500.00 on the loan, Maggiolo engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation in violation of Rule 1.2 (C); and knowingly made a false statement of fact in violation of Rule 7.2(A)(4).
>
> (c) By advising Darst to create back-dated promissory notes to give the commission's investigator with the intent to deceive the investigator, Maggiolo counseled or assisted a client in conduct he knew was fraudulent in violation of Rule 7.1(A)(4) and

7.2(A)(8) and participated in the creation of evidence when he knew the evidence was false in violation of Rule 7.2(A)(6).

. . .

Upon concluding that Maggiolo violated certain provisions of the Rules of Professional Conduct, the DHC entered an order of discipline disbarring Maggiolo from the practice of law.

[1] On appeal, Maggiolo does not assign error to any of DHC's conclusions and as such our inquiry will be limited to whether the findings are supported by substantial evidence. By way of his first assignment of error, Maggiolo argues that Finding of Fact No. 7 is not supported by adequate evidence. DHC found as follows:

> 7. At the closing, the interests of Maggiolo's client, Oak Hollow, conflicted with the interests of the Laws. Maggiolo read the Sales Agreement to the Laws and answered their questions about it. Maggiolo did not advise the Laws to consult with an independent attorney for advice concerning the terms of the Sales Agreement. The Laws expected the documents prepared by Maggiolo to protect their interests.

Review of disciplinary hearing decisions of the Commission is governed by the "whole record" test. *N.C. State Bar v. DuMont*, 304 N.C. 627, 642, 286 S.E.2d 89, 98 (1982).

> In applying the whole record test to the facts disclosed by the record, a reviewing court must consider the evidence which in and of itself justifies or supports the administrative findings and must also take into account the contradictory evidence or evidence from which conflicting inferences can be drawn. . . . Under the whole record test there must be substantial evidence to support the findings, conclusions and result. G.S. § 150A-51 (5). The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion.

Id. at 643, 286 S.E.2d at 98-99. The whole record test does not permit a reviewing court to replace the DHC's judgment as between two reasonably conflicting views, even though the Court may have justifiably reached a different decision. *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992), *affirmed*, 333 N.C. 786, 429 S.E.2d 716 (1993).

Here, it is apparent that the interests of the buyer, Oak Hollow, and the seller, the Laws, were conflicting. Yet, it is undisputed that Maggiolo failed to advise the Laws to seek the advice of independent counsel. The record shows that Maggiolo stipulated to this fact prior to the disciplinary hearing and that he is bound by this stipulation on appeal. *Moore v. Richard West Farms, Inc.*, 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993) (holding that once a stipulation is made a party is bound by it). Maggiolo also stipulated that an attorney-client relationship existed between him and the Laws, at least to the extent of preparing the deed. However, Maggiolo failed to advise Mr. Laws regarding the consequences of accepting an unsecured note.

In addition, the record supports the DHC's finding that Maggiolo answered the Laws questions and therefore advised them concerning the sales agreement. Mr. Darst, who was present at the closing, testified in part as follows:

> MR. SMITH: Now, who read to the Laws, this sales agreement that's Plaintiff's Exhibit Number 1?
>
> THE WITNESS: Bob [Maggiolo].
>
> . . .
>
> MR. SMITH: As he read the document, would he read it paragraph by paragraph and look up to see whether or not they understood what he was reading?
>
> THE WITNESS: Yes. And he had asked them if they had any questions.
>
> . . .
>
> MR. SMITH: During that process, would the Laws occasionally ask questions?
>
> THE WITNESS: Right.
>
> MR. SMITH: And would Mr. Maggiolo answer those questions?
>
> THE WITNESS: Right. And they would say—well, like I said, this means that we won't have to pay any more taxes on it, like that was one of the things. But if they had any questions, then Bob would respond.

Mr. Laws testified that Maggiolo explained to them "what it [the sales agreement] was about. . . ." Mr. Laws expected Maggiolo to prepare documents that would protect his interests and "thought every-

thing would be done as it should be." In sum, we find substantial evidence to support DHC's Finding of Fact No. 7.

[2] Maggiolo combines Assignments of Error Nos. 7, 8 and 9 with his next argument that DHC erred in finding that the appellant had knowledge in fact that the promissory notes prepared by Darst would be used to perpetrate a fraud or deceit on the Real Estate Commission. Specifically, Maggiolo contends that DHC erred by making the following findings:

> 22. After being advised by Darst that Darst needed something to get the commission "off his back," Maggiolo assisted Darst in preparing notes for Ladd to sign to indicate that the earnest money in each of the transactions described above had been paid by promissory notes.
>
> 23. On or about July 10, 1991, upon Maggiolo's advice, Darst had his secretary prepare three promissory notes for Ladd's signature which were back dated to the dates that the Offer to Purchase contracts had been entered into.
>
> . . .
>
> 25. On or about July 12, 1991, Darst gave copies of the back-dated promissory notes to an investigator for the commission. Copies of the notes were given to the investigator for the commission by Darst with the intent to deceive the commission. The copies were given to the investigator with the knowledge and advice of Maggiolo.

Again, DHC's findings were supported by the parties' stipulations and by the testimony of Mr. Darst. The parties stipulated that "Maggiolo advised Darst to prepare notes for Ladd to sign to indicate that the earnest money in each of the transactions described above had been paid by promissory notes." Furthermore, it was stipulated that "Darst gave copies of the back-dated promissory notes to an investigator . . . with the intent to deceive the [Real Estate] [C]ommission."

Testimony from Mr. Darst supports DHC's finding that copies were given to the investigator with knowledge and advice from Maggiolo. Darst testified to the following:

> Q. Well, prior to making the new notes, did you discuss that with Mr. Maggiolo?

A. Well, we knew that the notes were not available. So I asked Bob how to make new notes.

Q. Did you tell him what it was for?

A. Yes.

Q. And did you tell him that the Real Estate Commission was asking you about the Rick Ladd situation?

A. Yes, sir.

Q. And what did he tell you as a result of your inquiry to him?

A. Well, we made the new notes. . . .

Q. And the purpose of doing these notes was to give them to the Real Estate Commission?

A. Correct.

Q. To show them that you hadn't received money that should have been in a trust account?

A. Correct.

While Maggiolo presented contrary testimony, Darst's testimony is sufficient for a reasonable person to conclude that the notes were given to the Real Estate Commission with knowledge and advice of Maggiolo. It would have served Darst no purpose to present the Commission with notes dated July 1991 in response to its inquiry regarding whether Darst had received earnest money from Ladd some two years earlier. Accordingly, we find sufficient evidence to support the DHC's Findings of Fact Nos. 22, 23 and 25.

[3] By way of his last argument, Maggiolo contends that there was insufficient evidence to support DHC's Findings of Fact Nos. 12 and 13. Paragraphs 12 and 13 of the DHC's Findings of Fact are as follows:

12. Maggiolo's failure to disclose to the bank the existence of the Sales Agreement between Oak Hollow and the Laws and his failure to disclose Oak Hollow's note to the Laws prior to the bank advancing $132,500.00 for the purchase of the Laws Farm property was a misrepresentation of material fact necessary for the bank's consideration in determining whether to advance those funds.

13. Maggiolo's representation to the bank that the $132,500.00 advance would be used to purchase the Laws Farm property,

> when it was not so used, was a misrepresentation of material fact necessary for the bank's consideration in determining whether to advance those funds.

Maggiolo concedes in his brief that he did not disclose Oak Hollow's obligation to the Laws when he submitted a financial statement to Village Bank. Defendant contends Oak Hollow had not incurred the obligation to the Laws at the time he submitted the financial statement.

The record demonstrates, however, that Maggiolo was under a duty to update the information he provided to the bank. Just above the signature line, the financial statement form provides:

> Each undersigned understands that you are relying on the information provided herein (including the designation made as to ownership of property) in deciding to grant or continue credit. Each undersigned represents and warrants that the information provided is true and complete and that you may consider this statement as continuing to be true and correct until a written notice of a change is given to you by the undersigned. . . .

In addition, Maggiolo stipulated that although he represented to Village Bank that the loan would be used to purchase and develop the Laws Farm property, none of the $132,500.00 advanced by the bank was paid to the Laws as part of the purchase price. Based on the record, there is sufficient evidence for a reasonable person to conclude that Maggiolo made such misrepresentations.

Maggiolo, however, contends that the bank was not harmed by his statements and as such DHC erred in finding that the misrepresentations were material. Maggiolo's argument is directly contradicted by the testimony of Glenn Wheless, a loan officer for Village Bank. Wheless testified:

> Q. Was it your understanding that the $132,500 advanced by the bank on September the 20th was going to be for acquisition?
>
> A. Yes, sir.
>
> . . .
>
> Q. Would it have made any difference to The Village Bank in deciding whether to make this work-out loan had you known that he also had obligated himself to pay Mr. Laws—Mr. and Mrs. Laws 197,000—plus dollars?

A. Yes, sir. I don't even think Mr. Roupas would have made the loan under those conditions with that type of debt on the property. And considering Mr. Maggiolo's nonpayment history with us within the last year or so, I think that would have been even more of a foolish choice to do. And we would not have—I would not have done it, as senior loan officer. Mr. Roupas could override me. I can't speak for him.

But normal banking practices, we have to answer to the regulators and to the board of directors. And I could not recommend that type loan to be made.

Wheless' testimony is sufficient for a reasonable person to conclude that Maggiolo's misrepresentations were material.

In sum, after careful review of the whole record, we hold that the findings and conclusions made by DHC are fully supported by substantial evidence. Accordingly, the trial court's order is

Affirmed.

Judges EAGLES and McGEE concur.

RALPH DAVID BANKS, JR. AND CATHERINE BANKS, PLAINTIFFS/APPELLANTS v. DEBRA ANN McGEE, DEFENDANT/APPELLEE

No. COA95-1274

(Filed 1 October 1996)

Automobiles and Other Vehicles § 766 (NCI4th)— sudden emergency—defendant not entitled to instruction

Defendant was not entitled to a sudden emergency instruction where the evidence showed that she lost control of her automobile on a rainy day after striking a puddle of water on the road and that she was aware that water tended to puddle on that road.

Am Jur 2d, Automobiles and Highway Traffic §§ 421, 1117; Negligence § 1214.

Instructions on sudden emergency in motor vehicle cases. 80 ALR2d 5.

Sudden emergency as exception to rule requiring motorist to maintain ability to stop within assured clear distance ahead. 75 ALR3d 327.

Appeal by plaintiffs from judgment entered 15 August 1996 in Surry County Superior Court by Judge Judson D. DeRamus, Jr. Heard in the Court of Appeals 27 August 1996.

Lewis & Daggett, P.A., by Michael J. Lewis and David D. Daggett, for plaintiff-appellants.

Canady, Thornton, Brown & Laws, by Robert B. Laws, for defendant-appellee.

GREENE, Judge.

Ralph David Banks, Jr. (David), and Catherine Banks (Catherine) (collectively plaintiffs) appeal from a jury verdict in favor of Debra Ann McGee (defendant).

The plaintiffs seek damages for injuries sustained by David in an automobile collision which occurred on 28 May 1992 when an automobile driven by the defendant collided with the automobile driven by David. Catherine claims a loss of consortium.

The evidence presented to the jury further reveals that it was raining at the time of the collision and that defendant lost control of her automobile after hitting a "puddle of water" on the road. After hitting the water the defendant's automobile "started hydroplaning, [and] crossed into [the] other lane" and struck David's automobile. The defendant testified that she was aware that "it was rainy" on the day of the collision, that the "roads were slick," and that "water tended to puddle" at different places on the road she was traveling.

At the close of all the evidence, the defendant requested that the jury be instructed to evaluate the defendant's conduct in light of the sudden emergency doctrine. The trial court agreed and instructed the jury that "a person's conduct which might otherwise be negligent in and of itself would not be negligent if it results from a sudden emergency that is not of that person's own making." The jury answered the first issue in favor of the defendant in determining that she was not negligent.

The issue is whether the defendant is entitled to a sudden emergency instruction when she loses control of her automobile on a rainy

day after striking a puddle of water on a road when she is aware that water tends to puddle on that road.

"The doctrine of sudden emergency applies when one is confronted with an emergency situation which compels him or her to act instantly to avoid a collision or injury." *Colvin v. Badgett*, 120 N.C. App. 810, 812, 463 S.E.2d 778, 780 (1995), *aff'd*, 343 N.C. 300, 469 S.E.2d 553 (1996). The sudden emergency doctrine is not available to a defendant if the defendant's own negligence or wrongful act caused the emergency in whole or in material part. *Bryant v. Winkler*, 16 N.C. App. 612, 613, 192 S.E.2d 686, 687 (1972). There are two essential elements that must be found to warrant the submitting of a sudden emergency instruction: first, the alleged emergency situation must be unanticipated, and second, the defendant's own negligence arising from an independent source other than the emergency in question must not be a substantial factor in causing the accident. *Keith v. Polier*, 109 N.C. App. 94, 98-99, 425 S.E.2d 723, 726-27 (1993). If there is substantial evidence of these two elements, a sudden emergency instruction is proper. *See State v. Roten*, 115 N.C. App. 118, 122, 443 S.E.2d 794, 797 (1994). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In this case, all the evidence shows that it had been raining on the day of the collision, the defendant was aware that the roads were slick and that water had a tendency to puddle on the road she was traveling. Her automobile did hit a puddle of water causing her to skid into the path of David's automobile. This evidence simply cannot support a conclusion that the defendant's contact with the puddle of water was an unanticipated event. Thus there is no substantial evidence to support submitting the sudden emergency instruction to the jury. In so holding, we reject the argument of the defendant that because she did not see the puddle she was confronted with an unanticipated situation. The question is not what she saw but instead what a reasonable person in her situation should have seen. *See Yokely v. Kearns*, 223 N.C. 196, 198-99, 25 S.E.2d 602, 603-04 (1943); *see also Restatement (Second) of Torts* § 283 (1964).

New trial.

Judges JOHN and MARTIN, Mark D., concur.

FRANKLIN ALLEN MOORE, PLAINTIFF v. T. H. EVANS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS POLICE OFFICER IN THE AYDEN, NORTH CAROLINA POLICE DEPARTMENT, AND ROGER PAUL, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE AYDEN, NORTH CAROLINA POLICE DEPARTMENT AND CITY OF AYDEN, NORTH CAROLINA, *ET AL.*, DEFENDANTS

No. COA95-862

(Filed 15 October 1996)

1. **Appeal and Error § 118 (NCI4th)— denial of partial summary judgment—appealable—immunity claim**

   The denial of a partial summary judgment for defendants Evans and Paul in an action arising from an alleged false imprisonment by officers was appealable where defendants had raised immunity. When the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable.

   Am Jur 2d, Appellate Review § 170.

2. **Municipal Corporations § 446 (NCI4th); Sheriffs, Police, and Other Law Enforcement Officers § 13 (NCI4th)— false arrest and malicious prosecution—officer and chief—official immunity not available—liability insurance**

   Officer Evans and Chief Paul were not entitled to governmental and/or official immunity on claims of false imprisonment and malicious prosecution arising from an arrest. Police officers share in the immunity of their governing municipalities and are not entitled to the defense of governmental immunity to the extent that the municipality waived sovereign immunity by purchasing liability insurance. The city here had purchased liability insurance and the trial court properly denied summary judgment on state claims against defendants in their official capacities.

   Am Jur 2d, Municipal, County, School, and Tort Liability §§ 43, 45.

3. **Arrest and Bail § 136 (NCI4th); Malicious Prosecution § 19 (NCI4th)— probable cause—issue of fact—summary judgment denied**

   The trial court properly denied defendant Evans' motion for partial summary judgment in his individual capacity with respect to claims of false imprisonment and malicious prosecution arising from an arrest. A common element of each of these claims is

the absence of probable cause and there was a genuine issue of material fact as to whether Officer Evans had probable cause to arrest plaintiff.

Am Jur 2d, Arrest § 144; Summary Judgment § 27.

4. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— false arrest—civil rights claim—summary judgment for police chief in official capacity

Summary judgment should have been granted for defendant Paul in his official capacity as Chief of Police on a 42 U.S.C. § 1983 claim arising from an arrest where the only allegations against defendant Paul relate to his official duties as the Chief of Police and plaintiff made no allegations that defendant Paul was present or participated in any manner in his arrest or post-arrest detention, or that defendant Paul acted corruptly, maliciously, or outside the scope of his employment. As plaintiff seeks monetary damages for alleged violations of his constitutional rights, he cannot recover against defendant Paul in his official capacity.

Am Jur 2d, Sheriffs, Police, and Constables § 90; Summary Judgment § 26.

5. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— false arrest—civil rights claim against officer—summary judgment proper in official capacity, not in individual capacity

In an action arising from plaintiff's arrest by defendant Evans, summary judgment should have been granted for defendant Evans in his official capacity on plaintiff's action under 42 U.S.C. § 1983 because plaintiff sought monetary damages for alleged violations of his constitutional rights, but was properly denied in Evans' individual capacity because there was a genuine issue of fact as to whether the facts as presented were such as to lead a discreet and prudent person to believe that a criminal offense had been committed by plaintiff.

Am Jur 2d, Sheriffs, Police, and Constables § 90; Summary Judgment § 27.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendants T. H. Evans and Roger Paul from order entered 7 June 1995 by Judge David Q. LaBarre in Pitt County Superior Court. Heard in the Court of Appeals 18 April 1996.

Steven M. Fisher and Mark A. Ward for plaintiff-appellee.

Ward and Smith, P.A., by Kenneth R. Wooten and Cheryl A. Marteney, for defendants-appellants T. H. Evans and Roger Paul.

JOHNSON, Judge.

On 15 May 1993, Officers K. S. Stewart and T. H. Evans (defendant Evans) of the Ayden Police Department responded to a call regarding a possible breaking and entering at 205 Edge Road in Ayden, North Carolina. Upon arriving at the Edge Road address, Officer Stewart searched the surrounding area and discovered stereo speakers and other household items in the backyard of the residence, behind a fence. At the same time, Officer Evans spoke with Mable Sumpter, the neighbor who had called the Ayden Police Department after hearing noises coming from the 205 Edge Road residence and seeing someone in the backyard. As Mrs. Sumpter knew that her neighbors were out of town, she called the police department.

When Officer Evans questioned Mrs. Sumpter about her call to the police department, she explained that she had seen a black male, "wearing white clothing," in her neighbors' backyard. Mrs. Sumpter noted that she had not seen the suspect's face, and told Officer Evans that she could not identify the person. Officer Evans subsequently left Mrs. Sumpter's home, only to return moments later with plaintiff Franklin Allen Moore in the backseat of a patrol car. Officer Evans had Mr. Moore get out of the vehicle and stand approximately thirty (30) to forty (40) yards from Mrs. Sumpter, in front of the neighboring residence. A row of hedges separated Mrs. Sumpter and Mr. Moore. Mrs. Sumpter nodded her head at Officer Evans to indicate that the person was similarly attired to the person she had seen in her neighbors' backyard earlier.

Thereafter, Officer Evans put Mr. Moore into his patrol car and questioned him about his activities on the evening in question. Although Mr. Moore insisted upon his innocence, Officer Evans encouraged him to confess. Mr. Moore notes that at one point, the officer threatened to hold him in the car all night until he confessed; however, Mr. Moore would not confess. Subsequently, Officer Evans took Mr. Moore to the Ayden Police Department, where Officer Evans and another officer interrogated him. Although the officers insisted that things would go lighter for him if he would confess, Mr. Moore maintained his innocence. In fact, he told the officers that one of their

fellow officers had seen him at a nightclub at the time that the officers were insisting that he broke into the Edge Road residence.

After interrogating Mr. Moore, Officer Evans took him to a magistrate, and requested that the magistrate "[p]ut him under a high bond, I do not want him to get out." In response, the magistrate issued a warrant, charging Mr. Moore with felonious breaking and entering, and felonious larceny, and placing Mr. Moore under a $20,000.00 secured bond. Notably, the recommended minimum bond pursuant to the Pretrial Release Policies in the Three-A Judicial District for these charges is $7,500.00. Further, no inquiry was made into Mr. Moore's prior criminal record, nor his risk of flight, his finances, family ties, character, length of residence in the community, etc.—factors set forth in North Carolina General Statutes section 15A-534(b) and (c), which may justify such an excessive bond.

Since Mr. Moore could not post bail, he remained in jail. Although Officer Evans' testimony indicates otherwise, once Mr. Moore was arrested, the Ayden Police Department made a determination that no further investigation was necessary in the 15 May 1993 breaking and entering at 205 Edge Road.

On 20 May 1993, four days after Mr. Moore's arrest, an informant told Officer Evans that John Eric Ellis had committed the 15 May crime for which Mr. Moore had been arrested. Thereafter, on 21 May 1993, Ellis confessed to this crime, and indicated to Officer Evans that he had been wearing white shorts and a white shirt on the evening of 15 May 1993. Consequently, Officer Evans arrested Ellis for the 15 May break-in, and although he had a previous criminal record, Ellis was only placed under a $7,500.00 unsecured bond. However, Mr. Moore was not released from jail.

Mr. Moore's probable cause hearing was set for 8 June 1993—some twenty-three (23) days after his arrest and eighteen (18) days after Ellis' confession to the crime for which Mr. Moore had been charged. Officer Evans was not present for the hearing, and therefore, the trial judge continued Mr. Moore's case until 22 June 1993. Mr. Moore's attorney requested a bond reduction for his client at the 8 June hearing, and the judge continued this request until 9 June 1993, so that the assistant district attorney could contact Officer Evans and discuss the logistics of the case. Upon calling Officer Evans, the prosecutor was told that another person had been arrested, and that the case against Mr. Moore should be dismissed. The charges against Mr.

Moore were consequently dismissed and he was released on 8 June 1993.

On 16 May 1994, Mr. Moore filed this action in Pitt County Superior Court against defendants T. H. Evans, individually and in his official capacity as a police officer with the City of Ayden Police Department, Roger Paul, in his official capacity as Chief of Police of the City of Ayden Police Department, and the City of Ayden, alleging false imprisonment, malicious prosecution and deprivation of his civil rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. § 1983. Defendants answered, denying the material allegations of the complaint and raising the defenses of qualified and official immunity. Thereafter, defendants Evans and Paul moved for partial summary judgment, contending that they were entitled to such relief on the grounds of qualified and official immunity. By order entered 7 June 1995, Judge David Q. LaBarre denied the motion. Defendants Evans and Paul appeal.

[1] At the outset, we must note that an order which does not completely dispose of a 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 prohibiting interlocutory appeals 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) of the North Carolina Rules of Civil Procedure." *Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147 (citing *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983)), *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991).

However, when the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable. *See, e.g.*, *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 449 S.E.2d 240 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995); *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991); *Corum v. University of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596, *aff'd in part and rev'd in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S.

985, 121 L. Ed. 2d 431 (1992). In fact, the United States Supreme Court has previously held that a claim of qualified immunity to the extent that it is based on legal questions of whether a violation of clearly established law occurred is immediately appealable since it is immunity from suit rather than a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L. Ed. 2d 411, 424 (1985). As such, defendants' appeal is properly before this Court.

I. State Claims

[2] On appeal, defendants Evans and Paul first contend that the trial court erred in denying their motion for partial summary judgment regarding Mr. Moore's claims for malicious prosecution and false imprisonment (collectively referred to as "state claims" herein). Specifically, defendants contend that they were entitled to governmental and/or official immunity on these claims. We do not agree.

Summary judgment is properly granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The moving party has the burden of "positively and clearly" establishing the absence of any genuine issue of material fact. *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). A movant may meet this burden by showing that (1) an essential element of the nonmovant's case is nonexistent; or (2) based upon discovery, the nonmovant cannot produce evidence to support an essential element of his claim; or (3) the movant cannot surmount an affirmative defense which would bar the claim. *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). In making its decision on the motion, the trial court must consider the evidence in the light most favorable to the nonmovant, drawing all inferences of fact from the evidence presented at the hearing in his favor. *Rouse v. Pitt County Memorial Hospital*, 116 N.C. App. 241, 244, 447 S.E.2d 505, 507 (1994), *aff'd*, 343 N.C. 186, 470 S.E.2d 44 (1996).

We note that defendant City of Ayden is not a party to this appeal from Judge LaBarre's order denying defendants Evans and Paul's motion for partial summary judgment. In fact, it is well established that a municipality is not liable for the torts of its officers and employees if committed in the performance of a governmental func-

tion. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 45-6, 460 S.E.2d 899, 910 (1995), *disc. review allowed*, 342 N.C. 658, 467 S.E.2d 718 (1996). " 'A police officer in the performance of his[/her] duties is engaged in a governmental function.' " *Mullins v. Friend*, 116 N.C. App. 676, 680, 449 S.E.2d 227, 230 (1994) (quoting *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970)). A municipality which purchases liability insurance waives governmental immunity, thereby subjecting itself to liability for the tortious acts of its officers and employees. N.C. Gen. Stat. § 160A-485 (1994).

In the instant action, Mr. Moore presented evidence that defendant City had purchased liability insurance; and defendants admit to such. Thus, defendant City has waived any defense of governmental immunity with respect to Mr. Moore's state claims to the extent that Mr. Moore's damages do not exceed the amount of insurance coverage. *Id.*

A. Defendant Paul

Mr. Moore sues defendant Paul in his official capacity as Chief of Police of the City of Ayden. Police officers, as public officers, share in the immunity of their governing municipalities. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). However, where as in the case presently before us, the municipality waives its sovereign immunity by purchasing liability insurance, public officers such as defendant Paul are not entitled to the defense of governmental immunity, at least as to the extent of coverage purchased by the municipality. *Moore*, 120 N.C. App. at 46-7, 460 S.E.2d at 911. Accordingly, the trial court properly denied defendant Paul's motion for partial summary judgment regarding Mr. Moore's state claims against him in his official capacity as Chief of Police.

B. Defendant Evans

Mr. Moore sues defendant Evans in both his official and individual capacities. Like defendant Paul, defendant Evans is not entitled to the defense of governmental immunity because defendant City has waived its sovereign immunity by purchasing liability insurance. *Id.* Therefore, the trial court properly denied this motion as to defendant Evans in his official capacity as police officer with the City of Ayden Police Department.

[3] As to Mr. Moore's claims against defendant Evans in his individual capacity, we find that there was an issue of fact as to whether

defendant Evans was entitled to the use of the official immunity defense. To maintain a suit against a public official in his/her individual capacity, the plaintiff must make a *prima facie* showing that the official's actions (under color of authority) are sufficient to pierce the cloak of official immunity. *Epps v. Duke University*, 122 N.C. App. 198, 468 S.E.2d 846 (1996), *disc. review denied*, No. 230P96 (N.C. Supreme Court Sep. 5, 1996). Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity, thus holding the official liable for his acts like any private individual. *Gurganious v. Simpson*, 213 N.C. 613, 616, 197 S.E. 163, 164 (1938); *Golden Rule Insurance Co. v. Long*, 113 N.C. App. 187, 194, 439 S.E.2d 599, 603, *disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993).

"False imprisonment" has been defined as "the illegal restraint of a person against his will." *Marlowe v. Piner*, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995) (citing *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)). A restraint is illegal if it is unlawful or not consented to. *Id.* Specifically, a warrantless arrest without probable cause lacks legal authority and is therefore unlawful. *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984). "A false arrest is an arrest without legal authority and is one means of committing a false imprisonment." *Marlowe*, 119 N.C. App. at 129, 458 S.E.2d at 223 (citing *Myrick v. Cooley*, 91 N.C. App. 209, 212, 371 S.E.2d 492, 494, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988)).

In order to maintain an action for malicious prosecution, the plaintiff must demonstrate that the defendant "(1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of [the] plaintiff." *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992) (citing *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966)). "[M]alice can be inferred from the want of probable cause alone." *Fowler v. Valencourt*, 108 N.C. App. 106, 111, 423 S.E.2d 785, 788 (1992) (citing *Cook*, 267 N.C. at 170, 147 S.E.2d at 914; *Wright v. Harris*, 160 N.C. 543, 550, 76 S.E. 489, 492 (1912)), *rev'd in part on other grounds*, 334 N.C. 345, 435 S.E.2d 530 (1993). As it is undisputed that defendant Evans initiated the criminal prosecution against Mr. Moore and that the prosecution ended with a dismissal of the charges against him, the only issue as to Mr. Moore's claim for malicious prosecution is whether defendant Evans had probable cause to initiate the

criminal prosecution against him. Hence, a common element of each of the state claims alleged (false imprisonment and malicious prosecution) is the absence of probable cause.

The test for whether probable cause exists is an objective one—whether the facts and circumstances, known at the time, were such as to induce a *reasonable* police officer to arrest, imprison, and/or prosecute another. *See Fowler*, 108 N.C. App. at 112, 423 S.E.2d at 788 (quoting *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)). In *Pitts*, our Supreme Court stated:

> The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.

296 N.C. at 87, 249 S.E.2d at 379 (citations omitted), *quoted in Fowler*, 108 N.C. App. at 112, 423 S.E.2d at 788.

In the case *sub judice*, Mr. Moore brought claims against defendant Evans for false imprisonment, as well as malicious prosecution. In his complaint, Mr. Moore alleges that Evans' actions "constituted both an intentional and reckless disregard for the legal rights of plaintiff."

After close examination of the record, we find that there is indeed genuine issue of material fact as to whether defendant Evans had probable cause to arrest Mr. Moore. A review of the record tends to show conflicting evidence, thereby creating this question of material fact for the jury as fact finder. In an affidavit, Mrs. Mable Sumpter stated in pertinent part:

> On May 16, [sic] 1993 I was in my home and heard a knocking noise outside . . . I saw a black male in the Williams' backyard. He was wearing white clothing but I could not see his face. I knew that the Williams were out of town so I went back inside my home and called the police. I then continued to watch out my window until the police arrived. Sergeant Evans of the Ayden Police Department came to my home to speak with me concerning the call that I made. I told him what I had seen and told him the person had on white clothing. *I also told him that I did not see the person's face and that I could not identify the person.* . . . A few moments later Sergeant Evans returned in his patrol car with an individual in the backseat. Sergeant Evans had the individual get

> out of the patrol car and stand beside it directly in front of the Williams' house. . . . I walked out of my front door and stood by the hedge row at the front of my house and observed the individual standing in front of the patrol car. I nodded to Sergeant Evans indicating that the individual had on the same color clothing as the person that I had seen in the Williams' backyard. *I had previously told Sergeant Evans that I would not be able to identify anyone other than to say that they had similar colored clothing because I did not see the person's face.* . . . After I nodded to Sergeant Evans, he placed the individual back in the patrol car. He did not speak with me anymore about this suspect on the night of this incident and neither Sergeant Evans nor anyone from the Ayden Police Department has spoken to me since regarding the incident.

(emphasis added). This evidence directly conflicts with the affidavit and testimony of defendant Evans that Mrs. Sumpter made a "positive identification" of Mr. Moore. Defendant Evans stated in his affidavit:

> Mrs. Sumpter was told to go into her house while [the officers] were getting Plaintiff out of the car. Plaintiff then was positioned so that his profile was facing Mrs. Sumpter. Mrs. Sumpter indicated that Plaintiff looked like the black male she had seen standing on the porch who ran from the house, but she wanted Plaintiff to turn around because *she had seen him from the back* standing on the porch. Plaintiff was turned around, and *Mrs. Sumpter viewed him from the back, and then positively identified Plaintiff* as the man she had seen next door.

(emphasis added). Such converse testimony certainly creates issues of fact to be determined by a jury as to whether probable cause existed to arrest Mr. Moore.

Further, contrary to the dissenting opinion, we find the cases of *State v. Joyner*, 301 N.C. 18, 269 S.E.2d 125 (1980), and *State v. Wrenn*, 316 N.C. 141, 340 S.E.2d 443 (1986), to be inordinately distinguishable from the facts herein. First, in *Joyner*, the North Carolina Supreme Court found that probable cause to arrest existed where an officer observed the defendant approximately three and one-half (3 1/2) blocks from the rape victim's apartment, approximately seven (7) to ten (10) minutes following the commission of the offenses of burglary, rape and larceny; the officer had earlier been alerted by police radio concerning the commission of the offenses

and had been given a description of the suspect as a "*black male with facial hair, wearing a toboggan and a green or blue jogging suit with white strips down the sides of the trousers*"; when the officer observed defendant, he reconfirmed this description by radio; and the officer noted that defendant matched the description and placed him under arrest. *Id.* at 22, 269 S.E.2d at 129 (emphasis added).

Thus, the description of the suspect in *Joyner* was patently more detailed than the bare bones description of the suspect in the subject case as a "black male in white clothing." Moreover, Mrs. Sumpter, the eye witness herein, specifically stated that she told the arresting officer that she could not identify the suspect.

Similarly in *Wrenn*, our Supreme Court found probable cause for arrest to exist when the facts indicated that the defendant's vehicle was stopped exiting the apartment complex in which the crimes occurred, during the early morning hours, just moments after the crimes were committed; defendant was ordered to step out of the vehicle, was "patted down" and his car was searched; a loaded revolver was found in the unlocked console in the front seat of the vehicle; and defendant matched the description given by the witness—"a white male, dressed in a dark sweatsuit and possibly wearing a knit hat" and "possibly armed." 316 N.C. 141, 340 S.E.2d 443.

In the instant case, Mr. Moore was some five (5) blocks away from the crime scene when he was seen by a police officer. Upon being approached by the officer, defendant was cooperative when told about the breaking and entering at 205 Edge Road and asked about his activities on that evening. He denied any knowledge of the crime, but agreed to accompany the officer to the crime scene. Significantly, the record does not indicate whether Mr. Moore was leaving the vicinity of the crime scene or approaching that area. Additionally, none of the other determinative factors found in *Wrenn* are present herein—Mr. Moore had neither weapon nor stolen items in his possession when approached. Undoubtedly, any black male wearing white clothing in the City of Ayden on 15 May 1993 would have matched the general description given to defendant Evans on that evening. Regrettably, we are left with the tragic conclusion that notwithstanding his innocence, any such male may well have been arrested and subjected to the same indignities faced by Mr. Moore.

The record further shows that following Mr. Moore's arrest, the magistrate set bond at $20,000.00, ostensibly in response to defendant Evans' request that Mr. Moore be placed under a "high bond" so that

he would be unable to get out of jail. On or about 20 May 1993, another officer told Officer Evans that an informant had revealed that John Eric Ellis had broken into the house on Edge Road. Thereafter, police officers questioned Ellis and obtained his admission that he had been wearing white clothing on the night of 15 May 1993 and that he had committed the crime for which Mr. Moore had been charged. However, Deputy Evans stated that he "had encountered Mr. Ellis on prior occasions and knew that he had a propensity for not telling the entire truth." And that based on that perception and "due to the volume of items that had been taken from the house . . . , [he] still believed that two persons were involved in the break-in at Edge Road, so Plaintiff was not immediately released from custody."

Significantly, evidence was also presented which tended to conflict with defendant Evans' statement that he did not release Mr. Moore from jail after Ellis' arrest, because he "believed that two persons were involved in the break-in at Edge Road." First, the public defender representing Ellis, the person who confessed to committing the 15 May break-in at 205 Edge Road, noted in his affidavit that no mention had been made to him of an accomplice, co-defendant, or second party being involved in the 15 May break-in. Moreover, the Incident/Investigation Report of the crime indicates that no further investigation was needed of the crime after Mr. Moore's arrest—indicating a belief that the one person who had perpetrated the break-in at the Edge Road residence was in custody.

In the light most favorable to Mr. Moore, defendant Evans has failed to meet his burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Indeed, the evidence tends to show that there was genuine issue of material fact as to whether defendant Evans had probable cause to arrest Mr. Moore. As such, the trial court properly denied defendant Evans' motion for partial summary judgment with respect to Mr. Moore's state claims against him in his individual and official capacities.

II. Federal Constitutional Claims

[4] Defendants next contend that they were entitled to summary judgment regarding Mr. Moore's federal constitutional claims. In his complaint, Mr. Moore alleges that defendants deprived him of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. § 1983.

Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of [the United States], subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. Our Supreme Court has previously held,

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

Messick v. Catawba County, 110 N.C. App. 707, 713, 431 S.E.2d 489, 493, quoting *Corum*, 330 N.C. at 771, 413 S.E.2d at 282-83, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). In *Messick*, the Court interpreted this rule to preclude a § 1983 action against a county, its commissioners, as well as the sheriff and police officers in their official capacity. 110 N.C. App 707, 431 S.E.2d 489.

A. Defendant Paul

In his complaint, Mr. Moore makes no allegations that defendant Paul was present or participated in any manner in his arrest or post-arrest detention, nor does Mr. Moore allege that defendant Paul acted corruptly, maliciously, or outside of the scope of his employment. Rather, Mr. Moore's only allegations against defendant Paul relate to his official duties as the Chief of Police of the Ayden Police Department. As such, we must treat Mr. Moore's claims against defendant Paul in his official capacity.

As Mr. Moore herein seeks monetary damages for alleged violations of his constitutional rights, he cannot recover against defendant Paul in his official capacity under § 1983. *See id.* Hence, summary judgment is proper in regards to Mr. Moore's § 1983 claims against defendant Paul in his official capacity.

B. Defendant Evans

[5] Similarly, Mr. Moore is also precluded from recovering against defendant Evans in his official capacity under § 1983. *Id.* In addition,

the United States Supreme Court has held that public officials who perform discretionary functions are entitled to qualified immunity from suit against them personally in their individual capacity under 42 U.S.C. § 1983. However, a public official, like defendant Evans, may still be personally liable for damages under § 1983 where qualified immunity is not available. *Lenzer v. Flaherty*, 106 N.C. App. 496, 506, 418 S.E.2d 276, 282 (citing *Corum*, 330 N.C. at 772, 413 S.E.2d at 283), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992).

Generally, qualified immunity protects public officials from personal liability for performing discretionary functions to the extent that such conduct " 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Corum*, 330 N.C. at 772-73, 413 S.E.2d at 284 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982)), *quoted in Lenzer*, 106 N.C. App. at 508, 418 S.E.2d at 284. Clearly, " 'the doctrine of qualified immunity does not extend protection to those law enforcement officials who . . . knowingly violate the law.' " *Fowler*, 108 N.C. App. at 113-14, 423 S.E.2d at 789-90 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 278 (1986)).

In order to establish the existence of an official's right to the defense of qualified immunity, one must (1) identify the specific right allegedly violated; (2) determine whether that right was clearly established; and (3) if clearly established, determine whether a reasonable person in the officer's position would have known that his/her actions would violate that right. *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). "The first two determinations are questions of law for the court and should always be decided at the summary judgment stage." *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 670, 449 S.E.2d 240, 244 (1994) (citing *Pritchett*, 973 F.2d at 313; *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994)), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). The third determination, however, " 'requires the factfinder to make factual determinations concerning disputed aspects of the officer['s] conduct.' " *Id.* (quoting *Lee*, 114 N.C. App. at 585, 442 S.E.2d at 550).

As to Mr. Moore's alleged Fourth Amendment violation, we find that Mr. Moore's right to be free from unconstitutional arrests to warrant legal protection. Unquestionably, a police officer may be held liable for an unconstitutional arrest made without probable cause in violation of the Fourth Amendment to the United States Constitution. *See Malley*, 475 U.S. 335, 89 L. Ed. 2d 271.

While it is true that the Fourth Amendment to the United States Constitution allows an officer to briefly detain a suspect if there is a reasonable, articulable suspicion that the suspect committed a crime, *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), an officer must have probable cause to arrest that suspect. *Myrick*, 91 N.C. App. 209, 371 S.E.2d 492. Probable cause to arrest has been found to exist where a suspect is found in the general area of the crime and fits the description given by a witness to the crime. *Wrenn*, 316 N.C. 141, 340 S.E.2d 443; *Joyner*, 301 N.C. 18, 269 S.E.2d 125. *See also State v. Harrell*, 67 N.C. App. 57, 312 S.E.2d 230 (1984) (recognizing that a description of either a person or an automobile may furnish reasonable grounds for arresting and detaining a criminal suspect); *in accord State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980); *State v. Tippett*, 270 N.C. 588, 155 S.E.2d 269 (1967), *rev'd on other grounds*, *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994).

The facts in the instant case tend to show that defendant Evans told other officers, who arrived at the scene after defendant Evans and Officer Stewart, that Mrs. Sumpter had seen a black male, wearing a white shirt and white shorts, at her neighbors' house. Notably, however, Mrs. Sumpter stated in her affidavit that she had identified the suspect only as being a black male, wearing white clothing. In response to this description, Officer Vance Head left the scene and drove around the neighborhood, where he observed Mr. Moore—a black male, wearing white shorts and a white shirt, riding a bicycle approximately four (4) to five (5) blocks from the crime scene. In light of the description given by defendant Evans, the officer stopped Mr. Moore and questioned him about his knowledge of the break-in at 205 Edge Road. Although Mr. Moore denied any knowledge of the incident, he was asked to accompany Officer Head to the scene, which he did.

Officer Head subsequently returned to the scene with Mr. Moore, where Mrs. Sumpter allegedly "positively identified" him. However, according to Mrs. Sumpter, she never positively identified Mr. Moore—she only nodded her head that Mr. Moore was wearing white clothing, as she had previously stated. Mrs. Sumpter specifically told defendant Evans that she could not identify the suspect, because he had been so far away when she had seen him in her neighbors' backyard. There is, therefore, a genuine issue of material fact as to whether Mrs. Sumpter's "identification" was positive and could serve to give defendant Evans probable cause to arrest Mr. Moore.

Defendants contend that absent Mrs. Sumpter's identification, probable cause still existed for Mr. Moore's arrest. If this were true, then as stated previously, on 15 May 1996, any black male, with white clothing, in the city of Ayden would have been subject to arrest. This we cannot countenance. Absent any other circumstantial evidence, we simply cannot say that as a matter of law defendant Evans had probable cause to arrest Mr. Moore. In this case, factual determinations regarding defendant Evans' conduct and its circumstances are in question. As the Supreme Court stated in *Corum*,

> "[A] purely 'objective' test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated."

Corum, 330 N.C. at 773, 413 S.E.2d at 284 (quoting *Collinson v. Gott*, 895 F.2d 994, 1001-02 (4th Cir. 1990) (Phillips, J. concurring)). Moreover,

> "Where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment . . . by pointing to *specific evidence* that the officials' actions were improperly motivated.

Id. at 774, 413 S.E.2d at 285 (quoting *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988)).

In the instant action, in the light most favorable to Mr. Moore, the evidence tends to show that defendant Evans requested the magistrate to set Mr. Moore's bond high; that even after another person was questioned and confessed to the crime, admitting that he wore white clothing on that evening, defendant Evans failed to release Mr. Moore; that defendant Evans failed to question a key alibi witness, a fellow police officer, about Mr. Moore's whereabouts on the evening of 15 May 1993; that defendant Evans failed to appear in court for Mr. Moore's probable cause hearing; and that only after being questioned about the case by the assistant district attorney did the officer tell her that another person had been charged with the crime for which Mr. Moore had been arrested and imprisoned. Defendant Evans defends his actions, contending that he was still investigating the crime as he suspected that there were at least two persons who participated in the 15 May break-in, due to the amount of personal property removed

from the Edge Road residence. Defendant Evans also noted that he questioned the credibility of Mr. Ellis' confession to the crime because of his reputation for dishonesty.

As all evidence presented by Mr. Moore at this stage of the proceedings must be considered "indulgently," *Fowler*, 108 N.C. App. at 114, 423 S.E.2d at 790 (citing *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972)), and "as the slightest doubt as to the facts entitles plaintiff to a trial," *id.* (citing *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *disc. review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984)), summary judgment on the issue of defendant Evans' qualified immunity was properly denied.

Mr. Moore also contends that his bail was excessive in violation of his Eighth Amendment rights, and consequently § 1983. However, it is the magistrate, and not defendant Evans, who is responsible for setting Mr. Moore's bail; therefore, this contention is without merit.

In a related argument, Mr. Moore further contends that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment. The United States Supreme Court stated in *Ingraham v. Wright*, "An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." 430 U.S. 651, 664, 51 L. Ed. 2d 711, 725 (1977). Therefore, we find that the Eighth Amendment is inapplicable to the present case, as Mr. Moore was never formally adjudicated guilty of any crime.

Mr. Moore also alleges that defendant Evans violated § 1983 by depriving him of "life, liberty or property without due process of law," in violation of the Fourteenth Amendment. To successfully assert a § 1983 claim based upon the violation of the Fourteenth Amendment, a plaintiff "must assert facts that, at a minimum, demonstrate Defendants acted with deliberate or reckless intent." *Romero v. Fay*, 45 F.3d 1472, 1478 (10th Cir. 1995).

As noted herein, in the light most favorable to Mr. Moore, we find that there is an issue of fact as to whether defendant Evans acted with reckless indifference to Mr. Moore's constitutional rights. Contrary to defendant Evans' contention that the police department believed two people to be involved in the break-in, the Incident/Investigation Report of the crime indicated that no further investigation was needed of the crime after Mr. Moore's arrest. Further, contrary to

defendant Evans' assertion that he attempted in good faith to verify Mr. Moore's alibi witnesses, defendant Evans makes no mention of ever trying to speak with the Ayden police officer who Mr. Moore had specifically indicated had seen him at a nightclub at the time that the break-in occurred. Moreover, Mr. Moore indicates that he never saw Rabbit Forbes on the evening in question—in spite of defendant Evans' insistence that it was Mr. Forbes who confirmed that Mr. Moore was at the Ayden Lounge on 15 May, at the time of the break-in. In addition, defendant Evans states that he contacted the District Attorney's office with this information, while the assistant district attorney assigned to prosecute Mr. Moore notes in her affidavit that it was she who contacted defendant Evans regarding the status of the case, after he failed to appear in court for Mr. Moore's probable cause hearing. We conclude that there is genuine issue of fact as to whether the facts as presented were such as to lead a discreet and prudent person to believe that a criminal offense had been committed by Mr. Moore. Accordingly, summary judgment was properly denied as to Mr. Moore's § 1983 claim against defendant Evans in his individual capacity.

III. Conclusion

In light of the foregoing, the trial court's denial of defendant Evans and Paul's motion for partial summary judgment is affirmed as to Mr. Moore's state claims against defendant Evans in his official and individual capacities; and as to Mr. Moore's federal constitutional claims against defendant Evans in his individual capacity. The trial court's denial of partial summary judgment must, however, be reversed as to Mr. Moore's federal constitutional claims against defendant Evans and Paul in their official capacities.

Affirmed in part, and reversed in part.

Judge WYNN concurs.

Judge WALKER concurs in part, and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I concur with the majority's decision to reverse the trial court's denial of summary judgment as to plaintiff's federal constitutional claims against defendant City, and defendants Paul and Evans in their official capacities. However, I respectfully dissent from the majority's

opinion affirming the trial court's denial of defendants' motion for summary judgment as to plaintiff's state claims against defendant City and defendant Evans in his official and individual capacity and federal constitutional claims against defendant Evans in his individual capacity.

I. State Claims

In the present case, plaintiff brought claims against defendant City and defendant Evans individually and in his official capacity for false imprisonment and malicious prosecution. Defendants contend that they are entitled to summary judgment because plaintiff cannot prove an essential element of each offense nor can plaintiff surmount the affirmative defense of governmental immunity. A common element of each claim is the requirement that plaintiff demonstrate that defendant acted without probable cause.

a. Probable Cause

The majority concludes that "there is indeed a genuine issue of material fact as to whether defendant Evans had probable cause to arrest, imprison, and prosecute plaintiff." The majority relies on Mrs. Sumpter's affidavit in which she states:

> I nodded to Sergeant Evans indicating that the individual had on the same color clothing as the person that I had seen in the Williams' backyard. I had previously told Sergeant Evans that I would not be able to identify anyone. . . .

This affidavit conflicts with the affidavits from Officers K.S. Stewart, Vance Head, and defendant Evans which state that they were present when Mrs. Sumpter "positively identified" the plaintiff as the man she had seen in the neighbor's backyard. However, I disagree that a genuine issue of material fact exists so as to preclude summary judgment in favor of defendants.

Notwithstanding the question of whether Mrs. Sumpter "positively identified" the plaintiff, probable cause existed to justify the warrantless arrest of the plaintiff. In its opinion the majority recognizes the line of cases holding that probable cause to arrest exists where a suspect is found in close proximity to the place where the offense occurred and where the similarity of the suspect's appearance fits the description given by the witness. *See e.g., State v. Joyner*, 301 N.C. 18, 22, 269 S.E.2d 125, 129 (1980) (holding that probable cause existed to arrest the suspect where the suspect described

as a bearded black male, wearing a toboggan and a jogging outfit was located approximately three and one-half blocks from the scene of the crime).

Our Supreme Court was asked to determine if sufficient evidence existed to support a finding of probable cause in the case of *State v. Wrenn*, 316 N.C. 141, 340 S.E.2d 443 (1986). I interpret the holding in *Wrenn* to be different from that of the majority opinion. The majority states that probable cause was found "when the facts indicated that the defendant's vehicle was stopped exiting the apartment complex in which the crimes occurred; defendant was ordered to step out of the vehicle, was 'patted down' and his car was searched; [and] a loaded revolver was found in the unlocked console in the front seat of the vehicle . . . ." However, the finding of a weapon in the vehicle was not a factor considered by the Supreme Court in finding that probable cause existed for the arrest of defendant. Rather, such evidence was admissible because the search of defendant's vehicle was incident to a lawful arrest. Thus, probable cause must have existed to justify a warrantless arrest prior to the search of defendant's vehicle. Accordingly, the Supreme Court held:

> We find that the officers had probable cause to arrest defendant. Defendant was apprehended almost immediately after the reported felony had been committed as he exited victim's apartment complex at an early morning hour when there was no other vehicular or pedestrian traffic in the area. Defendant's appearance at the time of the arrest fit victim's general description of her assailant, i.e., white male wearing dark clothing. Under these circumstances, we find that the proximity of defendant to the location where the offenses were committed and the similarity of defendant's appearance to the description which had been reported to the police provided the arresting officer with the element of probable cause necessary to effectuate the [warrantless] arrest. *See State v. Joyner*, 301 N.C. 18, 22 269 S.E.2d 125, 129.

Wrenn, 316 N.C. at 147, 340 S.E.2d at 447-48.

In the present case, the police were alerted on 15 May at 11:10 p.m. by Mrs. Sumpter that a break-in was in progress at 205 Edge Road. Officers Evans, K.S. Stewart, and Vance Head arrived on the scene. Officer Evans forwarded the description of the suspect given by Mrs. Sumpter. Within minutes of when the crime had been reported, Officer Vance Head located plaintiff four or five blocks from the crime scene. Considering the late hour, the proximity of the

suspect to the crime scene, and the similarity of plaintiff's appearance to the description of the suspect provided by Mrs. Sumpter, I would find that there was sufficient evidence to support a finding of probable cause.

b. Malice

Additionally, the plaintiff's malicious prosecution claim for punitive damages is deficient. In order to maintain an action for punitive damages, plaintiff must demonstrate actual malice. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 43, 460 S.E.2d 899, 909 (1995), *appeal dismissed and disc. review granted*, 342 N.C. 658, 467 S.E.2d 718 (1996). Actual malice is defined as ill-will, spite, or desire for revenge. *Id.* As there is no showing of actual malice in this case, plaintiff's claim for punitive damages on the claim of malicious prosecution necessarily must fail.

c. Immunities

Defendant Evans is also entitled to summary judgment regarding plaintiff's state claims against him in his individual capacity on the basis of official immunity. The majority correctly states that to maintain a suit against a public official in his/her individual capacity, plaintiff must demonstrate that the official's actions were malicious, corrupt, or outside the scope of his/her official duties. Epps v. Duke Univ., *Inc.*, 122 N.C. App. 198, 211, 468 S.E.2d 846, 851 (1996). In his complaint, plaintiff alleges that Evans' actions "were grossly and wantonly negligent, or intentional." "An act is wanton when it is done of wicked purpose, or when it is done needlessly, manifesting a reckless indifference to the rights of others." *Marlowe v. Piner*, 119 N.C. App. 125, 128, 458 S.E.2d 220, 223 (1995).

In the present case, plaintiff alleges that defendant Evans prosecuted and imprisoned him without probable cause. A similar argument was made by the plaintiffs in *Marlowe v. Piner*, 119 N.C. App. 125, 128, 458 S.E.2d 220, 223 (1995). In *Marlowe*, the plaintiffs brought an action against defendant Piner, individually and in his official capacity as sheriff, for false arrest and false imprisonment. *Id.* at 126-27, 458 S.E.2d at 221-22. Although the plaintiffs alleged that defendant's actions were malicious in that the defendant arrested plaintiffs without probable cause, the trial court granted the defendant's motion for summary judgment based on official immunity. *Id.* at 128, 458 S.E.2d at 223. This Court affirmed the trial court's decision stating:

> Plaintiffs have made no forecast of evidence which would tend to show that defendant intended his actions to be prejudicial or injurious to them. At most, plaintiffs' evidence tends to show that defendant *negligently* believed he had probable cause to arrest plaintiffs.

Id. Similarly, based on plaintiff's forecast of the evidence, I would reverse the trial court's decision denying defendants' motion for summary judgment with respect to plaintiff's state claims against defendant City and defendant Evans in his official and individual capacity.

II. Federal Constitutional Claims

I also disagree with the majority's holding that defendant Evans was not entitled to qualified immunity regarding plaintiff's federal constitutional claims. In determining whether a defendant is entitled to qualified immunity, the plaintiff's right must be established so clearly that a reasonable official would know that his action violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 531 (1987). While the majority correctly states the test for determining whether a defendant is entitled to qualified immunity, I disagree with their application in the present case.

The United States Supreme Court established that "[g]overnment officials performing discretionary functions are shielded from civil liability to the extent their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982)). Accordingly, qualified immunity is intended to remove most cases from the legal process prior to submission to the jury except in cases where the official clearly violated the law. *Id.* The purpose of qualified immunity is to allow officials to perform their duties without the fear of impending lawsuits. "[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 530 (1987).

Qualified immunity is particularly appropriate for police officers who must make quick decisions in an atmosphere of great uncertainty. As the United States Court of Appeals for the Fourth Circuit

noted, "[h]olding police officers liable in hindsight for every injurious consequence of their actions would paralyze the functions of law enforcement." *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir.), *cert. denied*, — U.S. —, 133 L. Ed. 2d 436 (1995). Furthermore,

> [i]f every mistaken seizure were to subject police officers to personal liability under § 1983, those same officers would come to realize that the safe and cautious course was always to take no action. The purposes of immunity are not served by a police force intent on escaping liability to the cumulative detriment of those duties which communities depend upon such officers to perform.

Gooden v. Howard County, 954 F.2d 960, 967 (4th Cir. 1992).

Plaintiff contends that defendant Evans violated his Fourth Amendment right to be free from unwarranted searches and seizures. Having concluded that there was sufficient evidence for probable cause, I cannot say that Evans' conduct in arresting plaintiff violated his rights under the Fourth Amendment.

Even if Evans wrongly believed that there was probable cause to arrest defendant, he would be entitled to qualified immunity. As the Fourth Circuit explained:

> The "meaning" of the fourth amendment, at least when stated in broad philosophical terms, is relatively clear. The precise action or combination of actions, however, which will infringe a particular suspect's fourth amendment rights is often difficult for even the constitutional scholar to discern. . . . [T]here is often a "legitimate question" whether an officer's particular conduct constituted an improper search or seizure. When such a "legitimate question" exists, the principle of qualified immunity gives police officers the necessary latitude to pursue their investigations without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law.

Tarantino v. Baker, 825 F.2d 772, 775 (4th Cir. 1987) (citation omitted). Accordingly, I would hold that defendant Evans is entitled to qualified immunity as to this claim.

Plaintiff also argues that he had a clearly established right to be released from jail when John Erick Ellis confessed to the commission of the crime. The existence of an additional suspect, albeit one who confesses, does not automatically negate probable cause for plaintiff's arrest and detention. *See e.g.*, *In re Moss*, 295 S.E.2d 33, 39

(W.Va. 1982) (holding that evidence showing that another individual confessed to the crime and was charged does not dictate a finding of no probable cause).

Finally, plaintiff alleges that defendant Evans violated 42 U.S.C. § 1983 by depriving him of "life, liberty, or property without due process of law," in violation of the Fourteenth Amendment. To successfully assert a 1983 claim in violation of the Fourteenth Amendment, a plaintiff "must assert facts that, at a minimum, demonstrate [d]efendants acted with deliberate or reckless intent." *Romero v. Fay*, 45 F.3d 1472, 1478 (10th Cir. 1995).

Here, the plaintiff alleged that defendant Evans acted with deliberate and reckless intent when conducting his post-arrest investigation. The issue of whether an officer's post-arrest investigation rises to the level of deliberate or reckless intent has been addressed by the United States Court of Appeals for the Fifth Circuit in *Simmons v. McElveen*, 846 F.2d 337 (5th Cir. 1988). In *Simmons*, plaintiff filed a § 1983 action against police officers alleging that their post-arrest investigation violated his constitutional rights. Following plaintiff's arrest for armed robbery, the police failed to disclose exculpatory fingerprint evidence to the district attorney's office and failed to conduct a physical line-up and fingerprint comparison of another suspect who was implicated by a "crime stoppers" program tip. *Id.* at 338. Eight months after the arrest, defendant was released after his attorney located a witness who exonerated and conclusively implicated the "crime stoppers" suspect. *Id.* at 338-39. The Fifth Circuit affirmed the trial court's decision to award summary judgment to the defendant officers holding that the officers' conduct "simply [did] not exceed the level of negligence." *Id.* at 339.

Similarly, in *Romero v. Fay*, 45 F.3d 1472 (10th Cir. 1995), the plaintiff brought a § 1983 action against police alleging that their post-arrest investigation violated his constitutional rights. In *Romero*, plaintiff was arrested for the murder of David Douglas and was imprisoned for approximately three months before he was released from jail. *Id.* at 1474. Following his arrest, the police failed to contact plaintiff's alibi witnesses and failed to interview individuals who allegedly saw another man threaten and attempt to fight David Douglas approximately two hours before he was murdered. *Id.* at 1479. The Tenth Circuit held that the plaintiffs failed to allege conduct which amounted to a constitutional violation. *Id.* at 1478. The Court reversed the district court's decision denying defendants' qualified

immunity upon concluding that defendants' conduct did not exceed negligence even though in hindsight investigation of plaintiff's alibi witnesses and other individuals would have been fruitful. *Id.* at 1479.

In sum, while I do not condone the post-arrest investigation performed by defendant Evans, plaintiff has failed to allege that defendant acted with "deliberate or reckless intent" and he is therefore entitled to qualified immunity. Accordingly, I would reverse the trial court's decision and remand this case for an entry of summary judgment in favor of all defendants.

TONY B. NICHOLSON, PLAINTIFF v. AMERICAN SAFETY UTILITY CORPORATION, DUKE POWER COMPANY AND NORTH HAND PROTECTION, A DIVISION OF SIEBE NORTH, INC., SIEBE NORTH HOLDINGS CORP., SIEBE, INC., SIEBE INDUSTRIES, INC., AND SIEBE PLC, DEFENDANTS

No. COA95-554

(Filed 15 October 1996)

1. **Products Liability § 28 (NCI4th)— safety gloves—failure to inspect and warn—summary judgment improper**

Summary judgment was improperly entered for defendants in plaintiff electrical lineman's product liability action based upon negligence against the manufacturer and seller of safety gloves worn by plaintiff when he was injured by electricity from an energized line where there was a genuine issue of material fact as to the alleged failure of defendants to properly test and inspect the gloves and to convey adequate warning of potential deficiencies in the gloves.

Am Jur 2d, Products Liability §§ 305, 324; Summary Judgment § 27.

Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury. 76 ALR2d 9.

Manufacturer's duty to test or inspect as affecting his liability for product-caused injury. 6 ALR3d 91.

Failure to warn as basis of liability under doctrine of strict liability in tort. 53 ALR3d 239.

2. Products Liability § 9 (NCI4th)— manufacturer and seller—privity—buyer's employee

While the privity requirement has been eliminated for a buyer's employee to bring an action against the manufacturer of an allegedly defective product for breach of implied warranty, N.C.G.S. § 99B-2(b), a buyer's employee is still barred by lack of privity from suit against a seller grounded upon breach of implied warranty.

Am Jur 2d, Products Liability §§ 602, 613.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 ALR2d 39.

Privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property. 16 ALR3d 683.

3. Products Liability § 9 (NCI4th)— testing by seller—seller not manufacturer—buyer's employee—privity required

A seller's testing and inspection of safety gloves sold to plaintiff's employer did not render the seller a "manufacturer" of the gloves, and an action by the buyer's employee against the seller for breach of implied warranty was barred by a lack of privity.

Am Jur 2d, Products Liability §§ 569, 596.

4. Products Liability § 28 (NCI4th)— safety gloves—breach of implied warranty—issue of fact

A genuine issue of material fact was presented regarding the existence of a defect in plaintiff electrical lineman's safety gloves at the time they left defendant manufacturer's possession so that summary judgment was improperly entered for defendant manufacturer in plaintiff's action for breach of implied warranty.

Am Jur 2d, Products Liability §§ 224, 228; Summary Judgment § 27.

5. Products Liability § 18 (NCI4th)— contributory negligence—use of defective product

Assuming *arguendo* that contributory negligence bars a product liability action based upon either negligence or breach of war-

ranty, N.C.G.S. § 99B-4(3) requires that the contributory negligence be in the use of the allegedly defective product.

Am Jur 2d, Products Liability §§ 933, 947.

Contributory negligence or assumption of risk as defense to action for personal injury, death, or property damage resulting from alleged breach of implied warranty. 4 ALR3d 501.

6. Products Liability § 18 (NCI4th)— safety gloves—contributory negligence not shown

Plaintiff electrical lineman's product liability action against the manufacturer and seller of safety gloves was not barred by plaintiff's contributory negligence where (1) defendants' contention that plaintiff relied exclusively upon his gloves and failed to employ other safety measures to protect himself from electrocution did not relate to his use of the allegedly defective gloves, and (2) defendants did not establish that plaintiff was contributorily negligent as a matter of law in his use of the gloves by damaging the gloves, failing to store them properly, or failing to examine the gloves for damage prior to use.

Am Jur 2d, Products Liability § 932, 933.

Appeal by plaintiff from judgment entered 21 February 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 22 February 1996.

Twiggs, Abrams, Strickland & Trehy, P.A., by Douglas B. Abrams and Jerome P. Trehy, Jr., for plaintiff-appellant.

Wankser and Lindler, by H. Bright Lindler, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Linda Ambrose, for Harrison-Wright.

Smith Helms Mulliss & Moore, L.L.P., by Richard W. Ellis and Leslie C. O'Toole, for defendant-appellees Siebe North, Inc. and Siebe Holdings Corp.

Cranfill, Sumner & Hartzog, L.L.P., by Robert W. Sumner and H. Lee Evans, Jr., for defendant-appellee American Safety Utility Corp.

JOHN, Judge.

Plaintiff contends the trial court erred by granting defendants' motions for summary judgment and by denying his motion for partial summary judgment. We agree in part.

Pertinent facts and procedural information are as follows: On 26 January 1990, plaintiff, an electrical lineman for Harrison-Wright, Inc., was working on a Duke Power project to connect high-voltage overhead power lines to an underground cable. On the date in question, plaintiff was standing in an elevated, two-person aerial utility bucket located beneath energized overhead lines. At that time, plaintiff was connecting a de-energized conductor to a de-energized underground cable. The overhead energized lines carried approximately 7,200 volts of electricity, "phase-to-ground." In accordance with Duke Power regulations, plaintiff or his helper placed rubber hoses over the energized lines to shield them from the close proximity of the lines, and in addition the men wore protective helmets and thick rubber lineman's safety gloves.

Plaintiff's helmet had blown off at least twice prior to the incident at issue, and each time he had lowered the utility bucket to retrieve it. However, after a gust of wind blew the helmet off a third time, plaintiff continued tightening a "split bolt." An energized line thereupon either touched or came within an extremely short distance of plaintiff's unprotected head. Electricity raced from the overhead line to plaintiff's head and through his body, exiting via his gloved hands which were holding a de-energized, grounded cable. Plaintiff suffered severe and permanent brain and nervous system injuries.

The gloves worn by plaintiff at the time of his injury were purchased by defendant American Safety Utility Corporation (ASU) on 18 March 1989 from defendant Siebe North (Siebe); thereafter, the gloves were sold and delivered by ASU to plaintiff's employer in January 1990. Siebe sold the gloves as Class II lineman's gloves, safe for use with energized lines up to 17,000 volts. Plaintiff obtained the gloves from his employer 23 January 1990 and suffered the subject accident 26 January 1990.

Plaintiff commenced the instant products liability action by filing a complaint 9 December 1992 and an amended complaint 19 January 1993. Suit was brought against Siebe as manufacturer of the gloves worn by plaintiff at the time of the accident, as well as against seller ASU and Duke Power, the latter not a party to this appeal.

Contending he was injured "when electrical current completed as a direct result of the dangerously defective condition of the subject safety gloves," plaintiff alleged claims of negligence against Siebe and ASU based upon their failure, *inter alia*, to "exercise due care in the testing, inspection, marketing, promotion, sale and/or delivery of the subject safety gloves." Plaintiff's complaint also contained claims of breach of express and implied warranties, including specifically "the failure to provide necessary warnings."

All defendants answered denying liability and asserting numerous affirmative defenses, including contributory negligence, lack of privity, and alteration or damage to the gloves subsequent to defendants' release of possession and control thereof.

Defendants Siebe and ASU moved for summary judgment on all issues, and plaintiff sought summary disposition of the issues of breach of implied warranty and contributory negligence. Following a hearing 13 February 1995, the trial court granted defendants' motions and denied that of plaintiff. From these orders, plaintiff appeals.

We note at the outset that plaintiff has assigned error to the denial of his motion for summary judgment on the issues of breach of implied warranty and contributory negligence. Denial of a motion for summary judgment is interlocutory and non-appealable. *See Lamb v. Wedgewood Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983). Except as may arise in dealing with arguments properly before this Court, therefore, we decline to consider plaintiff's assignment of error directed to denial of his motion for summary judgment.

It is well-established that

> [t]o succeed in a summary judgment motion, the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.

Taylor v. Ashburn, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Summary judgment is appropriate only when it appears that "even if the facts as claimed by [the non-movant] are taken as true, there can be no recovery," *Lowder v. Lowder*, 68 N.C. App. 505, 506, 315 S.E.2d 520, 521, *disc. review denied*, 311 N.C. 759, 321 S.E.2d 138 (1984), with the non-movant's materials being "indulgently regarded" and the movant's "closely scrutinized," *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App.

347, 350, 363 S.E.2d 215, 217, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988).

A summary judgment movant may meet its burden of showing the lack of a triable issue of fact by demonstrating the non-existence of an essential element of plaintiff's claim or by establishing an affirmative defense as a matter of law. *Green v. Wellons, Inc.*, 52 N.C. App. 529, 532, 279 S.E.2d 37, 40 (1981). If a movant is successful in its showing, the burden shifts to the non-movant to produce a forecast of evidence sufficient to create a genuine issue of material fact. *Cockerham v. Ward and Astrup Co. v. West Co.*, 44 N.C. App. 615, 618, 262 S.E.2d 651, 654, *disc. review denied*, 300 N.C. 195, 269 S.E.2d 622 (1980).

Plaintiff's action, brought pursuant to the Products Liability Act (the Act), *see* N.C. Gen. Stat. Chapter 99B (1989), is based on two separate theories—negligence and breach of warranty, both express and implied. We discuss each separately.

I. Negligence

Summary judgment is generally inappropriate in a negligence action, *Brown v. Power Co.*, 45 N.C. App. 384, 386, 263 S.E.2d 366, 368, *disc. review denied*, 300 N.C. 194, 269 S.E.2d 615 (1980),

> even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury.

Surrette v. Duke Power Co., 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986). *See also Green*, 52 N.C. App. at 532, 279 S.E.2d at 39 (because of "peculiarly elusive nature of the term 'negligence', the jury generally should pass on the reasonableness of conduct in light of all the circumstances of the case"). Notwithstanding, summary judgment may be proper in a negligence action

> where there is no question as to the credibility of witnesses and the evidence shows either (1) a lack of any negligence on the part of the defendant, or (2) that plaintiff was contributorily negligent as a matter of law.

Surrette, 78 N.C. App. at 650-51, 338 S.E.2d at 131 (citations omitted).

The essential elements of a products liability action predicated upon negligence are: "(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of

that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury." *Ziglar v. Du Pont Co.*, 53 N.C. App. 147, 150, 280 S.E.2d 510, 513, *disc. review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981) (citation omitted). In addition, a plaintiff must present evidence the product was in a defective condition at the time it left the defendant's control. *See Cockerham*, 44 N.C. App. at 619, 262 S.E.2d at 655.

A *manufacturer* must use reasonable care in the design and manufacture of products, and this includes the duty to perform "reasonable tests and inspections to discover latent hazards." *Id.* at 619, 262 S.E.2d at 654. Moreover, a manufacturer must exercise "the 'highest' or 'utmost' caution, commensurate with the risks of serious harm involved, in the production of a dangerous instrumentality or substance." *Ziglar*, 53 N.C. App. at 154, 280 S.E.2d at 515. *See Corum v. Tobacco Co.*, 205 N.C. 213, 216-17, 171 S.E. 78, 80 (1933) (dangerous product is one which puts life and limb in great peril when negligently made).

In addition, a manufacturer is under an obligation to provide warnings of any dangers associated with the product's use "sufficiently intelligible and prominent to reach and protect all those who may reasonably be expected to come into contact with [the product]." *Id.* at 155, 280 S.E.2d at 516. Failure to warn adequately renders the product defective. *Ziglar*, 53 N.C. App. at 155, 280 S.E.2d at 516.

A non-manufacturing *seller* acting as a "mere conduit" of the product, on the other hand, ordinarily has no affirmative duty to inspect and test a product made by a reputable manufacturer. *See Sutton v. Major Products Co.*, 91 N.C. App. 610, 614, 372 S.E.2d 897, 900 (1988). However, this rule does not stand where the seller knows or has reason to know of a product's dangerous propensity. *Id.* Moreover, where the seller acts as more than a "mere conduit," such as in the case *sub judice* where seller performed product tests and inspections, it must do so with reasonable care. *See Crews v. W.A. Brown & Son*, 106 N.C. App. 324, 329-30, 416 S.E.2d at 924, 928 (1992) (seller not mere conduit if it performs "auxiliary functions in connection with sale" such as assembling and installing product); *see also Baker v. Dept. of Correction*, 85 N.C. App. 345, 346, 354 S.E.2d 733, 734 (1987) ("law imposes upon every [entity which] enters upon an active course of conduct a positive duty to exercise ordinary care to protect others from harm and a violation of such duty constitutes negligence").

Further, the exercise of due care requires a seller to warn of any hazard associated with use of a product if: (1) the seller has "actual or constructive knowledge of a particular threatening characteristic of the product;" and (2) the seller "has reason to know that the purchaser will not realize the product's menacing propensities for himself." *Ziglar*, 53 N.C. App. at 151, 280 S.E.2d at 513.

[1] Review of the record in light of the foregoing principles reveals the existence of a genuine issue of material fact as to the alleged failure of defendants Siebe and ASU to test and inspect the gloves properly and to convey adequate warning of potential deficiencies in the gloves.

At the summary judgment hearing, defendants presented evidence tending to show their compliance with industry inspection procedures for lineman safety gloves, including the subject gloves herein. Each defendant presented evidence it had conducted industry standard visual inspections and dielectric safety tests on the gloves used by plaintiff on 26 January 1990, the Siebe test taking place on or about 17 February 1989 and the ASU test on or about 12 January 1990.

Dielectric testing is a process of immersing and filling a glove in a vat of water, and then subjecting the inside and outside of the glove to increasing voltage. If the glove fails to insulate, a circuit is completed and the failure is recorded by the testing machine. Siebe's evidence indicated the gloves withstood dielectric testing of 20,000 volts for three minutes; ASU indicated it utilized a dielectric test of 20,000 volts for one and one-half minutes.

Defense counsel for ASU argued plaintiff had failed to present evidence of a discoverable defect, and Siebe's counsel contended there was no proof a defect existed when the gloves left Siebe's possession approximately 10 months prior to the accident. Ultimately, both defendants maintained the gloves must have been damaged by plaintiff in use or storage during the three days prior to the accident, and further argued that plaintiff's post-accident tests, which revealed defects in both gloves, had been improperly performed.

In contrast, plaintiff presented evidence, including his cross-examination at deposition of defense witnesses, that (1) there were no signs plaintiff had abused or misused the gloves or that the gloves had been improperly stored subsequent to leaving defendants' pos-

session, (2) that line workers, including plaintiff, were expected to rely on rubber safety gloves such as those at issue for protection from electrocution, and were permitted to do so by the National Electrical Safety Code and OSHA, and (3) that plaintiff had been electrocuted at approximately 7,200 volts—far less than the rated "use" voltage of 17,000 for the gloves.

Plaintiff also presented evidence that the right and left hand gloves each failed dielectric testing subsequent to the accident. According to statistical evidence developed from Siebe's own production reports and presented by plaintiff's expert, failure of this test by both gloves was a virtual impossibility if both Siebe and ASU had indeed properly tested the gloves as they asserted. In addition, the expert countered defendants' claims that plaintiff's test results were unreliable due to failure to wash the gloves prior to testing, and presented an explanation of why the right hand glove failed in the field at approximately 7,200 volts, but a failure did not register during subsequent testing until 10,000-15,000 volts were administered. Further, record evidence tended to show that despite defendant Siebe's knowledge that a certain percentage of gloves would fail in the field due to manufacturing defects, Siebe warned neither ASU nor line workers such as plaintiff of the potential for failure.

Finally, regarding the less-contested element of proximate cause, plaintiff presented evidence that burns on plaintiff's right hand correlated precisely with the area of the gloves which failed during post-accident testing.

Viewing the record in the light most favorable to plaintiff, *see Lowder*, 68 N.C. App. at 506, 315 S.E.2d at 521, we conclude plaintiff produced a forecast of evidence sufficient to create a genuine issue of material fact in response to defendants' attempted showing of the non-existence of an essential element of plaintiff's negligence claim. *See Green*, 52 N.C. App. at 532, 279 S.E.2d at 40. Most notably, evidence of the electrocution of plaintiff at 7,200 volts, far less than the "use" rating of the gloves, evidence of certain manufacturing defects in the gloves, and the testimony of plaintiff's expert calling into question defendants' assurances of testing and inspecting the gloves, work to offset defendants' showing. Questions of fact therefore remain regarding whether defendants "acted in conformity with the reasonable person standard," *see Surrette*, 78 N.C. App. at 650, 338 S.E.2d at 131, in testing and inspecting the gloves and, particularly as to defendant Siebe, in providing adequate warnings.

II. Breach of Warranties

Because plaintiff did not assign as error the trial court's entry of summary judgment for defendants on the issue of express warranty, this issue is not properly before the Court, *see* N.C. R. App. P. 10(a), and we do not address it.

ASU and Siebe first attack plaintiff's claim of breach of implied warranty by asserting lack of privity. As to ASU, which sold the gloves, we find this argument persuasive.

[2] Privity via a contractual relationship between the plaintiff and the seller or manufacturer of an allegedly defective product is required to maintain a suit for breach of implied warranty, "[e]xcept where the barrier of privity has been legislatively or judicially removed." *Crews*, 106 N.C. App. at 331, 416 S.E.2d at 929. Regarding an action against a "manufacturer" under the Act, our General Assembly in G.S. § 99B-2(b) has eliminated the privity requirement for employees of the buyer. *See id.* at 332, 416 S.E.2d at 929-30. However, a buyer's employee nonetheless is barred from suit against a *seller* grounded upon breach of implied warranty in that neither the Act, *see* G.S. Chapter 99B, nor the U.C.C. provisions regarding implied warranties, *see* N.C. Gen. Stat. §§ 25-2-314 to 25-2-318 (1986), abolish the privity requirement in such instance. *See Crews*, 106 N.C. App. at 332-33, 416 S.E.2d at 930.

[3] The involvement of ASU as seller in testing and inspecting the gloves does not fulfill the definitional requirements of a "manufacturer" under the Act. *See* G.S. § 99B-1(2). Plaintiff's products liability claim against ASU predicated upon breach of implied warranty was therefore barred, and entry of summary judgment in favor of ASU on this issue was not error.

[4] However, it is undisputed that Siebe qualifies as a manufacturer under G.S. § 99B-1(2), and plaintiff's implied warranty claim against it thus is not precluded by lack of privity. *See* G.S. § 99B-2(b). Notwithstanding, Siebe further argues summary judgment in its favor was proper because it demonstrated the absence of an essential element of plaintiff's implied warranty claim. We disagree.

A successful plaintiff in a breach of implied warranty of merchantability action under G.S. § 25-2-314 and, by reference, under the Act, *see Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987), must prove (1) the goods bought and sold were subject to an implied warranty, (2) the goods did not comply

with the warranty in that they were defective at the time of sale, (3) the defective nature of the goods caused injury; and (4) that damages resulted. *Id.* at 301, 354 S.E.2d at 497. Moreover, an action for breach of implied warranty of merchantability may be based upon the manufacturer's failure to warn. *Bryant v. Adams*, 116 N.C. App. 448, 465, 448 S.E.2d 832, 841 (1994), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995).

Specifically, Siebe contends it is entitled to summary judgment by virtue of having demonstrated a failure of the evidence relating to the second element—proof of defect at the time of sale. However, having determined above there exists a genuine issue of material fact regarding the existence of a defect in the gloves at the time they left Siebe's possession, we similarly conclude those issues of fact to be present with reference to plaintiff's claim of breach of implied warranty against Siebe.

III. Contributory Negligence

Finally, both Siebe and ASU argue summary judgment was in any event proper on grounds plaintiff was contributorily negligent as a matter of law. Assuming *arguendo* contributory negligence acts as a bar to products liability actions based upon either negligence or breach of warranty, *see* Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts*, § 26.42 (1991) (contributory negligence normally not a bar in action for breach of warranty, because "the defenses set out in section 99B-4 protect the manufacturer or seller from liability in 'any products liability action;' " presumably contributory negligence available no matter what the theory of recovery); *see also Gillespie v. American Motors Corp.*, 69 N.C. App. 531, 533, 317 S.E.2d 32, 33 (1984) (contributory negligence acted as bar to recovery of damages "whether plaintiff's claim [was] based on negligence or breach of warranty"), defendants' argument fails.

We note initially that the burden of proof on the issue of contributory negligence rests with defendants, and that

> [w]hen the party with the burden of proof moves for summary judgment [it] must show that there are no genuine issues of fact, that there are no gaps in [its] proof, [and] that no inferences inconsistent with [its] prevailing on the motion] arise from the evidence. . . .

Parks Chevrolet, Inc. v. Watkins, 74 N.C. App. 719, 721, 329 S.E.2d 728, 729 (1985). Further, as with ordinary negligence actions, sum-

mary judgment is appropriate on issues of contributory negligence only where "no other reasonable conclusion may be reached." *Bryant*, 116 N.C. App. at 472, 448 S.E.2d at 845 (citation omitted).

In N.C. Gen. Stat. § 99B-4, the Act codifies contributory negligence as it applies to product liability actions and additionally "sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action." *Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 452-53, 406 S.E.2d 856, 860 (1991). The section provides:

> No manufacturer or seller shall be held liable in any product liability action if:
>
> . . . .
>
> (3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant.

G.S. § 99B-4(3) (1989) (emphasis added).

[5] Defendants maintain that plaintiff's action should be barred as a matter of law because he "failed to exercise reasonable care under the circumstances" as required by the statute. In the main, defendants point to plaintiff's failure to secure or monitor adequately the position of the hoses placed over the energized lines, his failure to keep his helmet properly secured and to retrieve it immediately after it blew off, and his performance of the job in the proximity of energized lines when it could have been completed after de-energizing the lines.

On the other hand, plaintiff emphasizes that

> [s]ection 99B-4(3) requires that the failure of the Plaintiff to exercise reasonable care must be *in his use of the product involved in the case.*

(emphasis in original). Therefore, plaintiff continues, contributory negligence does not apply unless plaintiff's use of the *gloves* was unreasonable under the circumstances, regardless of any alleged failure *otherwise* to employ safety devices and act in an appropriate manner.

In resolving the question raised by plaintiff, our duty is to construe G.S. § 99B-4(3) in context with other provisions of the Act, or as a "composite whole" so as to harmonize the sections in order to effec-

tuate legislative intent. *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706, *disc. review denied*, 312 N.C. 82, 321 S.E.2d 895 (1984). *See also Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988) ("In the construction of statutes, [the court's] primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.").

A manufacturer or seller can avoid liability under the Act if, under G.S. § 99B-4(1), plaintiff was negligent in his "use of the product . . . contrary to any express and adequate instructions or warnings," or additionally, under G.S. § 99B-4(2), if plaintiff "use[d] . . . the product" even after his discovery of a "defect or unreasonably dangerous condition." Interpreting G.S. § 99B-4(3) in context with these neighboring subsections, we conclude it likewise requires the negligence of a plaintiff to be in the "use of the [allegedly defective] product."

Indeed, research reveals that in the cases before our Courts in which contributory negligence under G.S. 99B-4 has been alleged, all have involved the plaintiff's *use* of the alleged defective product. *See, e.g.*, *Champs*, 329 N.C. 446, 406 S.E.2d 856 (1991); *Finney v. Rose's Stores, Inc.*, 120 N.C. App. 843, 463 S.E.2d 823 (1995), *cert. denied*, 343 N.C. 306, 471 S.E.2d 70 (1996); *Bryant*, 116 N.C. App. 448, 448 S.E.2d 832 (1994); *Morgan v. Cavalier Acquisition Corp.*, 111 N.C. App. 520, 432 S.E.2d 915, *disc. review denied*, 335 N.C. 238, 439 S.E.2d 149 (1993); *Smith v. Selco Products, Inc.*, 96 N.C. App. 151, 385 S.E.2d 173 (1989), *disc. review denied*, 326 N.C. 598, 393 S.E.2d 883 (1990). *See also Sexton by and through Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 338-39 (4th Cir.), *cert. denied*, 502 U.S. 820, 116 L. Ed. 2d 52 (1991) (although plaintiff's negligence in operating unlighted motorcycle at sundown while traveling too close to center line and not watching road may have contributed to collision, "no evidence has been advanced to show that he negligently used the helmet or that the negligent use of the helmet was a cause of his injuries;" plaintiff's product liability action against helmet manufacturer thus not barred by applicable contributory negligence statute, Ky. Rev. Stat. Ann. § 411.320(3), nearly identical to G.S. § 99B-4(3) herein).

[6] In the event G.S. §99B-4 requires, as we have held, lack of reasonable care by plaintiff in *use* of the gloves, defendants contend plaintiff's exclusive reliance upon his gloves to protect himself from electrocution constitutes contributory negligence as a matter of law. This argument is unavailing in that it comprises a circular reassertion

of defendants' contention that plaintiff was negligent *in general*—as opposed to *in his use of the product*—by failing to employ other means of ensuring his safety from electrocution.

Defendants further assert plaintiff damaged the gloves or failed to store them properly during the three day period of his possession, and that he failed to examine the gloves for damage prior to use. Assuming *arguendo* such contentions find support in the evidence, we cannot say "no other reasonable conclusion may be reached," *Bryant*, 116 N.C. App. at 472, 448 S.E.2d at 845, and hence defendants likewise do not establish as a matter of law plaintiff's negligent use of the gloves "under the circumstances." *See also Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) ("Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.").

Based on the foregoing, we affirm the entry of summary judgment in favor of ASU on the issue of breach of implied warranty and in favor of both defendants on the issue of breach of express warranty. However, regarding the issues of the defendants' negligence, Siebe's breach of implied warranty, and plaintiff's contributory negligence, the grant of summary judgment is reversed.

Affirmed in part; reversed in part.

Judges EAGLES and WALKER concur.

JOSEPH M. KISIAH, EMPLOYEE, PLAINTIFF v. W.R. KISIAH PLUMBING, INCORPORATED, EMPLOYER; SELF-INSURED, (CONSOLIDATED ADMINISTRATORS), CARRIER, DEFENDANT

No. COA95-878

(Filed 15 October 1996)

1. Workers' Compensation § 420 (NCI4th)— disability compensation—defendant's unilateral modification

The issue of plaintiff's disability compensation was remanded to the Industrial Commission for rehearing where plaintiff was injured at a work site; a Form 21 Agreement was entered into by plaintiff and defendant and approved by the Industrial

Commission; plaintiff received temporary total disability payments and undertook treatment; he returned to work on 6 January 1993 on a part-time basis in a different capacity earning less; defendant discontinued payment of disability compensation beginning 6 January 1993, despite having received no approval to do so by the Commission; plaintiff was fired because he refused to discuss a pending lawsuit related to the injury; defendant unilaterally mailed plaintiff a check in April which ostensibly represented an amount the employer-defendant deemed proper as payment for temporary partial disability; after the lump sum payment, defendant began paying plaintiff a sum it decided was appropriate as temporary partial disability; and the full Commission concluded that plaintiff failed to establish that he continued after 6 January to suffer a loss of wage earning capacity, that plaintiff had the burden of proving disability and its extent, that plaintiff was not entitled to benefits, and that defendant was entitled to a credit for all temporary partial disability paid after 6 January 1993. A Form 21 agreement has long been regarded as constituting an award by the Commission and a presumption of disability exists to the benefit of the employee whenever a disability award is made by the Commission. Challenges to an award must thereafter be made pursuant to the processes mandated by the Act.

Am Jur 2d, Workers' Compensation § 431.

Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments when due. 8 ALR4th 902.

2. **Workers' Compensation § 290 (NCI4th)— disability—employer's unilateral modification of benefits—credits for payments**

It was improper for the Industrial Commission to conclude that credit should be given to defendant for disability payments made to plaintiff after defendant unilaterally and therefore improperly determined that plaintiff's return to work modified a Form 21 agreement. Credits should be given only if they were not due and payable when made and plaintiff was presumptively due payments pursuant to the Form 21 agreement until a contrary determination was made be the Commission.

Am Jur 2d, Workers' Compensation §§ 416, 545.

Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments when due. 8 ALR4th 902.

3. Workers' Compensation § 301 (NCI4th)— disability— unilateral modification—penalty

The Industrial Commission erred by determining that no basis existed upon which to assess a penalty against defendant where defendant voluntarily ceased making disability payments without the permission of the Commission, then decided to resume payments at a level it deemed proper. This is the exact behavior N.C.G.S. § 97-18 was enacted to prevent.

Am Jur 2d, Workers' Compensation §§ 226, 480, 684.

Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments when due. 8 ALR4th 902.

Appeal by plaintiff from opinion and award entered 29 April 1995 by the Full Commission. Heard in the Court of Appeals 27 March 1996.

Waggoner, Hamrick, Hasty, Monteith and Kratt, P.L.L.C., by S. Dean Hamrick, for plaintiff appellant.

Teague, Rotenstreich and Stanaland, L.L.P., by Laurie R. Stegall, for defendant appellee.

SMITH, Judge.

Plaintiff appeals from the opinion and award of the Full Commission, whereby the Full Commission, *inter alia*, concluded that plaintiff failed to prove continuing entitlement to either temporary total or partial disability payments after 6 January 1993, and that defendant was entitled to a credit for all temporary partial disability benefits paid plaintiff after 6 January 1993. Due to the Full Commission's (Commission) failure to apply the proper presumption of disability in favor of plaintiff, we reverse.

The facts necessary to resolution of this case are as follows. Plaintiff Joseph M. Kisiah, a construction worker, was burned by scalding water while attempting to turn off a valve attached to a ruptured pipe at a work site in Charlotte, North Carolina. Pursuant to this injury, a Form 21 Agreement was entered into by plaintiff and

defendant, and approved by the Industrial Commission. The Form 21 Agreement stated "[t]hat said employee sustained an injury by accident arising out of and in the course of said employment on the following date: 4/27/92."

Thereafter, plaintiff began to receive temporary total disability payments. Plaintiff undertook treatment for first- and second-degree burns to his legs and feet, and treatment for "diagnosed post-traumatic and abductor tendinitis due to deep partial thickness scalding burns of both legs." Following this treatment and a rehabilitative regimen, plaintiff was released for light duty work by his physician.

On 6 January 1993, plaintiff returned to work on a part-time basis for defendant, not in his former capacity as a construction superintendent at a weekly wage of $582.96, but as a shop foreman earning $10.00 an hour. At the start of plaintiff's third week back at work, at which time he was scheduled to begin full-time duties, he was fired by defendant. Plaintiff was fired because he refused to discuss a pending lawsuit related to the instant injury with defendant. Beginning 6 January 1993, defendant discontinued payment of disability compensation to plaintiff, despite having received no approval to do so by the Commission.

Plaintiff, on 2 February 1993, filed a Form 33 request for a hearing before the Commission. Plaintiff's Form 33 request alleged that defendant had "terminated all compensation payments without securing Industrial Commission approval." On or about 20 April 1993, defendant unilaterally mailed plaintiff a check in the amount of $3,462.97. This payment ostensibly represented an amount the employer-defendant deemed proper as payment for temporary partial disability compensation. According to defendant, the $3,462.97 check was intended to serve as a temporary partial disability payment for the period during which defendant had ceased all payments to plaintiff; after this lump sum payment, defendant began paying plaintiff a sum it decided was appropriate as "temporary partial disability."

On 24 May 1993, defendant submitted a Form 33R response admitting termination of benefits and noting plaintiff "ha[d] received all compensation to which he was entitled." Defendant's unilateral change in compensation to plaintiff was never approved by the Commission. After a hearing before the Deputy Commissioner of the Industrial Commission, plaintiff appealed to the Full Commission. The Full Commission's opinion and award included the following conclusions of law:

> 1. *Plaintiff returned to work for defendant and the presumption of disability ended.* After he was terminated by defendant, he failed to make any effort to look for employment suitable to his capacity, given his very limited work restriction regarding safety shoes. By failing to look for suitable employment, plaintiff failed to establish that he continued after 6 January 1993 to suffer a loss of wage earning capacity as a result of the injury of 27 April 1992. See Russell v. Lowes, 108 N.C. App. 762 (1993). *It is well established that plaintiff has the burden of proving disability and its extent.* Therefore, plaintiff is not entitled to benefits under either G.S. §97-29 or G.S. §97-30 after 6 January 1993.
>
> 2. Pursuant to G.S. §97-42, defendant is entitled to a credit for all temporary partial disability benefits paid to plaintiff after 6 January 1993.
>
> * * * *
>
> 5. There is *no basis* to assess attorney fees pursuant to G.S. §97-88.1 or other penalties.

(Emphasis added.) These conclusions of law are erroneous, and we address each, *in seriatim.*[1]

I. The Form 21 Presumption of Disability

[1] At the onset, we note that, if findings of fact made by the Industrial Commission " 'are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal.' " *Radica v. Carolina Mills*, 113 N.C. App. 440, 446, 439 S.E.2d 185, 190 (1994) (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)). The Full Commission's Conclusion of Law No. 1 contains at least two independent legal misapprehensions. First, under the facts of this case, the burden of proof was on the employer, not the employee, to demonstrate that plaintiff was no longer entitled to his disability award. Second, an employee's presumption of disability may not be defeated merely by a return to work.

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1. The statutory law applicable to this case is that which was in effect at the time liability for temporary total disability was admitted by the employer, 19 May 1992. After this date plaintiff's claim was not "pending." *See* N.C. Gen. Stat. § 97-18.1 (Cum. Supp. 1995) (indicating amendments to the Workers' Compensation Act effective 1 October 1994 and/or 1 January 1995 applicable only to claims "pending on or filed" after these dates).

This Court has repeatedly held that a Form 21 agreement (approved by the Commission) represents an admission of liability by the employer for disability compensation pursuant to the Workers' Compensation Act (the "Act"). *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 282-83, 458 S.E.2d 251, 256-57, *disc. review denied and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995); *see also Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190 (Form 21 agreement is an admission by employer of liability, entitling employee to continuing presumption of disability). In this case a Form 21 was entered into by the parties and approved by the Commission. Once this Form 21 agreement was in place, a concomitant presumption of disability attached in favor of the employee. *Dalton*, 119 N.C. App. at 283-84, 458 S.E.2d at 257. The Form 21 presumption of disability is a rule of law at least 25 years old, *Watkins Central v. Motor Lines, Inc.*, 279 N.C. 132, 137-38, 181 S.E.2d 588, 592 (1971), and is the equivalent of proof that plaintiff is disabled. *Dalton*, 119 N.C. App. at 283-84, 458 S.E.2d at 257. After the presumption attached, "the burden shift[ed] to [the employer-defendant] to show that plaintiff is employable." *Id.* at 284, 458 S.E.2d at 257.

The instant Form 21 agreement " 'for the payment of compensation, [once] approved by the Commission, [was] as binding on the parties as an order, decision or award of the Commission unappealed from.' " *Id.* at 282, 458 S.E.2d at 257 (quoting *Brookover v. Borden*, 100 N.C. App. 754, 756, 398 S.E.2d 604, 606 (1990)). Once the Form 21 agreement was reached and approved, " 'no party . . . [could] thereafter be heard to deny the truth of the matters therein set forth . . . .' " *Dalton*, 119 N.C. App. at 282, 458 S.E.2d at 257 (citation omitted).

In its Conclusion of Law No. 1 the Commission incorrectly enunciates the burden of proof, and strips plaintiff of his Form 21 presumption of disability. Needless to say, proper placement of the presumption and the burden of proof in a change of (disability) condition situation, can be, and often is, outcome determinative. In fact, the instant matters pivot entirely on these two factors. Here, the Commission straightforwardly noted where it placed the burden of proof and why—as Conclusion of Law No. 1 speaks for itself: "Plaintiff returned to work for defendant and the presumption of disability ended. . . . *See Russell v. Lowes*, 108 N.C. App. 762, [425 S.E.2d 454] (1993). It is well established that *plaintiff has the burden* of proving disability and its extent. Therefore, plaintiff is *not entitled to benefits* under either G.S. § 97-29 [total incapacity] or G.S. § 97-30 [partial incapacity] *after 6 January 1993*." (Emphasis added.)

Defendant's argument runs much the same line. Citing I.C. Rule 404 (1996) (I.C. Rule or Rule) as authority, defendant argues that once "the plaintiff returned to work with the defendant-employer, the defendant-employer was entitled to suspend compensation without the requirement of a Form 24 [request to terminate benefits]." On the basis of Rule 404, defendant unilaterally cancelled its obligations to plaintiff under the existing Form 21 agreement, and the Commission agreed that defendant was entitled to do so.

Indeed, a facial reading of Rule 404 and *Russell* might lead an arbiter of law to conclude that a return to work reallocates the burden of proof upon challenge by an employer. Defendant's reallocation theory apparently originates from this Court's seemingly unqualified recitation of law in *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457, to wit: "The burden *is on the employee to show* that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." (Emphasis added.) I.C. Rule 404 appears to tack the same course; it instructs that "in cases where the award is to pay compensation during disability, there is a rebuttable presumption that disability continues *until the employee returns to work*." (Emphasis added.) The underlying assumption of these statements, when viewed in isolation, is that a return to work exacts a transformative effect on the burdens of proof and entitlement to disability between the employer and disabled employee. Such an assumption is unfounded.

Pursuant to the above authority, the Commission approved defendant's self-asserted cancellation of plaintiff's benefits. The problem with the Commission's reliance on *Russell*, and defendant's corresponding Rule 404 argument, is that such actions misread the holding of *Russell*, and thereby overextend *Russell*'s intended perimeter. "*Russell* only addresses the burdens of the parties in the context of a hearing where there has been no previous determination that the employee is disabled." *Stone v. G & G Builders*, 121 N.C. App. 671, 675, 468 S.E.2d 510, 512-13, *disc. review allowed*, 343 N.C. 757, 473 S.E.2d 627 (1996). At the time of the Full Commission's ruling in the instant case, there had already been a determination that the employee was disabled—that was the purpose and effect of the Form 21 agreement. Thus, the rule enumerated in *Russell* is inapplicable to an employee entitled to rely on a Form 21 presumption.

The second part of defendant's (and the Commission's) analysis also fails. Defendant's argument is thus: Employee returns to work,

therefore the employee's presumptive right to continued disability payments ends, so defendant has no further obligation to pay—and may cancel the Form 21 disability award without further ado. If this is what defendant and the Commission apprehend Rule 404 and *Russell* to stand for, then they are in error.

The viability of I.C. Rule 404 has been questioned before. In *Martin v. Piedmont Asphalt & Paving Co.*, 113 N.C. App. 121, 124, 437 S.E.2d 696, 698 (1993) (*Martin I*), this Court voided the use of a Form 24 as a means to *administratively* terminate disability awards under I.C. Rule 404; in other words the employee was not afforded an opportunity for a hearing pursuant to §§ 97-83 or 97-84. This Court's decision in *Martin I* was subsequently overruled on procedural grounds by our Supreme Court in *Martin v. Piedmont Asphalt and Paving*, 337 N.C. 785, 788-89, 448 S.E.2d 380, 382 (1994) (*Martin II*) (vacating *Martin I* as, *inter alia*, an advisory opinion). Although *Martin I* has no precedential effect, it is nonetheless instructive.

At the time of the *Martin I* decision, the Commission had established a practice of allowing employers to stop disability payments by filing a Form 24. *Martin I*, 113 N.C. App. at 124, 437 S.E.2d at 698. Once filed, a Commission administrator would "process" the forms by stamping them "approved" or "denied." *Id.* The *Martin* Court held that disability awards could be changed only as provided by statute, *id.* at 125-26, 437 S.E.2d at 699, and disavowed any "administrative [Commission] procedure which allows and condones the termination of compensation by an employer and the employer's insurance carrier by the mere filing of an Industrial Commission form (Form 24) . . . ." *Id.* at 124, 437 S.E.2d at 697-98.

In the instant case, the Commission not only failed to honor the presumption of disability to which plaintiff was due, it also sanctioned the equivalent of an administrative termination, by holding: "Plaintiff returned to work for defendant and the presumption of disability ended. . . . Therefore, plaintiff is not entitled to benefits under either G.S. §97-29 [total incapacity] or G.S. §97-30 [partial incapacity] after 6 January 1993." In this case, defendant decided it owed no more to plaintiff, and cancelled the Commission's Form 21 award. Thus, the Commission's Conclusion of Law No. 1 is tantamount to a holding that an employee's return to work is a *per se* change in disability, allowing an employer to terminate an award. This position is incorrect.

It appears from the instant Commission's opinion, and defendant's arguments, that each has misconstrued the determinative factor underlying disability, which is "post-injury earning *capacity* . . . ." *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991) (emphasis added). "An employee's release to return to work is not the equivalent of a *finding* that the employee is able to earn the same wage earned prior to the injury, nor does it *automatically deprive* an employee of the [Form 21] presumption." *Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190 (emphasis added). For instance, even if an employee returns to work at a pre-injury wage level, this evidence alone may " 'be an unreliable basis for estimating [earning] capacity.' " *Tyndall*, 102 N.C. App. at 730, 403 S.E.2d at 550 (quoting 2 Larson's Workmen's Compensation Law § 57.21(d) at 10-125).

For referential purposes, we also note that our rules of evidence, though not technically binding on the Commission, "impose[] on the party against whom [the presumption] is directed the burden of going forward with *evidence* to rebut or meet the presumption . . . ." N.C. Gen. Stat. § 8C-1, Rule 301 (1992) (emphasis added); and *see Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 594-95, 200 S.E. 438, 441-42 (1939) (Industrial Commission not bound to strict adherence to the Rules of Evidence).

Needless to say, only a duly authorized body may make a "finding," or take "evidence," and in the workers' compensation context, an employer is not such a body. This Court has long recognized that the Industrial Commission is the sole fact finding agency in workers' compensation cases. *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992). Determinations of disability under N.C. Gen. Stat. § 97-2(9) require application of law to fact, or otherwise put, the making of findings and conclusions of law. *See Radica*, 113 N.C. App. at 446-47, 439 S.E.2d at 189-90; *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982); *West v. J.P. Stevens Co.*, 12 N.C. App. 456, 460, 183 S.E.2d 876, 879 (1971).

Thus, absent a settlement with the employee, an award of temporary total disability cannot be undone without resort to a lawful determination by the Commission that the employee's disability no longer exists—which will require the application of law to fact and, therefore, a hearing. *Radica*, 113 N.C. App. at 446-47, 439 S.E.2d at 189-90

(the Act requires the Commission to make findings when passing on disability issues). N.C. Gen. Stat. § 97-83 is unequivocal about the need for a hearing; it states

> if [the employer and employee] have reached such an agreement [for disability payments] which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may *make application to the Industrial Commission for a hearing in regard to the matters at issue*, and for a ruling thereon.

(Emphasis added.)

Given the requirement of a hearing, it necessarily follows that only the Commission can ascertain whether an employer has presented evidence rebutting a Form 21 presumption of disability. *See Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 209, 472 S.E.2d 382, 388 (1996) (Walker, J., concurring) (discussing ways an employer may rebut the presumption of total disability). Unless the presumption is waived by the employee, no change in disability compensation may occur absent the opportunity for a hearing. *Radica*, 113 N.C. App. at 447-48, 439 S.E.2d at 190; *see also*, *Martin*, 113 N.C. App. at 124-25, 437 S.E.2d at 699-700. We note that one such way a waiver might occur is when an employee and employer settle their compensation dispute in a manner consistent with N.C. Gen. Stat. § 97-17, and that settlement is subsequently approved by the Commission. N.C. Gen. Stat. § 97-17.

Once (or if) a hearing occurs, the existence of a Form 21 agreement entitles the employee to rely on the "benefit of [the] presumption that she is totally disabled." *Franklin*, 123 N.C. App. at 205, 472 S.E.2d at 386. The employee need not present evidence at the hearing unless and until the employer "claim[ing] that the plaintiff *is* capable of earning wages . . . come[s] forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is *capable* of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke University Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (emphasis supplied) (emphasis added). Again, *capacity to earn* is the benchmark test of disability, so mere proof of a return to work is insufficient to rebut the Form 21 presumption. *Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190. Necessarily then, the Commission's conclusion that plaintiff "returned to work for

defendant and the presumption of disability ended . . . [t]herefore, plaintiff is not entitled to benefits . . ." cannot stand.

In summary, the presumption of disability inures to the benefit of an employee whenever a disability award is made by the Commission. *Dalton*, 119 N.C. App. at 282, 283, 458 S.E.2d at 256, 257; *Watkins*, 279 N.C. at 137, 181 S.E.2d at 592. A Form 21 agreement has long been regarded by this Court as "constitut[ing] an award by the Commission, enforceable if necessary, by a court decree." *Watkins*, 279 N.C. at 138, 181 S.E.2d at 593; *Dalton*, 119 N.C. App. at 282, 458 S.E.2d at 256; *see also* N.C. Gen. Stat. § 97-82. Such an award is "conclusive and binding as to all questions of fact." N.C. Gen. Stat. § 97-86 (1991). Challenges to an award must thereafter be made pursuant to the processes mandated by the Act.

In this case, defendant made its own determination that a change of condition had occurred, to wit, that plaintiff had returned to work; therefore defendant's obligation to continue disability payments had ceased. Given the precedent directly contradicting this proposition, we remand the issue of plaintiff's disability compensation for rehearing to the Full Commission.

II. Credit for Temporary Total Disability Payments

[2] The Commission's failure to properly apply the presumption of total disability in favor of plaintiff eviscerates its conclusions regarding a credit for monies paid by the employer for "temporary total disability." As we stated above, plaintiff was presumptively due payments for total disability pursuant to the Form 21 agreement up and until the date of a contrary determination by the Commission. In the instant award, the Commission concluded (in Conclusion of Law No. 2) that defendant was due a credit for "all temporary partial disability benefits paid to plaintiff after 6 January 1993."

Apparently, the Commission made this determination based on its Conclusion of Law No. 1. Conclusion of Law No. 1 states that "plaintiff is not entitled to benefits under either G.S. § 97-29 [temporary total disability] or G.S. § 97-30 [temporary partial disability] after 6 January 1993." This proposition is untenable since plaintiff was presumptively due payments for total temporary disability until the Commission held otherwise.

Credits by the Commission for payments made by an employer should be given only if they "were not due and payable when made." N.C. Gen. Stat. § 97-42 (1991 & 1994 Cum. Supp.). Given the

Commission's failure to apply the Form 21 presumption in this case, it was improper for a credit to have been entered. We do not mean to imply that defendant will or will not qualify for a credit once the issues are reheard, only that at this stage of the proceedings no credit should have been given.

III. Penalties

[3] The Full Commission determined that "no basis" existed upon which to assess a penalty against defendant in its Conclusion of Law No. 5. This is also incorrect. N.C. Gen. Stat. § 97-18(e) states: "If any installment of compensation . . . is not paid within 14 days after it becomes due . . . there shall be added to such unpaid installment[s] an amount equal to ten per centum (10%) thereof . . . unless such non-payment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment[s] could not be paid within the period prescribed for the payment."

In this case, defendant voluntarily ceased making payments without the permission of the Commission. On its own, defendant decided it was entitled to completely cease temporary total disability payments to plaintiff. Then defendant decided, again on its own, to resume payments at a level it deemed proper. Even assuming defendant was confused as to the incongruities between I.C. Rule 404 and the existing case law on compensation termination, this does not provide defendant with an excuse. Rule 404(2) itself allows that "[w]hen an employer . . . seeks to terminate or suspend compensation being paid pursuant to N.C. Gen. Stat. § 97-29 . . . the employer or carrier/administrator shall notify the employee and the employee's attorney of record, if any, on a Form 24 rev., Application to Stop Payment of Compensation." No such "Form 24 rev." appears in the record, and the Commission's opinion and award does not mention any receipt of same. Defendant's actions cannot be countenanced, as this is the exact behavior N.C. Gen. Stat. § 97-18 was enacted to prevent. *Foster v. Western-Electric Co.*, 320 N.C. 113, 116, 357 S.E.2d 670, 673 (1987) (prompt payment of compensation required).

For the foregoing reasons, we reverse and remand to the Commission for proceedings in accord with this opinion.

Reversed and Remanded.

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

STATE OF NORTH CAROLINA v. ADRIAN CARLO RHYNE

No. COA95-1133

(Filed 15 October 1996)

Searches and Seizures § 82 (NCI4th)— drug raid—pat down for weapons—totality of circumstances—unreasonable intrusion

The trial court erred in a prosecution for possession with intent to sell and deliver cocaine by denying defendant's motion to suppress cocaine found on his person in a warrantless search where an officer received an anonymous telephone call from a caller who reported that several black males were selling drugs in the breezeway of a building; no further description was given of the men; officers arrived at the building within ten minutes and observed several black men in the upper part of a breezeway and defendant seated on a step in the lowest level of the breezeway; defendant was approached and produced identification showing that he was a resident of the building; the officer asked defendant if he had drugs on him and defendant answered that he did not; the officer asked if he could search defendant and defendant refused; the officer asked if he would allow a dog standing 10 to 15 feet away to check him out; defendant refused, stating that he was afraid of dogs; other officers said that they had found a large amount of money on the other men; the officer asked defendant if he had any weapons on him and defendant said that he did not; the officer decided to return to his car to check for any outstanding warrants for defendant; he frisked defendant before doing this and felt something which he suspected to be rock cocaine; and he reached into defendant's pocket and pulled out a plastic bag containing what appeared to be crack cocaine. The anonymous tip was not specific to defendant; the area was known for drug activity but was defendant's residence; defendant was cooperative when questioned and did not flee the scene; he was wearing a jersey and shorts, neither of which could easily conceal a weapon; when asked if he had a weapon he lifted his shirt to show that he did not; he did not make any sudden or suspicious gestures which would suggest that he had a weapon; and the findings indicate that other officers were nearby whom the arresting officer could have asked to cover him while he went to his patrol car to check for outstanding warrants.

Am Jur 2d, Searches and Seizures §§ 51, 78.

Modern status of rule governing admissibility of evidence obtained by unlawful search and seizure. 50 ALR2d 531.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

Judge MARTIN, Mark D. dissenting.

Appeal by defendant from judgment and commitment entered 27 April 1995 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 June 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Elisha H. Bunting, Jr. and Assistant Attorney General D. Sigsbee Miller, for the State.

Allen W. Boyer for defendant.

LEWIS, Judge.

The sole issue on appeal is whether the trial court erred in denying defendant's motion to suppress evidence obtained in a warrantless search of defendant.

On 19 September 1994, defendant was indicted for possession with intent to sell and deliver cocaine in violation of N.C. Gen. Stat. section 90-95(a)(1) (1990). The case came on for trial at the 24 April 1995 criminal session of superior court. On 1 September 1994, defendant moved to suppress evidence obtained from a search performed by the arresting officer. After making findings of fact and conclusions of law, the trial court denied defendant's motion. Defendant gave notice of appeal. Defendant then pled guilty to the charge as indicted. He was given a suspended sentence of three (3) years and placed on probation. Even though defendant entered a plea of guilty to the charges against him, he preserved his right of appeal pursuant to N.C. Gen. Stat. section 15A-979(b) (1988) from the denial of his motion to suppress the evidence seized in the search.

At the suppression hearing, the State presented evidence showing the following: On 1 July 1994, Officer D. L. Scheppegrell of the Charlotte Police Department received an anonymous telephone call from a caller who reported that several black males were selling drugs in a breezeway of a building located at 3101 Nobles Avenue.

However, the caller gave no further description of the men. Officer Scheppegrell and other officers arrived at the address within ten minutes and observed several black men in the upper part of a breezeway. They also observed defendant who was seated on a step in the lowest level of the breezeway, below where the other men were.

Officer Scheppegrell approached defendant while other officers approached the men in the upper breezeway. Defendant was wearing a Carolina Panthers hat, a jersey, and blue jean shorts. After the officer asked him for identification, defendant produced identification showing that he was a resident of an apartment in 3101 Nobles Avenue. The officer asked defendant if he had any drugs on him; defendant answered that he did not. The officer then asked if he could search defendant, but defendant refused.

The officer also asked defendant if he would allow a dog standing 10 to 15 feet away from him to check him out. A canine officer, who was standing a few feet away with the dog on a leash, explained to defendant that the dog would not bite him. However, defendant refused stating that he was afraid of dogs. While the canine officer was talking to defendant, the other officers told Officer Scheppegrell that they had found a large amount of money on the other men. The officer also asked defendant if he had any weapons, and defendant said that he did not.

Officer Scheppegrell then decided to return to his car to check for any outstanding warrants for defendant. However, before doing this, he frisked defendant for weapons by checking his waistband and by feeling the outside of his pockets. In the right pocket, the officer felt something which he immediately suspected to be cocaine rocks. He reached into the pocket and pulled out a plastic bag containing a substance appearing to be crack cocaine. Defendant was then arrested. A further search revealed a small plastic bag of powder in defendant's left pocket.

Officer Scheppegrell testified that this incident occurred in a high drug trafficking area and that, in his experience, drug suspects often carry weapons. He stated that he did not want to turn his back on defendant before going to his car to check for warrants, without first checking for weapons. He also testified that defendant appeared nervous while he was being questioned. He further testified that, while he was questioning defendant, other officers were in the upper breezeway questioning the other young men. He also stated, that in

his experience with drug dealers, one person would have the money and another would have the drugs.

Defendant's account of the events is similar to that given by Officer Scheppegrell. However, defendant testified, that when asked if he had weapons he said "no" and then pulled up his shirt and turned around to show that he had no guns near his back. He also testified that he did not hear the other officers say that they had found money on the other men.

The trial court made the following findings of fact:

1. On or about July 1, 1994, Officer D. L. Scheppegrell received an anonymous telephone call reporting that there were several black males selling drugs in the breezeway of an apartment complex located at 3101 Nobles Avenue. The anonymous caller provided no description of the black males reportedly involved in the drug transactions.

2. Shortly after receiving the call, Officer Scheppegrell and other police officers went to the address in question. Officer Scheppegrell observed several black males, including the Defendant, in the vicinity of the breezeway. He arrived between 3:00 and 4:00 p.m.

3. On the occasion in question, Officer Scheppegrell had been a police officer in excess of ten years and had received training in identifying controlled substances and had felt and touched cocaine and its derivatives on hundreds of occasions.

4. When he arrived at 3101 Nobles Avenue, he approached a black male and spoke with Adrian C. Rhyne, the Defendant. Mr. Rhyne was sitting in the area of a stairwell between the first and second floors and Officer Scheppegrell asked him for identification, which the Defendant produced.

5. The Defendant lived in the complex involved.

6. While he was talking with the Defendant, Officer Scheppegrell did not observe any money, beeper or weapon on the Defendant. When he spoke with the Defendant, however, the Defendant did appear to be nervous. Defendant was dressed in blue jean shorts and wore a Panthers hat and a Panthers jersey.

7. In his conversation with the officer, the Defendant said he had no drugs. Officer Scheppegrell asked the Defendant if he minded the officer's searching him; and the Defendant said, "Yes," he did

mind. Officer Scheppegrell thereafter asked the Defendant if it would be agreeable for the drug dog to sniff about him for drugs. The Defendant indicated he was afraid of dogs and did not want the dog sniffing him. Officer Scheppegrell asked the Defendant if he had weapons and the Defendant said, "No," and lifted his jersey to show the officer the area around his waistband.

8. Officer Scheppegrell, after talking with the Defendant, decided to return to his patrol car and to determine whether or not there were any outstanding warrants against the Defendant. He did not want to turn his back on the Defendant without searching him, in that the complex in question was across from Boulevard Homes and in an area with a reputation for high drug activity. Officer Scheppegrell felt that individuals involved in drug activities sometimes carry weapons.

9. There were several other police officers in the complex at the time Officer Scheppegrell was speaking with the Defendant and at the time that he made his determination to search the Defendant. Exactly where in relationship to Officer Scheppegrell and the Defendant the other officers were located when the conversation and subsequent search took place cannot be determined from the evidence.

10. Officer Scheppegrell commenced patting the Defendant down and when he touched the outside pockets of the Defendant's pants, he felt something he immediately believed to be crack cocaine. His determination was based on the way crack is typically packaged. He pulled out a plastic bag from the right pocket of the Defendant in which there were 10 rocks of crack. He thereafter placed the Defendant under arrest and found smaller portions of cocaine powder on the Defendant's person.

Based on these findings, the trial court concluded, *inter alia*, that the investigative stop and pat-down were reasonable considering the totality of the circumstances and that defendant's constitutional rights were not violated.

On appeal, defendant asserts that the trial court erred in denying his motion to suppress the seized evidence because it was seized in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution.

If supported by competent evidence, the trial court's findings of fact are binding on appeal. *See State v. Brooks*, 337 N.C. 132, 140-41,

446 S.E.2d 579, 585 (1994). Although defendant assigned error to the sufficiency of evidence to support the court's findings, he has abandoned this issue on appeal by not presenting argument in his brief. *See* N.C.R. App. P. 28(a) (1996). Even so, we conclude that there is competent evidence to support the findings. Our task, then, is to determine whether the findings support the trial court's conclusions of law. *See State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57, *appeal dismissed and disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995).

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. Const. amend. IV. A warrantless search is unconstitutional unless there is probable cause to search and the government demonstrates that the exigencies of the situation made a search without a warrant imperative. *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979) (citing *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1969)).

The State does not contend that the officer had probable cause to search defendant. The issue here is whether, absent probable cause, the officer was justified in searching defendant for weapons. The U.S. Supreme Court has held that a protective pat-down search for weapons may be performed by an officer, even without probable cause, if he has reason to believe, based on objective facts, that he is dealing with an armed and dangerous individual. *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909 (1968). The officer must have acted "upon 'specific and articulable facts' that led him to conclude that [the] defendant was, or was about to be, engaged in criminal activity and that [the] defendant was 'armed and presently dangerous.' " *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (quoting *Terry*, 392 U.S. at 21, 24, 20 L. Ed. 2d at 906, 908). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909.

The State relies on *State v. Wilson*, 112 N.C. App. 777, 437 S.E.2d 387 (1993). In *Wilson*, the officers stopped and searched the defendant after receiving an anonymous tip that several individuals were dealing drugs in the breezeway of an apartment building but gave no description of the alleged dealers. *Id.* at 778, 437 S.E.2d at 387. We upheld the search. *Id.* at 779, 437 S.E.2d at 388.

However, this case is distinguishable from *Wilson*. In *Wilson*, the defendant and the other suspects attempted to flee when the squad car drove into the parking lot. *Id.* Here, the defendant did not flee, but simply remained sitting on the breezeway outside his apartment building and cooperated generally with the officer. Other than being nervous, he exhibited no other behavior that would indicate that he was engaged in criminal activity. In addition, here, unlike *Wilson*, the officer had time to question and observe defendant and to ascertain that he lived in the complex.

Defendant asserts that this case is more akin to *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). In *Fleming*, we followed *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979), and held unconstitutional the stop and frisk of a defendant who was simply standing and walking around an apartment complex in a high drug area at twelve o'clock midnight. *Fleming*, 106 N.C. App. at 170-71, 415 S.E.2d at 785-86.

The facts of this case actually lie somewhere between those in *Wilson* and *Fleming*. Unlike the defendant in *Wilson*, defendant did not flee, and unlike *Fleming*, there was an anonymous tip that several men were dealing drugs in the breezeway in which the defendant was sitting. Unlike either *Wilson* or *Fleming*, the facts here show that the officer was aware that the defendant lived in the building where he was searched.

This case is also distinguishable from *In re Whitley*, 122 N.C. App. 290, 468 S.E.2d 610, *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996), a recent decision in which this Court upheld a similar search. In *Whitley*, officers responded to a report that two black males were selling drugs on Merrick Street in Durham. *Id.* at 292, 468 S.E.2d at 612. Upon arriving at the scene, the officers found two black men in the location indicated by the caller and searched the men. *Id.* In *Whitley*, the caller referred to two black men, whereas here, the caller referred to a group of black men. In addition, in *Whitley*, the officer observed that the defendant's legs "were very tight." *Id.* Here, defendant was not engaged in any suspicious activity or gestures when approached by the officer. Furthermore, the defendant in this case was sitting on the steps outside his apartment; whereas, in *Whitley*, the defendant was standing with another man under a tree near a street. *See id.* at 291, 468 S.E.2d at 611.

In light of the totality of circumstances, we conclude that this patdown search was not justified. The anonymous tip referred simply to

several black men located in the apartment complex breezeway; it was not specific to defendant. Furthermore, although defendant was in an area known for drug activity, this area was also his residence, a fact known to the officer prior to the search. When questioned, defendant was cooperative and did not flee the scene. He was wearing a jersey and shorts neither of which could easily conceal a weapon. In fact, when asked if he had a weapon, defendant lifted his shirt to show that he did not. Defendant also did not make any sudden or suspicious gestures which would suggest that he had a weapon. In addition, the court's findings indicate that other officers were nearby. Officer Scheppegrell could have asked one of these officers to cover him while he went to his patrol car to check for outstanding warrants.

This pat-down search was an unreasonable intrusion upon defendant's Fourth Amendment right to personal security and privacy. The trial court erred in denying defendant's motion to suppress the evidence thereby obtained.

The order denying defendant's motion to suppress is reversed, and the judgment is vacated.

Judge JOHNSON concurs.

Judge MARTIN, Mark D. dissents.

Judge MARTIN, Mark D., Judge, dissenting.

As recently articulated by Judge McGee in *In re Whitley*, 122 N.C. App. 290, 468 S.E.2d 610, *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996), it is well settled " '[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.' " *Id.* at 292, 468 S.E.2d at 612 (*quoting State v. Allen*, 90 N.C. App. 15, 25, 367 S.E.2d 684, 689 (1988)). Put simply, an officer must have reasonable suspicion, based on specific and articulable facts, that an individual is involved in criminal activity before performing a pat down search or *Terry* stop. *State v. Fleming*, 106 N.C. App. 165, 169-170, 415 S.E.2d 782, 785 (1992).

In *Whitley*, the officers received a telephone call stating drug sales were occurring "between two black males on Merrick Street."

Whitley, 122 N.C. App. at 291, 468 S.E.2d at 611. The officers found two black males standing in the alleged location of the drug sales. *Id.* at 292, 468 S.E.2d at 612. This Court upheld the subsequent *Terry* stop because "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." *Id.*

Likewise, in the present case, Officer Scheppegrell was dispatched to 3101 Nobles Avenue based on an anonymous telephone tip that several black men were selling drugs in the breezeway. At the scene, Officer Scheppegrell, and his fellow officers, noticed three black males, including the defendant, in the breezeway. Officer Scheppegrell approached defendant, who was sitting alone in the stairwell between the first and second floors, while the other officers went upstairs to question the remaining two men.

At Officer Scheppegrell's request, defendant produced identification indicating he was a resident of the building. Nevertheless, defendant appeared nervous. Officer Scheppegrell testified the other officers informed him the two men in the upper part of the breezeway had a large amount of money, but no drugs. In his experience with drug dealers, Officer Scheppegrell has found one person often holds the money while another person carries the drugs.

Before returning to his car to check for outstanding warrants, Officer Scheppegrell asked defendant if he was carrying any weapons. Defendant responded in the negative and pulled up his shirt to show Officer Scheppegrell his waistband. Officer Scheppegrell proceeded to pat down defendant because, in his experience, drug dealers often carry weapons, some of which are very small and easy to conceal. During this search, Officer Scheppegrell discovered what he readily identified as cocaine.

When considered through "the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training," *Whitley*, 122 N.C. App. at 292, 468 S.E.2d at 612 (*quoting Allen*, 90 N.C. App. at 25, 367 S.E.2d at 689), the telephone call corroborated by observations at the scene, defendant's nervousness, and the discovery of a large amount of money on the two other men in the breezeway are articulable facts which establish a reasonable suspicion defendant "might be armed, dangerous and involved in criminal activ-

ity and justified the officer's search of [defendant]." *See Whitley*, 122 N.C. App. at 292, 468 S.E.2d at 612. Further, when, as here, an officer is engaged in a lawful search for weapons and he discovers an item which he can immediately identify as contraband, it is lawful for the officer to seize such item. *State v. Wilson*, 112 N.C. App. 777, 780, 437 S.E.2d 387, 388 (1993).

Because there is no legal, much less constitutional, distinction between *Whitley* and the present case, this Court is required to affirm the trial court's denial of defendant's motion to suppress. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989).

Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA v. ROBERT L. DAVIS

No. COA96-12

(Filed 15 October 1996)

1. **Evidence and Witnesses § 1252 (NCI4th)— confession— right to counsel**

The trial court did not err in a prosecution for rape, burglary, and assault by denying defendant's motion to suppress his confession where, before being questioned, defendant was apprised of his *Miranda* rights, including his right to have counsel present during questioning; defendant clearly understood his rights and indicated that he did not wish to have counsel present; after making a telephone call, defendant asked if he needed a lawyer and was told that it was his decision to make; and defendant voluntarily continued answering questions, ultimately confessing to the crime. After defendant was advised that the decision to have an attorney present was his to make, nothing in his words or actions indicated his unwillingness to answer further questions in the absence of counsel, nor could be interpreted as a request for counsel.

Am Jur 2d, Evidence §§ 633, 713.

Admissibility of pretrial confession in criminal case. 4 L. Ed. 2d 1833.

2. Criminal Law § 1291 (NCI4th Rev.)— sentencing—mitigating factor—acknowledgement of wrongdoing—motion to suppress confession—acknowledgement thereby repudiated

The trial court did not err when sentencing defendant for rape, burglary, and assault by failing to find as a mitigating factor that defendant voluntarily acknowledged his wrongdoing where defendant moved to suppress his confession and thereby repudiated it.

Am Jur 2d, Criminal Law § 527; Trial §§ 572, 841, 1760.

3. Criminal Law §§ 1158, 1159 (NCI4th Rev.)— sentencing—aggravating factors—victim sleeping—husband away

The trial court did not err when sentencing defendant to a greater than presumptive term for second-degree rape and first-degree burglary by finding the nonstatutory aggravating factors that defendant knew that the victim's husband was away on military duty and that the victim was asleep in her bed just prior to the attack.

Am Jur 2d, Trial §§ 841, 1760.

Appeal by defendant from judgment entered 5 May 1995 by Judge Jay D. Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 9 September 1996.

Michael F. Easley, Attorney General, by Jill Ledford Cheek, Assistant Attorney General, for the State.

Malcolm Ray Hunter Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

WYNN, Judge.

On the night of 16 April 1993, the prosecuting witness, hereinafter referred to as Ms. Doe because the identity of the victim is not an issue in this case, was attacked and raped in the bedroom of her home in Onslow County, North Carolina. The evidence in the record on appeal tends to show that the defendant, who was living next door, approached Ms. Doe at her home several days before the rape and introduced himself. During the course of their conversation defendant ascertained that Ms. Doe was at home alone and her husband,

who was deployed overseas with a branch of the military service, was due back the following Friday. While Ms. Doe was sleeping the night before her husband was due home, a man dressed in black, wearing a ski mask and gloves broke into the house and assaulted and raped her. The next day, defendant was taken to the police station for questioning. Detective Sergeant John Matthews of the Onslow County Sheriff's Department advised defendant of his *Miranda* rights, and defendant declined to have an attorney present. When Detective Joseph Graham arrived, he confirmed that defendant still understood his rights. Before questioning began, defendant requested and was allowed to make a phone call. Following the phone call, defendant told Detective Graham that "somebody at his office told him he needed a lawyer." Detective Graham responded, "Well, that's your decision." Defendant then asked, "Do I need a lawyer?" and Detective Graham replied: "That is your decision; I can't make that decision for you." Defendant did not respond, and followed Detective Graham into an office to be questioned.

The questioning was interrupted by the arrival of a friend and co-worker who was allowed to meet with defendant alone, after which the questioning resumed. Defendant initially denied any misconduct, stating that he only remembered certain portions of the night on which the rape occurred. After further questioning, defendant confessed to the rape and was placed under arrest.

At trial, the trial judge denied defendant's motion to suppress his confession. A jury found defendant guilty of second degree rape, first degree burglary, assault on a female, and assault inflicting serious bodily injury. After making findings of aggravating and mitigating circumstances, the trial judge sentenced defendant beyond the presumptive sentence to consecutive terms of imprisonment of 30 years for second degree rape and life for first degree burglary. Defendant appeals from the judgment and sentence entered against him.

The issues presented on appeal are whether the trial court erred in (I) denying the defendant's motion to suppress his pretrial confession, (II) failing to find as a mitigating circumstance that the defendant voluntarily acknowledged his wrongdoing, and (III) finding two non-statutory aggravating factors. We find no error.

I.

[1] Defendant first contends that his confession was taken in violation of both the state and federal constitutions, and therefore the trial

court erroneously denied his motion to suppress. More specifically, defendant alleges his question to Detective Graham, "Do I need a lawyer?" was an equivocal invocation of his right to have counsel present during interrogation. He argues that since police officers continued to question him after he had invoked his right to counsel, in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution, his confession must be deemed involuntary and inadmissible. We disagree.

Prior to ruling on defendant's motion to suppress, the trial court held a *voir dire* hearing. "The trial court's findings of fact following a *voir dire* hearing on the voluntariness of a confession are conclusive on appeal if they are supported by competent evidence in the record." *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986). In the case before us the trial court made the following relevant findings of fact:

> The defendant was orally advised of his constitutional rights otherwise known as Miranda Rights by Detective Matthews. . . . The defendant verbally answered that he understood his rights. Detective Matthews asked the defendant verbally "do you understand all these rights?" The defendant verbally answered "yes". And then the defendant wrote in the words "yes" on the form after that "yes" and put his initials above the word "yes" indicating that he understood all of his rights. Detective Matthews asked the defendant "do you want a lawyer now?" At first the defendant answered by shaking his head in a negative manner.
>
> Detective Matthews told the defendant the defendant would have to verbalize the answer at which time the defendant said "no" and then the defendant wrote "no" in the space provided in the form and put his initials "R.D." over the answer; otherwise he'd initially put his "R.D." over his answer "yes" indicating he understood all of his rights. The defendant then signed his name "Robert L. Davis" to the interview sheet.
>
> 6. After completing the interview sheet, the defendant remained in the Detective Division office in the presence of Detective Matthews waiting for the arrival of Detective Graham. Even though the defendant was free to walk around the room, he was always under surveillance by Detective Matthews. The defendant was "in custody" for Miranda purposes beginning from the time that he came in the presence of Detective Matthews.

7. Detective Graham arrived at the Sheriff's office Detective Division at approximately 9:45 a.m. and was told by Detective Matthews that the defendant had been advised of his Miranda warnings. Detective Graham asked the defendant if he still understood his rights, and the defendant stated that he did. Detective Graham and Lieutenant O'Malley took the defendant into Lieutenant O'Malley's office. The defendant request [sic] to make a phone call, which was allowed. The defendant called . . . a co-worker with the defendant at [his place of employment] and a person with whom he had been dating for nine months. The defendant told [his co-worker] that he did not need a lawyer. [The co-worker] advised him to get a lawyer.

After the phone conversation, the defendant asked Sergeant Graham if he, (Sergeant Graham), thought that the defendant needed a lawyer. Sergeant Graham told the defendant that that was a decision the defendant would have [sic] make on his own. The defendant never again mentioned anything about a lawyer. Sergeant Graham did not ask any additional questions to the defendant to clarify what the defendant meant by asking the question if Sergeant Graham thought whether the defendant needed a lawyer. The defendant was not again advised of his Miranda Rights. The statement of the defendant to Sergeant Graham was an ambiguous or equivocal reference to an attorney. It was not a clear assertion of the right to counsel. The defendant did not actually request an attorney.

8. Sergeant Graham and Lieutenant O'Malley questioned the defendant for approximately ten minutes in Lieutenant O'Malley's office. The defendant was not handcuffed or restrained in any way. The defendant denied having anything to do with the rape.

Sheriff Brown after this ten minute period came to the door of the office and was told that the defendant had been advised of his rights. The defendant was taken to the Sheriff's office where his employer . . . and his co-worker and friend . . . were waiting.

The defendant was allowed by the officers to talk alone with [his friend] for ten or fifteen minutes inside the Sheriff's office.

The defendant was then questioned by Sergeant Graham and Sheriff Brown with Sheriff Brown doing most of the interrogating. The defendant's friend and co-worker . . . was present. This

> interrogation went on for approximately twenty to thirty minutes. The defendant made statements to the officers that he remembered right up to the point of breaking into the house and right after the incident. Sheriff Brown, among other comments that he made to the defendant, stated to the defendant that memory does not come and go. That if a person remembers some things they should remember them all. The defendant paused and then he gave his confession. The confession essentially was that he was jogging. That he stopped in front of the victim's house. That he went behind her house and raised her rear window. That he went into her house, kicked down the bedroom door. There was a struggle; that he may have hit the victim. That he raped her and then he went home and had trouble sleeping. That it was like a dream and that the defendant could not believe he did anything like that.
>
> After the confession, the defendant placed his face in his hands and he and [his friend] were both crying, allowed by the officers to console one another. The defendant was then arrested, defendant was then placed under arrest and taken away.
>
> 9. At the time of the confession, the defendant was not handcuffed and was under no restraint. The defendant had been questioned a total of 30 to 40 minutes first by Sergeant Graham for approximately ten minutes and then by Sergeant Graham and Sheriff Brown. There were no promises, offers of reward or inducement by the law enforcement officers for the defendant to make a statement. There were no threats, suggestion of violence or show of violence by any law enforcement officer to persuade or induce the defendant to make a statement. There was no indication that the defendant had any desire to end the questioning. The defendant was in control of his mental faculties on April 16th, 1993. The defendant was 24 years old.

After examining the record, we find competent evidence to support the foregoing findings of fact.

Based on the findings of fact, the trial court concluded as a matter of law that "[t]he defendant was in full understanding of his constitutional right to remain silent and his right to counsel and all other rights and he freely, voluntarily, and intelligently and voluntarily waived each of these rights and thereupon made the statement." The trial court also concluded that:

> The defendant's question to Sergeant Graham as to whether he (Sergeant Graham) thought the defendant needed a lawyer was not an actual or clear assertion of the right to counsel. It was not a request for counsel. It was an ambiguous or equivocal statement that did not preclude further questioning by the officers.

The trial court's conclusions of law are fully reviewable on appeal. *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993), *cert. denied*, 129 L. Ed. 2d 865 (1994). In determining the appropriateness of the trial court's conclusion that the defendant's confession was voluntary and admissible, we note that "[t]here are no 'magic words' which must be uttered in order to invoke one's right to counsel. . . . In deciding whether a person has invoked her right to counsel, therefore, a court must look not only at the words spoken, but the context in which they are spoken as well." *State v. Torres*, 330 N.C. 517, 528, 412 S.E.2d 20, 26 (1992).

The record in the case before us indicates that before being questioned, the defendant was appraised of his *Miranda* rights, including his right to have counsel present during questioning; that he clearly understood his rights; and that he indicated he did not wish to have counsel present. This was evidenced by his responses, initials, and signature on the interview sheet. After making a phone call, the defendant asked if he needed a lawyer and was told that it was his decision to make. Thereafter, defendant voluntarily continued answering questions, ultimately confessing to the crime. After defendant was advised that the decision to have an attorney present was his to make, nothing in the defendant's words or actions indicated his unwillingness to answer further questions in the absence of counsel, nor could be interpreted as a request for counsel. Thus, under the facts of this case, and considering all the circumstances, we hold that the defendant did not invoke his right to counsel. *See Barber*, 335 N.C. 120, 436 S.E.2d 106. Accordingly, we affirm the trial court's denial of defendant's motion to suppress his statement.

II.

[2] Defendant next contends that the trial court erred by failing to find as a mitigating circumstance that the defendant voluntarily acknowledged his wrongdoing. We find this argument without merit.

The Supreme Court of North Carolina has clearly stated the rule as to whether a defendant may use evidence that he voluntarily

acknowledged wrongdoing as a mitigating circumstance after he moves to suppress the confession:

> In *State v. Hayes*, this Court held that a defendant could not use a confession to prove the mitigating circumstance after he had repudiated the confession. In *State v. Robbins*, we said, "[D]efendant made a motion to suppress these statements. This Court has held that if a defendant repudiates his incriminatory statement, he is not entitled to a finding of this mitigating circumstance." We hold that *when a defendant moves to suppress a confession, he repudiates it and is not entitled to use evidence of the confession to prove this mitigating circumstance.*

State v. Smith, 321 N.C. 290, 362 S.E.2d 159 (1987) (emphasis added) (citations omitted).

The defendant in this case moved to suppress his confession and has thereby repudiated it; accordingly, that repudiated confession cannot be used as the basis of a mitigating circumstance. Therefore, we uphold the trial court's refusal to find as a mitigating circumstance that defendant voluntarily acknowledged wrongdoing.

III.

[3] Defendant lastly contends that the trial court erred by finding two non-statutory aggravating factors. We disagree.

In addition to finding the statutory factor that defendant has applicable prior convictions, the trial judge sentenced the defendant to a term beyond the presumptive sentence for the charges of second degree rape and first degree burglary based on the following non-statutory aggravating factors:

> 1. The victim's husband was away on miltary [sic] duties and the defendant was specifically aware of this vulnerability and proceeded with the commission of this offense as a result of this knowledge.
>
> 2. The victim was especially vulnerable [in] that she was asleep in her bed just prior to the attack.

Defendant questions the propriety of these non-statutory factors as not authorized under N.C. Gen. Stat. § 15A-1340.4 (1988). The trial court is not limited to a consideration of statutory factors only. Non-statutory aggravating factors are permitted so long as they are "rea-

sonably related to the purposes of sentencing." N.C.G.S. § 15A-1340.4. Defendant alleges that the non-statutory factors found by the trial judge do not comport with the primary purposes of sentencing set out in N.C. Gen. Stat. § 15A-1340.3 (1988).

A. Second Degree Rape

In the context of second degree rape, this Court addressed both of the non-statutory aggravating factors at issue in this case in *State v. Davy*, 100 N.C. App. 551, 397 S.E.2d 634, *disc. review denied and appeal dismissed*, 327 N.C. 638, 398 S.E.2d 871 (1990). In *Davy*, the defendant raped the victim after he broke into the victim's house while she was asleep, knowing that the victim's husband was away on military duty. *Id.* Among other aggravating factors, the trial court found that "[t]he victim was particularly and especially vulnerable in that she was asleep," and "[h]er husband was away on military duties and that the defendant was specifically aware of this vulnerability and made a calculative decision to proceed with the commission of this offense." *Id.* at 559-60, 397 S.E.2d at 638-39. This Court addressed the propriety of each factor in turn and upheld both aggravating factors. *Id.* In that case, we said: "[T]he trial court properly aggravated the defendant's sentence because the victim was asleep and was therefore 'impeded from fleeing or fending off the attack.' " *Id.* at 559, 397 S.E.2d at 638 (citation omitted). We also found that "the trial court properly aggravated the defendant's sentence based upon a finding that the defendant knew that the victim's husband was away on military duty and proceeded to target her because of this knowledge." *Id.* at 560, 397 S.E.2d at 639.

Similarly, in the present case, the defendant raped the victim after breaking into her house while she was sleeping and knowing that the victim was alone because her husband was away on military duty. As in *Davy*, we find that the trial court properly aggravated the defendant's sentence based upon both of the non-statutory aggravating factors at issue.

B. First Degree Burglary

In the context of a first degree burglary charge, the Supreme Court of North Carolina has considered the non-statutory aggravating factors at issue.

In *State v. Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991), the trial court aggravated the defendant's sentence on the charges of first

degree burglary and robbery by finding that "defendant took advantage of the victims being helpless and defenseless." *Id.* at 494, 402 S.E.2d at 395. The State contended and the Court agreed that "a person who is attacked while asleep is in a more vunerable [sic] position than one who is conscious of his surroundings." *Id.* at 495, 402 S.E.2d at 395. In upholding the use of this aggravating factor, the Court overruled *State v. Underwood*, 84 N.C. App. 408, 352 S.E.2d 898 (1987), which had held that "the fact that the victim was asleep when defendant committed an assault with a deadly weapon inflicting serious injury was not a proper aggravating factor because the victim was in no worse position than any other unsuspecting victim." *Thompson*, 328 N.C. at 494, 402 S.E.2d at 395.

Moreover, in *State v. Taylor*, 322 N.C. 280, 367 S.E.2d 664 (1988), our Supreme Court upheld the trial court's finding of the non-statutory aggravating factor for defendant's burglary conviction that defendant "had inside information, knowing when that lady was alone in a rural area and took advantage of it with the keys." *Id.* at 286, 367 S.E.2d at 668. In *Taylor*, the defendant had talked with the victim earlier in the day and ascertained that she would be alone because her daughter would not be at home that night. *Id.* at 282, 367 S.E.2d at 665. In upholding the use of this aggravating factor, the Court noted:

> Here, the trial court aggravated defendant's sentence on the basis of defendant's use of information gained as a result of his inquiry to determine whether the victim would be alone and defendant's use of keys surreptitiously copied while they were entrusted to his wife. It is certainly reasonable to conclude that this is the type of behavior from which the public should be protected and from which possible future offenders should be deterred. Thus, the trial court's finding of the nonstatutory aggravating factor in question was clearly related to the purposes of sentencing.

Id. at 287, 367 S.E.2d at 668.

In the case before us, the defendant committed the burglary by breaking into the victim's house while she was asleep and after having ascertained that she would be in the house alone that night. Following the reasoning of the Supreme Court in *Thompson* and *Taylor*, we find that the trial court properly aggravated the defendant's sentence on the burglary charge based on the non-statutory factors at issue here.

For the foregoing reasons, we conclude that the defendant had a fair trial, free of prejudicial error.

No error.

Judges JOHNSON and LEWIS concur.

JAMES E. HENDERSON AND WIFE, GLENDA J. HENDERSON, PLAINTIFF-APPELLEES v. UNITED STATES FIDELITY & GUARANTY COMPANY, GLENDA LINTON AND GREAT AMERICAN INSURANCE COMPANY, DEFENDANT-APPELLANTS

No. COA95-1206

(Filed 15 October 1996)

1. Insurance § 895 (NCI4th)— indemnity policy for builder—sale of residence—unfair practice—common law definition

The trial court erred by granting partial summary judgment for plaintiffs and should have granted summary judgment for defendants where plaintiffs brought an action against a builder which arose from the sale of a residence in a drainage area subject to severe flooding; a jury found that the builder had engaged in unfair and deceptive practices and awarded damages; the trial court trebled the jury's award for unfair and deceptive practices; plaintiffs brought this action alleging that defendant insurance companies had issued policies agreeing to indemnify the builder and that they were third party beneficiaries; defendants asserted that the policies provide no coverage; and the trial court determined that coverage exists under the advertising injury coverage of the USF&G policy and the advertising liability coverage of the Great American Policy. If coverage exists under these provisions of the policies, it exists only if the builder's acts constituted unfair competition, which is not defined in either policy. The statutory definition of unfair competition cannot be equated with the common law definition, and the term "unfair competition" appears in both policies alongside a host of readily identifiable common law torts. Given the context, it is reasonable to construe the term as a reference to the common law tort of unfair competition. The builder's actions do not parallel any of the definitions of common law unfair competition and neither

the advertising liability nor the advertising injury provisions provide coverage.

Am Jur 2d, Insurance §§ 703 et seq.

2. Insurance § 896 (NCI4th)— indemnity—unfair practice in sale of residence—not an occurrence

The trial court did not err by granting partial summary judgment for defendants on the issue of whether their insurance policies provide coverage where plaintiffs brought an action against a builder which arose from the sale of a residence in a drainage area subject to severe flooding; a jury found that the builder had engaged in unfair and deceptive practices and awarded damages; plaintiffs brought this action alleging that defendant insurance companies had issued policies agreeing to indemnify the builder and that they were third party beneficiaries; defendants asserted that the policies provide no coverage; and the trial court determined that no coverage exists under the property damage, bodily injury, and personal injury provisions of either policy. Both policies refer to injury or damage caused by an "occurrence"; however, if an intentional act is either intended to cause injury or substantially certain to result in injury, it is not an occurrence and no coverage is provided. The builder's purposeful and intentional acts here were so substantially certain to cause injury and damage as to infer an intent to injure as a matter of law. Finally, although the USF&G policy also provided coverage for personal injury, the jury in the underlying action did not find that the insured had committed any of the acts named in the policy definition of "personal injury."

Am Jur 2d, Insurance §§ 703 et seq.

Event triggering liability insurance coverage as occurring within period of time covered by liability insurance policy where injury or damage is delayed—modern cases. 14 ALR5th 695.

Appeal by defendants from judgment entered 28 July 1995 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 21 August 1996.

McMillan, Smith & Plyler, by James M. Kimzey and Katherine E. Jean, for plaintiff-appellees.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, for defendant-appellant US Fidelity & Guaranty Company.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey and G. Lawrence Reeves, Jr., for defendant-appellant Great American Insurance Company.

MARTIN, John C., Judge.

In September 1989, plaintiffs brought a civil action against Clifton Hicks Builder, Inc., ("Hicks") and others, alleging multiple claims for relief, including claims for negligence, breach of implied warranty, and unfair and deceptive practices in violation of G.S. § 75-1.1 *et seq.* The action arose out of a real estate transaction in which plaintiffs purchased from Hicks a residence situated in a drainage area subject to severe flooding. At the trial of the case in March 1993, the jury was unable to reach a verdict as to the issues involving negligence and breach of warranty, but found that Hicks had engaged in unfair and deceptive practices as follows: (1) Hicks falsely represented to the Hendersons that they would not have any water problems on Lot 82 (the lot the Hendersons purchased from Hicks); (2) Hicks concealed from the Hendersons the existence of a surface water flooding problem on Lot 82; and (3) Hicks concealed from the Hendersons the existence and location of a drainage grate and piping system which he had installed on Lots 83 and 84, and which piped water through Lot 82. The jury awarded damages in the amount of $500,000. The trial court declared a mistrial as to the negligence and breach of warranty issues and trebled the jury's award for unfair and deceptive practices pursuant to G.S. § 75-16.1. After applying a credit for a settlement which plaintiffs had reached with parties other than Hicks, the trial court entered judgment for plaintiff against Hicks in the amount of $1,375,000, plus costs and attorneys' fees. Hicks appealed and this Court found no error. *Henderson v. Clifton Hicks Builder, Inc.*, 117 N.C. App. 731, 453 S.E.2d 877, (unpublished), *disc. review denied*, 340 N.C. 112, 456 S.E.2d 314 (1995).

Plaintiffs also brought the present action alleging, *inter alia*, that defendant insurance companies had issued policies of insurance agreeing to indemnify Hicks for the damages and costs awarded plaintiffs in the underlying action. Plaintiffs alleged they are entitled, as third party beneficiaries under the insurance policies, to recover from defendant insurance companies the amount of the judgment, costs and attorneys' fees awarded them against Hicks.

The insurance policies at issue are (1) a comprehensive general liability policy issued by United States Fidelity & Guaranty

Company (USF&G) with limits of $1,000,000 per occurrence, and (2) an excess "catastrophe liability policy" issued by Great American Insurance Company ("Great American") with limits of $1,000,000 per occurrence. The USF&G policy provides coverage for "bodily injury," "property damage," "personal injury" and "advertising injury"; the policy issued by Great American provides excess insurance coverage for "property damage," "personal injury" and "advertising liability." In their answers, both USF&G and Great American asserted, based on definitions and exclusions contained in their respective policies, that the policies provide no coverage for Hicks' liability to plaintiffs.

Plaintiffs moved for summary judgment as to both defendants on the issue of coverage. The trial court granted partial summary judgment for plaintiffs, determining that coverage exists for plaintiffs' damages, costs, attorneys' fees, and interest under the "advertising injury" coverage of the USF&G policy and the "advertising liability" coverage of the Great American policy. The trial court also determined that no coverage exists under the "property damage," "bodily injury," and "personal injury" provisions of either policy. Both USF&G and Great American appeal.

I.

[1] By their assignments of error, defendants assert the trial court erred in determining that they provide any coverage for the payment of damages awarded plaintiffs against Hicks in the underlying lawsuit. They specifically argue that the "advertising injury" and "advertising liability" provisions of their respective policies afford no coverage for Hicks' liability. We agree.

The rules for determining the meaning of words used in an insurance policy are well established; where the words used are ambiguous or their meaning is uncertain, they must be construed in favor of the insured or beneficiary. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). Where non-technical words are not defined, they "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.* at 354, 172 S.E.2d at 522. Those provisions which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction; exclusionary provisions are not favored and, if ambiguous, will be construed against the insurer and in favor of the insured. *State*

Capital Ins. Co. v. Nationwide Mutual Ins. Co., 318 N.C. 534, 350 S.E.2d 66 (1986). Where, however, no ambiguity exists, the court may not rewrite the contract and find coverage where none was contracted for. *Trust Co.*, 276 N.C. 348, 172 S.E.2d 518.

The USF&G policy provides coverage for "advertising injury" as follows:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the named insured's business, within the policy territory, ...

The policy defines an "advertising injury" as

> injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, *unfair competition*, or infringement of copyright, title or slogan (emphasis added).

The Great American policy provides coverage for damages which the insured is legally obligated to pay because of "advertising liability." The policy defines an "advertising liability" as

> liability arising out of the named insured's advertising activities for libel, slander or defamation of character; invasion of rights of privacy; infringement of copyright, title or slogan; and piracy or *unfair competition* or idea misappropriation committed or alleged to have been committed during the policy period (emphasis added).

All parties seem to agree that if coverage exists under the "advertising injury" and "advertising liability" provisions of the USF&G and Great American policies, it exists only if Hicks' acts constituted "unfair competition." Plaintiffs contend coverage exists because the acts committed by Hicks were found by the trial court in the underlying action to have been "unfair or deceptive practices" in violation of G.S. § 75-1.1 *et seq.*

Neither policy defines "unfair competition." Thus, the issue is whether an insured's civil liability for violating North Carolina's unfair and deceptive practices statutes constitutes "unfair competition" as that term is used in defining "advertising injury" and "advertising liability" in the policies. Although the issue is one of first

impression in North Carolina, a majority of courts of other jurisdictions which have considered the issue have concluded that the phrase "unfair competition" means those claims which constitute unfair competition under the common law and does not include claims arising under statutory unfair trade or business practices acts. *See Graham Resources, Inc. v. Lexington Insurance Co.*, 625 So.2d 716 (La. App. 1 Cir., 1993), *cert. denied*, 631 So.2d 1164 (La. 1994) (misrepresentations in advertising materials, held no coverage under advertising injury); *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 833 P.2d 545, 10 Cal. Rptr.2d 538 (1992) (misrepresentations to customers, held no coverage under advertising injury); *Curtis Universal v. Sheboygan Emergency Medical Services, Inc.*, 844 F.Supp. 492 (E.D. Wis. 1994) (held no coverage under advertising injury).

In *Bank of the West*, the California Court of Appeals noted:

> The common law tort of unfair competition is generally thought to be synonymous with the act of "passing off" one's goods as those of another. The tort developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection. According to some authorities, the tort also includes acts analogous to "passing off," such as the sale of confusingly similar products, by which a person exploits a competitor's reputation in the market.
>
> Expansion of legal remedies against deceptive business practices occurred not so much through the common law as through the enactment of statutes . . . .

Bank of the West at 1263, 833 P.2d at 551, 10 Cal. Rptr.2d at 544. The primary purpose of these statutes was to extend to the consuming public the protection once afforded only to business competitors through the common law tort of unfair competition, which required a showing of competitive injury and hence was not an effective remedy for consumers. On the other hand, statutory unfair competition extends to all unfair and deceptive practices. For this reason, the statutory definition of "unfair competition" cannot be equated with the common law definition. *Id.*

The terms of an insurance policy cannot be read in isolation but "must be construed in the context of [the] instrument as a whole." *Nationwide Mut. Ins. Co. v. Dynasty Solar, Inc.*, 753 F. Supp. 853,

856 (N.D. Cal. 1990) (quoting *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 718 P.2d 920 (1986)). The term "unfair competition" appears in both policies alongside a host of readily identifiable common law torts, including libel, slander, defamation and piracy. These named torts describe legal rights at common law among business rivals, not statutory legal rights between consumers and businesses. The Court in *Curtis Universal*, 844 F. Supp. at 501-02, found that the placement of the term within a list of specific common law torts negates a definition of the term that would include statutory claims. Given the context in which "unfair competition" appears in the policies at issue here, it is reasonable to construe the term as a reference to the common law tort of unfair competition, long recognized in North Carolina. *See Extract Co. v. Ray*, 221 N.C. 269, 20 S.E.2d 59 (1942) (unfair competition includes a party advertising that his products are identical with those of a competitor, if his statements are untrue, and it includes taking advantage of the good will and business reputation of a competitor by unfair means); *Steak House v. Staley*, 263 N.C. 199, 139 S.E.2d 185 (1964) (unfair competition amounts to a person selling goods as the goods of another or doing business as the business of another); *Foods Corp. v. Tuesday's*, 29 N.C. App. 519, 225 S.E.2d 122, *disc. review denied*, 290 N.C. 660, 228 S.E.2d 451 (1976) (palming off one's goods as those of another is unfair competition). Hicks' actions do not parallel any of the definitions of common law unfair competition. Accordingly, we hold that the term "unfair competition" as contained in the "advertising injury" and "advertising liability" coverages of the USF&G and Great American policies does not include statutory unfair and deceptive practices prohibited by G.S. § 75-1.1, *et seq.* Thus, neither the "advertising injury" coverage of the USF&G policy nor the "advertising liability" coverage of the Great American excess policy affords liability insurance coverage to Hicks for the damages awarded plaintiffs in the underlying suit.

II.

[2] By cross-assignments of error pursuant to N.C.R. App. P. 10(d), plaintiffs contend the trial court erred in concluding that neither the USF&G policy nor the Great American policy provide coverage to Hicks under the "bodily injury," "property damage," or "personal injury" provisions of the respective policies, for the damages awarded them in the underlying suit. We disagree.

The USF&G policy provides coverage on behalf of the insured for

all sums which the **insured** shall become legally obligated to pay as damages because of

A. **bodily injury** or

B. **property damage**

to which this insurance applies, caused by an occurrence, ...

"Occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the insured . . . ." Great American's umbrella policy provides similar coverage for personal injury or property damage "caused by or arising out of an occurrence happening anywhere." "Occurrence" is defined as "an event or happening, including continuous or repeated exposure to conditions, which results in personal injury, property damage or advertising liability neither expected nor intended from the standpoint of the insured."

The dispositive issue with regard to this coverage is whether plaintiffs' damages arose out of an "occurrence"; if the plaintiffs' injuries were either expected or intended by Hicks, no coverage is provided by either policy.

In *North Carolina Farm Bureau Mut. Ins. Co. v. Stox,* 330 N.C. 697, 700, 412 S.E.2d 318, 320-21 (1992), the Supreme Court interpreted a policy which, similarly to the policies at issue here, defined "occurrence" as "an accident, including exposure to conditions, which results during the policy period in: (a) bodily injury; or (b) property damage," and excluded coverage for bodily injury or property damage "which is expected or intended by the insured . . . ." The evidence showed that defendant-insured intentionally pushed a fellow employee, who fell and was injured. The Court held that the policy provided coverage because the act of the insured was not such that an intent to injure could be inferred from the act and the insurer had not shown that the injury itself was intended. *Id.* at 706, 412 S.E.2d at 324. Under *Stox,* then, injury or damage caused by an intentional act may constitute an occurrence, as defined by the instant policies, unless the intentional act is either (1) intended to cause injury or damage, or (2) substantially certain to cause injury or damage. Put in other words, if an intentional act is either intended to cause injury or substantially certain to result in injury, it is not an occurrence under the policy definitions recited above, and no coverage is provided.

In *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983), the insured argued with his wife, fired shots into the car in which she and a friend were riding, and killed the friend. The insured stipulated that he intended to shoot his wife and shot the friend by mistake. The policy excluded coverage for injuries which were "expected or intended" by the insured. This Court found that the injury was intentional and denied coverage, on the basis that the insured should have anticipated the likelihood that one of the bullets would hit the friend. In *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 464 S.E.2d 723 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996), we held that sexual harassment is substantially certain to cause injury and therefore "intent to injure may be inferred as a matter of law from the intent to act for the purpose of determining coverage under an insurance policy."

The trial court in the underlying action determined that Hicks' unfair and deceptive practices were intentional acts. Intent to injure may be inferred as a matter of law from the intent to act, *Russ*, 121 N.C. App. 185, 464 S.E.2d 723, and such is a reasonable inference in this case. Flooding problems had already occurred on Lot 82; Hicks intentionally misrepresented and omitted information regarding these problems, even after inquiry by plaintiffs. Notwithstanding Hicks' assertions that he did not intend or anticipate his misrepresentations to injure or damage plaintiffs, such purposeful and intentional acts were so substantially certain to cause injury and damage as to infer an intent to injure as a matter of law. Accordingly, we hold that any bodily injury or property damage sustained by plaintiff as a result of Hicks' intentional conduct was not caused by an occurrence within the insuring agreements contained in the USF&G and Great American policies. Thus, no coverage is provided for "bodily injury" or "property damage" under USF&G's insurance policy, nor is there coverage for "personal injury" or "property damage" under Great American's excess policy.

The USF&G policy also provides coverage for "personal injury" which is defined in the policy as:

> injury arising out of one or more of the following offenses committed during the policy period:
>
> (1) false arrest, detention, imprisonment, or malicious prosecution;
>
> (2) wrongful entry or eviction or other invasion of the right of private occupancy;

(3) a publication or utterance

(a) of a libel or slander of other defamatory or disparaging material, or

(b) in violation of an individual's right of privacy;

except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.

The jury in the underlying action did not find that the insured had committed any of the acts named in the policy definition of "personal injury." Therefore, there is no coverage under USF&G's policy for "personal injury."

In view of our holding that no coverage is provided by the insuring agreements of the policies, it is unnecessary to consider the arguments of the parties with respect to the applicability of various policy exclusions. The judgment of the trial court is reversed and this matter is remanded for the entry of summary judgment in favor of defendants USF&G and Great American.

Reversed and remanded.

Chief Judge ARNOLD and Judge SMITH concur.

TOYA JORDAN, EMPLOYEE, PLAINTIFF v. CENTRAL PIEDMONT COMMUNITY COLLEGE, EMPLOYER; NORTH CAROLINA DEPARTMENT OF COMMUNITY COLLEGES, SELF-INSURER; DEFENDANTS

No. COA94-1184

(Filed 15 October 1996)

1. Workers' Compensation § 282 (NCI4th)— mental injuries by accident—compensability

Mental as well as physical injuries by accident are compensable under the Workers' Compensation Act as long as the resulting disability meets statutory requirements.

Am Jur 2d, Workers' Compensation §§ 368, 369.

2. Workers' Compensation § 282 (NCI4th)— witnessing inmates fighting—resulting PTSD—compensable injury

The Industrial Commission's decision that a vocational instructor at a correctional center suffered a compensable mental injury by accident arising out of and in the course of her employment was supported by evidence and findings that she suffered from post-traumatic stress disorder as a result of witnessing a fight between two prison inmates in her classroom.

Am Jur 2d, Workers' Compensation §§ 368, 369.

Appeal by both parties from an Industrial Commission decision in favor of plaintiff entered 9 August 1994 by a panel of the Full Commission. Heard in the Court of Appeals 29 August 1995.

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

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller, for defendant-appellants.

McGEE, Judge.

Plaintiff, Toya Jordan, was employed by defendant, Central Piedmont Community College, as a cooking instructor. She was assigned to provide vocational training to inmates at a minimum custody facility at the Mecklenburg II Correctional Center in Huntersville, North Carolina. Before the cooking classes began, prison officials conducted an orientation session with plaintiff during which they explained the type of prison facility where she would be working. She was informed she was subject to searches and that there was a potential for her to be involved in a hostage situation. However, she was also advised she should feel well-protected at the prison and that there had been no incidents where anyone had been hurt or harassed by the inmates. She was told that if a conflict should arise, she should allow a staff member to handle the matter.

During the first two years plaintiff taught at the correctional facility, she held classes in the cafeteria. Later, she was assigned to a classroom trailer that was fenced off from the rest of the facility and located approximately one hundred feet from the facility. Other than the inmates enrolled in her class, there were no other people in the classroom trailer. There were no guards present and the trailer was not equipped with a telephone, intercom, or other means of communication.

On 26 June 1991, plaintiff was present when a fight broke out between two inmates in the classroom. There was testimony that the inmates began arguing and plaintiff requested the inmates separate and leave each other alone. The inmates ignored plaintiff's directions, and the argument escalated from gesturing to grabbing chairs and brooms. Since the classroom had no communication equipment, plaintiff left the room to summon help. She went outside to the steps of the trailer and called out to a couple of officers within earshot, "I need an officer's assistance, please." The officers were unresponsive, so she returned to the classroom where she found the inmates on the floor fighting. Again, she went outside and called for officers and again, she received no response. When she returned to the classroom for the second time, she found some of the other inmates breaking up the fight. There was blood on the floor and a window had been broken. When officers finally arrived, the fight had already ended. The inmates were taken to the prison infirmary for treatment of the injuries from the fight.

Plaintiff testified that prior to the 26 June 1991 incident, she had never experienced an inmate fight in her classroom. During the three years she had taught at this correctional facility, she never feared for her safety because she felt that the prison staff was available to assist her if a conflict arose. Plaintiff testified that even though she was never directly threatened during the fight, the result of the incident caused her to feel unsafe and insecure in that she could no longer rely on officer or staff protection. Plaintiff communicated her concern to the front office prison personnel and to her supervisor at Central Piedmont.

Soon after the inmate fight, plaintiff began suffering debilitating anxiety attacks as she drove to work in the mornings. She experienced insomnia and when she could sleep, she had nightmares about the fight. She began to avoid arguments and confrontations and she withdrew from other people. Plaintiff sought treatment from psychologist Alice Sudduth beginning 14 August 1991. Ms. Sudduth diagnosed plaintiff as suffering from post-traumatic stress disorder as a direct result of the 26 June 1991 inmate fight. Ms. Sudduth treated plaintiff with relaxation therapy and supportive psychotherapy.

Plaintiff filed a claim for workers' compensation benefits alleging a psychological injury by accident as a consequence of the 26 June 1991 inmate fight. The case was heard by Deputy Commissioner Lawrence B. Shuping, Jr. and on 17 March 1993, he concluded plain-

tiff had sustained an injury by accident arising out of and in the course of her employment and he awarded her temporary total disability benefits until May 1992, when she began working for a new employer. Defendants appealed and on 9 August 1994, the Full Commission revised the deputy's opinion, but agreed plaintiff had sustained an injury by accident and was therefore eligible for temporary total disability benefits until May 1992.

After receiving the Full Commission's Opinion and Award, plaintiff's attorney filed a motion for interest on the award, pursuant to N.C. Gen. Stat. § 97-86.2 and for attorney fees under N.C. Gen. Stat. § 97-88. The Full Commission denied plaintiff's motion on 27 September 1994.

On 8 September 1994, defendants gave notice of appeal to this Court from the Full Commission's Opinion and Award of 9 August 1994. Plaintiff gave notice of a cross appeal on 7 October 1994 from the Full Commission's decision to deny interest on the award and payment of attorney fees. On 26 January 1995, this Court dismissed plaintiff's cross appeal for failure to pay the bond required under Rule 6(c) as well as the docketing fee and the printing deposit as required under Rule 12(c) of the North Carolina Rules of Appellate Procedure.

Defendants' primary argument is that because plaintiff only sustained a mental injury and not a physical injury, she is not entitled to compensation under our Workers' Compensation Act (Act).

I. Mental Injuries and General Principles of Negligence

Defendants argue that when the Act was created, "the common law did not provide a remedy for mental conditions" and therefore, the General Assembly "would not possibly have intended to provide a remedy that was not even provided by tort law until the 1980's [sic] and 1990's [sic]." In support of this proposition, defendants cite *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied* 327 N.C. 644, 399 S.E.2d 133 (1990) among other cases. However, *Ruark* stands for the opposite proposition. Indeed, *Ruark* provides a clear, concise and thorough review of the history of the *acceptance* by North Carolina courts of the negligence issue of compensability of mental injury as opposed to physical injury. *Ruark*, 327 N.C. at 290-304, 395 S.E.2d at 89-97. Contrary to defendants' argument, our courts have compensated plaintiffs for mental injuries since the late nineteenth century:

> In our earliest consideration, this Court thus held that "mental injury" is simply another type of "injury"—like "physical" and "pecuniary" injuries—for which the plaintiff could recover in tort upon showing that his injury was proximately and foreseeably caused by the defendant's negligence . . . .

Id. at 292-93, 395 S.E.2d at 90. According to the *Ruark* Court, our traditional and earliest holdings that "mental anguish is as real as physical, and recovery in proper cases is allowed of just compensation when anguish, whether physical or mental, is caused by the negligence, default or wrongful act of another" were later mischaracterized. *Id.* at 293, 395 S.E.2d at 91 (quoting *Bowers v. Telegraph Co.*, 135 N.C. 504, 505, 47 S.E. 597, 597 (1904)). Later courts "characterize[d], unfortunately, emotional injury as a type of physical injury—albeit injury for which plaintiffs could recover in emotional distress actions." *Id.* at 294, 395 S.E.2d at 91. Consequently, the *Ruark* Court said:

> [W]e disapprove the unnecessary and erroneous terminology . . . which apparently led many lawyers and some scholars away from the underlying reasoning of our well settled law allowing recovery for emotional distress, not connected with or growing out of a physical injury, in negligence actions.

Id. at 295, 395 S.E.2d at 92.

II. Mental Injuries and the Act

The broad intent of the Workers' Compensation Act is to provide compensation for employees who sustain an injury arising out of and in the course of their employment. The Act is to be liberally construed and no technical or strained construction should be given to defeat this purpose. *Abels v. Renfro Corp.*, 108 N.C. App. 135, 141, 423 S.E.2d 479, 482 (1992), *affirmed in part, reversed in part on other grounds*, 335 N.C. 209, 436 S.E.2d 822 (1993); *See also Johnson v. Hosiery Company*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930). When construing a statute, the words are given their ordinary meaning, unless it appears from the context that they should be used in a different sense. *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 770-71 (1973).

The General Assembly has defined the word "injury" in the Act as:

> (6) Injury.—"Injury and personal injury" shall mean only injury by 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, . . . "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. . . ."

N.C. Gen. Stat. § 97-2(6) (Supp. 1995). The definition specifically includes personal injuries and excludes diseases, except those which result from an on-the-job accident. The only injury which the General Assembly's definition specifically characterizes as physical in nature is a back injury. The General Assembly went no further in defining injury. Except for back injuries, the Act makes no distinction between physical and psychological injuries. *Black's Law Dictionary* defines personal injury as "a hurt or damage done to a man's *person*" versus his property or reputation. *Black's Law Dictionary* 786 (Sixth ed. 1990). "In worker's compensation acts, 'personal injury' *means any harm or damage to the health of an employee*, however caused, whether by accident, disease or otherwise, which arises in the course of and out of his employment, and incapacitates him in whole or in part." *Id.* (emphasis added).

Recent cases from this Court have recognized depression, a mental condition, as an occupational disease and compensable under the Act. In *Baker v. City of Sanford*, 120 N.C. App. 783, 463 S.E.2d 559 (1995), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996), the Industrial Commission found that plaintiff suffered from work-related depression which it stated was an occupational disease. However, the Commission concluded the plaintiff's disability was not the result of this occupational disease, but was a consequence of an intervening event. This Court reversed and remanded the case stating, among other things, the Commission erred in denying benefits to plaintiff because it did not employ the proper, three-part analysis in concluding plaintiff's depression was not compensable. (For a disease to be occupational, it must be (1) characteristic of claimant's trade or occupation; (2) the disease must not be an ordinary disease of life to which the general public is equally as exposed; and (3) the disease must be causally connected to the claimant's employment. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983)).

The *Baker* Court pointed to an earlier case, *Harvey v. Raleigh Police Dept.*, 85 N.C. App. 540, 355 S.E.2d 147, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 86 (1987), *appeal after remand*, 96 N.C. App. 28, 384 S.E.2d 549, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454

(1989), as recognizing depression as an occupational disease. *Baker*, 120 N.C. App. at 788, 463 S.E.2d at 563. In *Harvey*, a police officer committed suicide and his wife filed for workers' compensation benefits under N.C. Gen. Stat. § 97-38 alleging Harvey suffered from the occupational disease of depression due to his employment with the Raleigh Police Department. The Full Commission denied plaintiff's claim, but this Court reversed and remanded the case concluding the Industrial Commission made inadequate findings of fact to support its conclusions of law.

More recently, this Court upheld an award for compensation to a plaintiff who was suffering from depression and post-traumatic stress syndrome caused by her work as a police and public safety officer. *Pulley v. City of Durham*, 121 N.C. App. 688, 694, 468 S.E.2d 506, 510 (1996). In upholding the award, this Court used the three-part test for determining if an occupational disease is compensable under N.C. Gen. Stat. § 97-53(13). The Court then reviewed the Full Commission's findings of fact and conclusions of law and determined plaintiff had presented sufficient evidence to satisfy the test for a compensable occupational disease.

The approach in *Harvey*, *Baker*, and *Pulley* was to apply to each plaintiff the three-part test for occupational disease to determine whether compensation was proper. *See Harvey*, 85 N.C. App. at 543, 355 S.E.2d at 150; *Baker*, 120 N.C. App. at 787, 463 S.E.2d at 562-63; *Pulley*, 121 N.C. App. at 693, 468 S.E.2d at 510 (all three cases applying the test outlined in *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365). These cases do not make a distinction between mental and physical occupational diseases. The question for each Court was simply whether plaintiff's condition met the test for compensable occupational disease.

[1] While the claim in this case involves an injury by accident as opposed to an occupational disease, we do not read or interpret the Act as limiting compensation for mental conditions to only occupational diseases, excluding mental injuries by accident. As the Supreme Court in *Ruark* pointed out, our courts have recognized the compensability of mental injuries under tort law since the late nineteenth century. *Ruark*, 327 N.C. at 292-93, 395 S.E.2d at 90. Furthermore, mental conditions have been acknowledged and compensated as occupational diseases under our Workers' Compensation Act. *See Pulley*, 121 N.C. App. 688, 468 S.E.2d 510 (1996). We cannot conclude that mental injuries by accident are not covered under the

Act when we have clearly awarded workers' compensation for mental conditions as occupational diseases. Such a holding would lead to harsh results and would be incongruous in light of our well established history of compensating mental injuries under general principles of tort law. Our decision is in keeping with the purposes of the Act and is supported by a majority of other states' courts. *See* 1 Arthur Larson, *The Law of Workmen's Compensation*, § 42.23 (1996). We conclude that as long as the resulting disability meets statutory requirements, mental, as well as physical impairments, are compensable under the Act.

III. Consideration of the Commission's Opinion and Award

[2] Since the Act is not limited to physical injuries, we now consider whether there was competent evidence to support the Commission's findings of fact and whether these findings of fact support the Commission's conclusions of law that plaintiff suffered a compensable injury by accident. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982) (setting forth the Court of Appeals' standard of review for Industrial Commission cases).

Injury by accident has been defined as "[a]n unexpected, unusual or undesigned occurrence." *Edwards v. Publishing Co.*, 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (quoting Black). It has also been described as "an unlooked for and untoward event which is not expected or designed by the injured employee." *Gabriel v. Newton*, 227 N.C. 314, 316, 42 S.E.2d 96, 97 (1947). "An accidental cause will be inferred, however, when an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences occurs." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986).

After reviewing the transcript of the proceedings before Deputy Commissioner Shuping and examining the evidence in the record, the Full Commission found as fact that as a result of the 26 June 1991 inmate fight:

> 6. [P]laintiff experienced an interruption of her normal work routine, and the introduction thereby of unusual conditions likely to result in unexpected consequences when two inmates began arguing in a classroom and a fight subsequently broke out between them . . . result[ing] in plaintiff developing a post-traumatic stress disorder and thereby the otherwise compensable injury for which compensation is claimed.

> The post-traumatic stress disorder involved is an anxiety condition that results following an event that is outside the normal range of human events. This condition causes the person witnessing the event or directly affected by the event to experience anxiety symptoms such as being fearful or a sense of being unsafe, difficulty sleeping and breathing, nightmares, distrustfulness of others and withdraw [sic] from family. These are the very symptoms plaintiff developed following and as a result of her 26 June 1991 injury.

The Full Commission then concluded:

> 1. [P]laintiff sustained an injury by accident arising out of and in the course of her employment, and as a result thereof was temporarily totally disabled from 9 August 1991 through the date certain in May 1992 when plaintiff returned to alternate employment at Carolinas Medical Center. Plaintiff is therefore entitled to compensation at a rate of $300.00 per week, subject to defendant's deduction against the same for unemployment compensation benefits plaintiff received in the interim. . . .

In making its findings of fact, the Commission had before it competent evidence, including a deposition from plaintiff's treating psychologist, plaintiff's own testimony, testimony of the program director for the correctional facility, and the officer who investigated the 26 June 1991 inmate fight. While there may have been conflicting evidence as to plaintiff's degree of psychological impairment, it was for the Commission to weigh the credibility of the witnesses and to decide the issues. *See Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied* 300 N.C. 196, 269 S.E.2d 623 (1980), *appeal after remand* 54 N.C. App. 582, 284 S.E.2d 343 (1981), *disc. review denied* 305 N.C. 152, 289 S.E.2d 379 (1982). We find there was competent evidence in the record to support the Commission's findings of fact and conclusions of law.

The opinion and award of the Full Commission is affirmed.

Judges COZORT and WALKER concur.

MEMBERS INTERIOR CONSTRUCTION, INC., PLAINTIFF-APPELLANT v. LEADER CONSTRUCTION COMPANY, INCORPORATED, HARTFORD FIRE INSURANCE COMPANY, DEFENDANT-APPELLEE/CROSS-APPELLANT

No. COA95-1279

(Filed 15 October 1996)

1. Pleadings §§ 405, 390 (NCI4th)— amendment of complaint at close of plaintiff's evidence—pre-trial motion not heard—evidence also supported alleged facts

The trial court did not err by denying plaintiff's motion to amend its complaint at the close of its case-in-chief under N.C.G.S. § 1A-1, Rule 15 (1990) in an action arising from a disputed construction debt where plaintiff failed to cause its pre-trial motion to amend to be heard, so that defendant Hartford could have justifiably concluded that plaintiff had abandoned this issue. Furthermore, the allegedly extraneous evidence introduced by plaintiff also supports operational facts alleged in the complaint, so that it cannot be said that defendant Hartford understood that the alleged extraneous evidence was aimed at establishing a violation of N.C.G.S. § 58-63-15(11) rather than proving an issue actually raised by the pleadings.

Am Jur 2d, Pleading §§ 315, 322.

2. Judgments § 654 (NCI4th)— prejudgment interest—offer of undisputed portion of claim

The trial court erred in its calculation of prejudgment interest against an insurance company on a construction claim where the trial court decreased the amount of principal being taxed with interest to account for unconditional payment offers by defendant Hartford where Hartford had offered to pay undisputed portions of the alleged debt without prejudice to plaintiff's rights to further prosecute its claim against defendant. An aggrieved party may, without prejudice to its right to recover prejudgment interest, decline unconditional payment offers. The trial court's award was reversed and remanded with instructions to award interest on the verdict from the date of the breach of contract.

Am Jur 2d, Interest and Usury § 59; Judgments § 257.

Judge GREENE concurring.

Appeal by plaintiff and defendant from judgment entered 31 May 1995 by Judge Julius A. Rousseau, Jr., in Iredell County Superior Court. Heard in the Court of Appeals 27 August 1996.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak and Stewart, L.L.P., by C. Hamilton Jarrett and Robin Adams Anderson, for defendant-appellee/cross-appellant.

MARTIN, Mark D., Judge.

On 10 March 1992 the Iredell-Statesville Board of Education (Board) executed a contract with Leader Construction (Leader) for the construction of East Iredell Middle School (project). On the same day Leader and Hartford Fire Insurance (Hartford) executed a labor and material payment bond (bond). On 2 June 1992 Leader subcontracted out a portion of the project to Members Interior Construction (Members). The original subcontract price was $225,000. Leader subsequently issued three change orders which increased the subcontract price to $271,075.

On 12 October 1993 Members filed a proof of claim with Hartford alleging Leader was $68,350 in arrears to Members. By letter dated 29 October 1993, Hartford contacted Leader regarding Members' claim. The 29 October letter stated, in pertinent part:

> Hartford calls upon Leader . . . to pay any undisputed amount to Members . . . within 5 (five) days of the date of this letter. Should Leader contend that the entire amount claimed or any portion of it is disputed, Leader should provide sufficient documentation of the amount disputed by Leader to The Hartford within 5 (five) calendar days.
>
> Leader's failure to pay any undisputed amount within five calendar days and/or Leader's failure to provide sufficient documentation to The Hartford of the amount disputed by Leader . . . shall constitute an acknowledgement [by] Leader that the amount claimed is valid . . . and authorization by Leader to The Hartford to pay the amount claimed.

On 1 December 1993 Members admitted overstating its arrearages by $1000 leaving an actual claim of $67,350. On the same day Hartford notified Members that only $16,845.75 of the claimed $67,350 was

presently owed because certain work had not yet been accepted by the architect, the original contract was not entirely completed, and certain areas were improperly constructed. The 1 December letter also noted that further funds would be released after Hartford received "written certification from the architect that the three change orders are complete and acceptable and the additional work on the original contract is complete."

On 1 December 1993 Members instituted the present action alleging Leader's nonpayment breached the subcontract and Hartford was liable for Leader's debt under the bond. On 26 August 1994 Hartford offered Members $49,817.50 as payment of the undisputed portion of Leader's debt "without prejudice to Members' rights to further prosecute its claim against Hartford." On 11 May 1995 Hartford made an offer of judgment, pursuant to N.C.R. Civ. P. 68, for $64,000 plus allowable costs. Members rejected both settlement offers. On 31 May 1995 the trial court entered a jury verdict awarding Members $59,150 plus accrued interest of $3,599.15.

Noting the total award was less than the Rule 68 offer of judgment, the trial court further ordered that the $62,749.15 award "be subject to a set off in the amount of said defendant's costs incurred after making said Offer of Judgment as may be awarded by the Court and shall be subject to an award, if any, of said defendant's attorney's fees pursuant to N.C.G.S. § 44A-35." The trial court, by order filed 26 June 1995, subsequently denied Hartford's motion for costs and attorneys fees.

PLAINTIFF'S APPEAL

On appeal Members contends the trial court erred by: (1) denying Members' motion to amend its pleadings; (2) excluding testimony on whether Hartford reasonably investigated Members' claim; (3) dismissing Members' claim of Unfair and Deceptive Trade Practices, N.C. Gen. Stat. § 75-1, *et seq.*; (4) failing to calculate interest on the full amount of the verdict from 19 October 1993; and (5) signing an erroneous judgment.

I.

[1] We first consider whether the trial court erred by denying Members' motion to amend its complaint at the close of its case-in-chief, pursuant to N.C.R. Civ. P. 15(b), to allege a violation of N.C. Gen. Stat. § 58-63-15(11) (1994).

Motions to amend are governed by the provisions of N.C.R. Civ. P. 15. N.C. Gen. Stat. § 1A-1, Rule 15 (1990). Generally, Rule 15 is to be construed liberally to allow amendments where the defense will not be materially prejudiced. *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986). Nevertheless, a motion to amend is addressed to the sound discretion of the trial court and denial of such a motion will not be disturbed on appeal absent a clear showing the trial court abused its discretion. *North River Ins. Co. v. Young*, 117 N.C. App. 663, 670, 453 S.E.2d 205, 210 (1995). Reasons justifying denial of a motion to amend include (a) undue delay, (b) undue prejudice, and (c) futility of amendment. *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985).

When, as here, evidence is introduced without objection, a Rule 15(b) motion should be granted only if the parties understand the evidence is aimed at an issue not expressly pleaded. *See J. M. Westall & Co. v. Windswept View of Asheville*, 97 N.C. App. 71, 76, 387 S.E.2d 67, 69-70, *disc. review denied*, 327 N.C. 139, 394 S.E.2d 175 (1990). Where the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, however, failure to object does not amount to implied consent to try the unpleaded issue. *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 630, 347 S.E.2d 473, 476 (1986).

In the present case, Members moved to amend its complaint, pursuant to Rule 15(b), to state a claim for violation of section 58-63-15(11). Members argues the trial court erred by denying this motion because Hartford understood, and consented to, Members developing its section 58-63-15(11) claim. Specifically, Members contends Hartford understood Members was adducing evidence to support its section 58-63-15(11) claim because Members filed a written motion to amend its complaint alleging a violation of that section prior to trial.

Because Members failed to cause its pre-trial motion to amend to be heard, however, Hartford could have justifiably concluded Members abandoned this issue. Further, the allegedly extraneous evidence introduced by Members at trial also supports operational facts alleged in Members' complaint. It follows, therefore, that we cannot say Hartford understood the alleged extraneous evidence was aimed at establishing a violation of section 58-63-15(11) rather than proving an issue actually raised by the pleadings. Accordingly, under *J. M. Westall & Co.* and *Tyson*, we conclude the trial court did not err in denying Members' Rule 15(b) motion.

II.

[2] We next consider Members' allegation the trial court erred by failing to award interest on the full amount of the verdict from 19 October 1993.

In breach of contract actions, N.C. Gen. Stat. § 24-5 authorizes the award of pre-judgment interest on damages from the date of the breach at the contract rate, or the legal rate if the parties have not agreed upon an interest rate. N.C. Gen. Stat. § 24-5 (1991). See also N.C. Gen. Stat. § 24-1 (1991) (legal rate is eight percent). " 'Interest is the compensation allowed by law, or fixed by the parties, for the use, or forbearance, or detention of money.' " *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 95 N.C. App. 270, 282, 382 S.E.2d 817, 824 (1989) (*quoting Parker v. Lippard*, 87 N.C. App. 43, 49, 359 S.E.2d 492, 496, *modified in part on reh'g*, 87 N.C. App. 487, 361 S.E.2d 395 (1987)). *See also Craftique, Inc. v. Stevens and Co., Inc.*, 321 N.C. 564, 568, 364 S.E.2d 129, 132 (1988) (interest compensates recovering party "for retention of the principal of the debt"). Put simply, "interest . . . means compensation allowed by law as additional damages for the lost use of money during the time between the accrual of the claim and the date of the judgment." 22 AM. JUR. 2D *Damages* § 648 (1988) (emphasis added). *See also Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 9, 430 S.E.2d 895, 900 (1993); *Ledford v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 44, 49-50, 453 S.E.2d 866, 868-869 (1995).

Although the accrual of interest is tolled when defendant makes a "valid tender of payment for the full amount [of plaintiff's claim], plus interest to date," *Thompson-Arthur Paving Co.*, 95 N.C. App. at 282, 382 S.E.2d at 824, we recognize Hartford's unconditional payment offers are, by definition, not tender offers as tender offers are made in full and final settlement of a claim, *see id.*, *Ingold v. Assurance Co.*, 230 N.C. 142, 147-148, 52 S.E.2d 366, 369-370 (1949). Rather, the instant situation presents the novel issue of whether interest should be tolled when a defendant offers to pay the aggrieved party undisputed portions of the alleged debt without prejudice to the aggrieved party's rights to further prosecute its claim against the defendant.

The trial court, here, awarded Members $59,150.00 in damages, plus accrued interest of $3,599.15, for a total judgment of $62,749.15. In calculating the accrued interest, the trial court followed Hartford's proposed computation method by decreasing the amount of principal

being taxed with interest on 1 December 1993 and again on 26 August 1994 to account for the unconditional payment offers made by Hartford on those dates—$16,845.75 on 1 December 1993; and $49,817.50 on 26 August 1994.

Hartford contends the trial court's interest computation is proper because it is unreasonable to refuse unconditional payment offers. Further, Hartford maintains that reversing the trial court's interest award would remove any incentive a defendant has to pay undisputed portions of an alleged debt prior to trial.

Members, on the other hand, asserts the trial court erred because an aggrieved party should not be required to accept less than the full amount of its claim. Indeed, according to Members, the rule employed by the trial court here impermissibly limits the autonomy of an aggrieved party by foreclosing its opportunity to refuse unconditional payment offers for tactical reasons without losing a portion of its prejudgment interest.

While both positions have merit, we conclude an aggrieved party may, without prejudice to its right to recover prejudgment interest, decline unconditional payment offers for three reasons. First, requiring defendant to pay pre-judgment interest on the full amount of the verdict, without adjusting for unconditional payment offers, is appropriate because defendant has the opportunity to invest the money during the pendency of the suit. *See Baxley*, 334 N.C. at 9, 430 S.E.2d at 900 (reaching same conclusion on prejudgment interest for underinsured motorist carriers). To hold otherwise, as urged by Hartford, would impose a penalty on an aggrieved party for a discretionary tactical decision, *see Rorrer v. Cooke*, 313 N.C. 338, 358, 329 S.E.2d 355, 367-368 (1985) (certain trial tactics are discretionary), *Applegate v. Dobrovir, Oakes & Gebhardt*, 628 F. Supp. 378, 383 (D.D.C. 1985) (generally trial tactics are discretionary), *aff'd*, 809 F.2d 930 (D.C. Cir.), *cert. denied*, 481 U.S. 1049, 95 L. Ed. 2d 837 (1987), and, in fact, result in a windfall for the defendant. Such a rule also clearly contravenes the intent behind awarding interest—compensation for lost use of principal. *Thompson-Arthur Paving Co.*, 95 N.C. App. at 282, 382 S.E.2d at 824; *Craftique, Inc.*, 321 N.C. at 568, 364 S.E.2d at 132.

Second, by making an offer of judgment based upon a good faith determination of the actual value of plaintiff's claim, defendant will be entitled to "costs incurred after the making of the offer" "[i]f the judgment finally obtained by . . . [plaintiff] is not more favorable than the offer." N.C. Gen. Stat. § 1A-1, Rule 68(a) (1990). Further, in some

instances, as here, the trial court is authorized by statute to award reasonable attorneys fees to the prevailing party. *See, e.g.*, N.C. Gen. Stat. § 44A-35 (1995). Defendant can thus insulate itself from many of the expenses attending frivolous and useless litigation.

Third, we reject Hartford's contention that there will be no incentive for defendants to make unconditional payment offers if this Court does not adopt Hartford's proposed interest calculation method. In fact, under certain circumstances, a defendant's failure to offer payment of an undisputed debt may rise to the level of a bad faith refusal to settle claim. *See, e.g., Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148, *disc. review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985). Therefore, contrary to Hartford's allegation, we believe an incentive remains—potential liability for punitive damages—for insurers to make unconditional payment offers regarding undisputed portions of an alleged debt.

Accordingly, we reverse the trial court's award of $3,599.15 in accrued interest and remand to the trial court with instructions to award interest on the verdict from the date of Hartford's breach of contract.

Finally, after careful consideration, we conclude Members' remaining assignments of error are entirely without merit.

DEFENDANT'S APPEAL

Hartford, on cross appeal, alleges the trial court erred by denying Hartford's motion for: (1) costs pursuant to N.C.R. Civ. P. 68; and (2) attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35.

To recover either costs under Rule 68 or attorneys fees pursuant to section 44A-35, the amount of Hartford's offer of judgment must exceed Members' total recovery including interest. *Poole v. Miller*, 342 N.C. 349, 353-355, 464 S.E.2d 409, 411-412 (1995), *reh'g denied*, 342 N.C 666, 467 S.E.2d 722 (1996). *See also* N.C. Gen. Stat. § 1A-1, Rule 68(a) ("[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."); N.C. Gen. Stat. § 44A-35 (1995) ("the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. . . . [A] 'prevailing party' is . . . an offeror against whom judgment is rendered in an amount less favorable than the last offer.") (emphasis added). Accordingly, as the present judgment has been remanded to the trial court for recalculation of the accrued interest, we decline to consider Hartford's appeal.

Affirmed in part, reversed in part, and remanded.

Judge JOHN concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring.

I write separately with respect to the calculation of interest. Our statute provides that in actions for breach of contract, "the amount awarded on the contract bears interest from the date of the breach." N.C.G.S. § 24-5(a) (1991). If, however, there is a "valid tender of payment for the full amount" due under the contract, the amount awarded does not bear interest from the date of the breach. *Thompson-Arthur Paving Co. v. Lincoln Battleground Assoc.*, 95 N.C. App. 270, 282, 382 S.E.2d 817, 824 (1989). It follows that a "tender in an amount less than the amount due" does not suspend the accrual of interest on the debt. 47 C.J.S. *Interest & Usury* § 62, at 149 (1982). For these reasons I agree with the majority that the trial court erred in computing the interest inconsistent with section 24-5(a).

ROBERT D. JACOBSEN, GUARDIAN AD LITEM FOR ERIC JOEL CAMPBELL, AND ANTHONY CAMPBELL, PLAINTIFF-APPELLANTS v. ARTHUR HOUSTON McMILLAN, DEFENDANT-APPELLEE/CROSS-APPELLANT

No. COA95-1273

(Filed 15 October 1996)

1. Negligence § 95 (NCI4th); Automobiles and Other Vehicles § 433 (NCI4th)— offer of ride to child—duty of due care—failure to stop—child jumping from truck—breach of duty

When defendant offered the seven-year-old plaintiff a ride to his grandparents' home, he voluntarily assumed the duty to exercise due care in delivering plaintiff safely to his grandparents' home. The jury could properly find that defendant breached this duty of care where plaintiff's evidence tended to show that he rode in the open bed of defendant's truck; defendant failed to

stop at the grandparents' home but maintained a constant speed as he passed the home; and plaintiff jumped from the truck as it passed the home and was injured.

Am Jur 2d, Automobile and Highway Traffic § 572; Negligence § 144.

2. Damages § 113 (NCI4th)— medical expenses—mandatory presumption of reasonableness

The rebuttable presumption of reasonableness of medical expenses established by N.C.G.S. § 8-58.1 when testimony of the amount of such expenses by the injured party or his guardian is accompanied by records or copies of those charges is a mandatory rather than a permissive presumption. Thus, when plaintiff proffers the evidence required by § 8-58.1, the fact-finder must find that the total amount of the alleged medical charges is reasonable unless defendant carries its burden of going forward with evidence rebutting the presumed fact of reasonableness.

Am Jur 2d, Damages §§ 918 et seq.

3. Damages § 113 (NCI4th)— medical expenses—burden of proof

In order to recover medical expenses, plaintiff bears the ultimate burden of proving that the claimed medical expenses were (1) reasonably necessary and (2) reasonable in amount.

Am Jur 2d, Damages §§ 918 et seq.

4. Damages § 113 (NCI4th)— medical expenses—statutory presumption of reasonableness—jury finding that treatment not necessary

The statutory presumption that medical expenses were reasonable in amount does not preclude the jury from finding that those medical expenses were not reasonably necessary for the proper treatment of plaintiff's injuries. Therefore, even though the minor plaintiff's father testified that his son's medical expenses were nearly $50,000, the medical records were admitted into evidence, and defendant failed to rebut the presumption of reasonableness, the jury did not err as a matter of law in awarding only $20,000 for medical expenses since the jury could have found that all of the treatment was not reasonably necessary.

Am Jur 2d, Damages §§ 918 et seq.

5. Judgments § 445 (NCI4th)— relief from judgment—opportunity to move for new trial

A party cannot seek relief from a judgment under Rule 60(b)(2) where such party had the opportunity, through the exercise of due diligence, to make a motion for a new trial pursuant to Rule 59(a)(4). N.C.G.S. § 1A-1, Rules 59(a)(4) and 60(b)(2).

Am Jur 2d, Judgments § 820.

Appeal by plaintiffs and defendant from judgment filed 6 April 1995 by Judge James R. Strickland in Robeson County Superior Court. Heard in the Court of Appeals 27 August 1996.

Duffus & Associates, by J. David Duffus, Jr. and D. Christopher Hyland, for plaintiff-appellants.

Anderson, Johnson, Lawrence, Butler & Bock, by Steven C. Lawrence, for defendant-appellee/cross-appellant.

MARTIN, Mark D., Judge.

On 4 November 1993 Robert Jacobsen, guardian *ad litem* for the minor child Eric Campbell (Campbell), instituted the present action to recover damages for injuries incurred when Campbell jumped from the bed of defendant's truck. By order filed 28 April 1994 the complaint was amended to add Anthony Campbell, Campbell's father, as a party plaintiff seeking recovery for medical expenses.

It is undisputed that in September 1991 Campbell was seven years old and lived at his grandparents' home in St. Pauls, North Carolina. On 7 September 1991 Campbell walked from his grandparents' house to the local convenience store to purchase tire patches for his bicycle. On his way home from the store, defendant stopped and offered Campbell a ride home. Because two passengers were already in the cab of defendant's truck, Campbell rode in the open truck bed. At a point near his home, Campbell jumped from the bed of defendant's truck and was injured. At trial, the parties stipulated to Campbell's medical records and Anthony Campbell testified the medical expenses incurred for Campbell's treatment totalled $49,820.59.

The jury returned a verdict in favor of plaintiffs and awarded Campbell $10,000 for personal injuries and Anthony Campbell $20,000 for medical expenses. On 31 March 1995 defendant made a motion for judgment notwithstanding the verdict. On 10 April 1995 plaintiffs made a motion, pursuant to N.C.R. Civ. P. 59(a), to set aside the ver-

dict and award a new trial. On 18 April 1995 plaintiffs moved for relief from the judgment under N.C.R. Civ. P. 60(b). The trial court, by order filed 14 September 1995, denied all post-trial motions.

On appeal plaintiffs contend the trial court erred by: (1) failing to set aside the jury verdict and grant a new trial because the present verdict is contrary to the evidence in that it awards inadequate damages; and (2) denying plaintiffs' motion for relief from judgment when a previously unknown witness came forward the night before the trial court charged the jury.

Defendant, on cross-appeal, alleges the trial court erred by denying his motions for directed verdict and judgment notwithstanding the verdict because plaintiffs failed to establish their *prima facie* case of negligence.

[1] We first consider defendant's contention that, under the present facts and circumstances, plaintiffs failed to present sufficient evidence that defendant breached a legal duty owed to Campbell.

A motion for a directed verdict and a motion for judgment notwithstanding the verdict (JNOV) both test the legal sufficiency of the evidence to go to the jury. *Everhart v. LeBrun*, 52 N.C. App. 139, 141, 277 S.E.2d 816, 818 (1981). Indeed, courts apply the same standard when considering a directed verdict motion and a motion for JNOV. *Moon v. Bostian Heights Volunteer Fire Dept.*, 97 N.C. App. 110, 111, 387 S.E.2d 225, 226 (1990).

When ruling on a motion for a directed verdict, and likewise a JNOV motion, the evidence must be taken in the light most favorable to the non-movant. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-338 (1985). Specifically, the trial court must grant the non-movant the benefit of every reasonable inference while also resolving all conflicts and inconsistencies in favor of the non-movant. *Id.*

In the present case, it is undisputed the defendant, an adult, offered to take Campbell, a seven-year-old child, back to his grandparents' house. The cab of defendant's truck was full and, consequently, Campbell had to ride in the bed of defendant's truck. Plaintiffs presented evidence, which must be considered true, *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337, that defendant maintained a constant speed as he passed Campbell's house. While passing in front of his house, Campbell jumped from defendant's truck.

Defendant argues, under the above detailed facts, that he did not breach a legal duty owed to Campbell. To the contrary, defendant, by offering Campbell a ride, voluntarily assumed the duty to exercise due care in delivering Campbell safely to his grandparent's home. 57A AM. JUR. 2D *Negligence* § 112 (1989) ("one who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care."); 1 WILLIAM S. HAYNES, NORTH CAROLINA TORT LAW § 19-6(D) (1989) (The law imposes an obligation on everyone who attempts to do anything, even gratuitously for another, to exercise some degree of skill and care in the performance of those acts and imposes liability where the one performing the acts has done so negligently). Further, a reasonable jury could find that defendant's failure to stop at Campbell's house was a breach of defendant's duty to exercise reasonable care in transporting a minor in the back of his truck. *See Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E.2d 585, 589 (1974) (higher duty of care necessary to protect young children); *Arnett v. Yeago*, 247 N.C. 356, 361, 100 S.E.2d 855, 859 (1957) ("children and particularly [] young children have less judgment and capacity to avoid danger than adults . . . ."); *Johnson v. Clay*, 38 N.C. App. 542, 545, 248 S.E.2d 382, 384 (1978) ("law imposes a higher standard of care when one either knows or should know that one's actions pose a grave risk to the safety of [a child]") Therefore, as a jury could reasonably conclude defendant breached a duty of care he owed to Campbell, we affirm the trial court's denial of defendant's motions for directed verdict and JNOV.

Plaintiffs, in their first assignment of error, contend the trial court erred by denying their motion to set aside the verdict and award a new trial pursuant to N.C.R. Civ. P. 59(a).

[2] At the outset we note the denial of a motion to set aside the verdict is within the trial court's discretion and will not be reversed on appeal absent a showing the trial court abused that discretion. *State v. Peterson*, 337 N.C. 384, 397, 446 S.E.2d 43, 51 (1994). In the instant situation, plaintiffs argue the trial court abused its discretion in failing to grant their Rule 59 motion because of the presumption created by N.C. Gen. Stat. § 8-58.1.

Section 8-58.1 provides:

> Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian . . . is competent to give evidence regarding the

> amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges.

Id. (1986) (emphasis added). At trial, Campbell's medical records were admitted into evidence and Anthony Campbell testified that his son's medical expenses totalled $49,820.59. Therefore, plaintiffs clearly satisfied the prerequisites of section 8-58.1 and were entitled to invoke the statutory presumption as to "the reasonableness of the amount of the [medical] charges." N.C. Gen. Stat. § 8-58.1.

By definition, a presumption is merely an evidentiary rule which requires or allows the jury to assume a fact (presumed fact) because another fact (basic fact) was proved during the trial. *See* KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 44 (4th ed. 1993); N.C. Gen. Stat. § 8C-1, Rule 301 (1992). Thus, as the weight a finder-of-fact must accord any presumption depends on whether the presumption is conclusive, mandatory, or permissive, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 44, we must ascertain the nature of the medical expenses presumption.

It is axiomatic the medical expenses presumption, which is rebuttable, N.C. Gen. Stat. § 8-58.1, does not constitute a conclusive presumption. *See* BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 44 (conclusive presumptions are not rebuttable). Indeed, relying on the plain language of section 8-58.1, *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-137 (1990), we conclude the medical expenses presumption is mandatory, rather than permissive, for two reasons.

First, section 8-58.1, after a *prima facie* showing by plaintiff, "establishes a rebuttable presumption of the reasonableness of the amount of the [medical] charges." N.C. Gen. Stat. § 8-58.1. "Establish" means "[t]o settle, make or fix firmly; . . . put beyond doubt or dispute . . . ." BLACK'S LAW DICTIONARY 546 (6th ed. 1990). *See Wells Lamont Corporation v. Bowles*, 149 F.2d 364, 366 (Emer. Ct. App.) (establish means "to settle firmly or to fix unalterably"), *cert. denied*, 326 U.S. 730, 90 L. Ed. 434, *reh'g denied*, 326 U.S. 808, 90 L. Ed. 492 (1945). Therefore, we believe the use of "establish" in section 8-58.1 connotes a mandatory presumption rather than a permissive inference or permissive presumption. *See State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970) (courts may resort to dictionaries to ascertain common and ordinary meaning).

Second, the General Assembly expressly stated the medical expenses presumption is a "rebuttable presumption." N.C. Gen. Stat. § 8-58.1. This language would be rendered superfluous if the medical expenses presumption were categorized as a permissive presumption because, by definition, it is not necessary to rebut a permissive presumption for the trier-of-fact to disregard the presumed fact. BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 44. Therefore, as rendering any portion of a statute superfluous clearly contravenes well settled principles of statutory construction, *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994), *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818-819 (1991), it naturally follows the medical expenses presumption constitutes a mandatory presumption. *See* N.C. Gen. Stat. § 8C-1, Rule 301 commentary (1992) (a judicial or statutory presumption should be considered a mandatory presumption unless there is clear language to the contrary).

As a general rule, a mandatory presumption:

> imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist.

N.C. Gen. Stat. § 8C-1, Rule 301. Thus, when plaintiff proffers the evidence required by section 8-58.1, the finder-of-fact <u>must</u> find the total amount of the alleged medical charges is reasonable, <u>unless</u> defendant carries its burden of going forward by rebutting the presumed fact of reasonableness. *Id. See also* BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 44.

[3] Nonetheless, to recover medical expenses plaintiff bears the ultimate burden of proving "both that the medical attention [plaintiff] received was reasonably necessary for proper treatment of [plaintiff's] injuries and that the charges made were reasonable in amount." *Ward v. Wentz*, 20 N.C. App. 229, 232, 201 S.E.2d 194, 197 (1973). *See also* N.C.P.I., Civ. 106.15-106.20.[1] Put simply, an aggrieved party must

1. The trial court, here, instructed the jury:

> Medical expenses include all hospital, doctor, drug and psychologist bills <u>reasonably paid or incurred</u> by the Plaintiff, Anthony Campbell, <u>as a consequence of the minor Plaintiff's injury</u>.

satisfy a two-prong test—the claimed medical charges were (1) reasonably necessary, and (2) reasonable in amount.

[4] When, as here, defendant fails to rebut the medical expenses presumption, the second prong—medical expenses are reasonable in amount—is conclusively established. The medical expenses presumption does not, however, operate to preclude the jury from finding that Campbell's medical expenses were not reasonably necessary for the proper treatment of his injuries. In fact, to hold otherwise would infringe on the unassailable right of the jury to weigh evidence and assess the credibility of witnesses. *See Booher v. Frue*, 98 N.C. App. 570, 577-578, 394 S.E.2d 816, 819-820, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). Therefore, as it remains entirely within the province of the jury to determine whether certain medical treatment was reasonably necessary, we cannot say, under the present record, that the jury erred, as a matter of law, in awarding only $20,000 for medical expenses. Accordingly, we conclude the trial court did not abuse its discretion by denying plaintiffs' motion for a new trial under N.C.R. Civ. P. 59(a).

[5] Plaintiffs next contend the trial court erred by denying their motion for relief from judgment pursuant to N.C.R. Civ. P. 60(b)(2).

> Rule 60(b) provides, in pertinent part:
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990). N.C.R. Civ. P. 59(b) establishes that a motion for new trial under subsection (a) must be made "not later than 10 days after entry of the judgment." N.C. Gen. Stat.

> So, finally, as to this fourth issue on which the [Plaintiffs] have the burden of proof, if you find, by the greater weight of the evidence . . . the amount of actual medical expenses of Eric Joel Campbell, proximately caused by the negligence of the Defendant, then it would be your duty to write that amount in the blank space provided, <u>if you find the amount of [$49,820.59] to be reasonable and necessary</u>.

(emphasis added). *See* N.C.P.I., Civ. 810.20.

§ 1A-1, Rule 59(b). Thus, according to the plain language of Rule 60(b)(2), the moving party cannot seek relief from judgment where the movant had the opportunity, through the exercise of due diligence, to make a motion for new trial pursuant to Rule 59(a)(4). Therefore, under the present facts and circumstances, this assignment of error must fail.

No error.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. CEDRICK L. WILDER

No. COA95-1227

(Filed 15 October 1996)

1. Narcotics, Controlled Substances, and Paraphernalia § 141 (NCI4th)— trafficking in cocaine—constructive possession—substantial movement

The trial court did not err by denying defendant's motion to dismiss charges of trafficking in cocaine for insufficient evidence where the evidence showed that an officer observed defendant throw an object into bushes when the car in which he was a passenger was stopped by the police; defendant entered his house and remained for approximately 30 seconds while the officer was waiting for backup; several non-law enforcement individuals were seen searching the bushes where defendant had thrown the package after the police left the area; defendant's neighbor discovered a bag which matched the description given by an officer approximately ten feet from where defendant had stopped and gotten out of the car; and the bag was later determined by the SBI lab to contain 990.3 grams of cocaine. A reasonable mind could rationally conclude that defendant possessed the cocaine, that he gave instructions to the occupants of his house to retrieve it after the police left, and that there was a substantial movement of the cocaine when defendant threw it into the bushes, thus avoiding being caught with the cocaine and making it possible to later retrieve it.

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

2. Narcotics, Controlled Substances, and Paraphernalia § 196 (NCI4th)— trafficking in cocaine by possession —amount not in dispute—no charge on lesser offense of possession

The trial court did not err in a prosecution for trafficking in cocaine by not instructing the jury on the lesser included offense of possession of cocaine. Trafficking in cocaine by possession requires the possession of at least 28 grams; the uncontradicted evidence here indicated that the bag recovered from the bushes contained 990.3 grams. The only question for the jury was whether defendant had possessed the bag.

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

3. Criminal Law § 429 (NCI4th Rev.)— trafficking in cocaine—prosecutor's argument—defendant's failure to offer evidence

Defendant's right to due process in a cocaine trafficking prosecution was not denied where defendant did not present evidence and the prosecutor argued that the people who could have told the jury the most about the case did not testify. The trial court properly sustained defendant's objections and gave adequate curative instructions when the prosecutor's remarks implicated the defendant's right not to testify, and the prosecutor's comments regarding the failure of the defendant to call certain witnesses were permissibly directed toward the defendant's failure to offer evidence to rebut the State's case and not toward the defendant's failure to testify.

Am Jur 2d, Trial §§ 705, 707, 709.

4. Criminal Law § 475 (NCI4th Rev.)— trafficking in cocaine—prosecutor's argument—comment on not guilty plea

The prosecutor's closing argument in a prosecution for trafficking in cocaine did not rise to the level of gross impropriety where the prosecutor's remarks were clearly improper in that they implied that by pleading not guilty in order to put the State to its burden of proving the charge against him, the defendant was really guilty. However, the prosecutor twice noted during closing arguments that defendant was entitled to a presumption of innocence and the trial court after closing arguments properly instructed the jury on the law regarding reasonable doubt, presumption of innocence, and a plea of not guilty.

Am Jur 2d, Trial §§ 554 et seq.

Appeal by defendant from judgment entered 29 June 1995 by Judge Jerry Cash Martin in Surry County Superior Court. Heard in the Court of Appeals 20 August 1996.

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

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

WYNN, Judge.

On 30 November 1994, Elkin police officer Chris Cave stopped the vehicle in which the defendant, Cedrick L. Wilder, was a passenger approximately 150 to 200 feet from defendant's home. The defendant was suspected of being involved in a shooting incident. From approximately 100 to 150 feet behind the defendant's stopped car, Officer Cave observed the defendant throw a rough-shaped, predominantly white object from the car into the bushes. The defendant then exited the car and approached Officer Cave's car yelling and waving his arms. Officer Cave, concerned that the defendant might have a weapon, moved his patrol car away from defendant and called for back up. The defendant then entered his house and remained inside for approximately thirty seconds. Upon exiting the house, he again began shouting, waving his arms and walking toward Officer Cave and Officer Collins, who had arrived as back-up. Officer Easter arrived after obtaining a search warrant for defendant's house and any vehicles on the premises. He calmed the defendant and asked him what was going on. The defendant responded "Dope. It's all over dope." A number of items were seized in a search of the defendant's house including razor blades and plastic bags, one of which was later determined to contain cocaine residue. From their patrol car, Officer Cave and Sergeant Chris Swaim used a flashlight and the vehicle's spot lights to search the bushes for the package the defendant had thrown; however, they were unable to find the package.

A neighbor, James Edward Vestal, saw the police searching along the road. After the police abandoned their search, Mr. Vestal searched the bushes himself and found a white plastic bag, approximately five inches wide and eight inches long, wrapped with duct tape, which he took into his home. He later observed several people, not police officers, searching the same bushes. Mr. Vestal telephoned Officer Roger Smith who drove to Mr. Vestal's house and retrieved the package. The

SBI lab later determined that the bag contained 990.3 grams of cocaine.

The defendant was indicted for trafficking in cocaine by transporting more than 400 grams of cocaine and trafficking in cocaine by possessing more than 400 grams of cocaine. At trial, the defense rested without presenting any evidence and the defendant's motion to dismiss due to insufficient evidence was denied. A jury convicted the defendant of two counts of trafficking in more than 400 grams of cocaine, as charged. The defendant appeals from that judgment.

The issues before this Court are: (I) Whether the trial court erred in denying defendant's motion to dismiss based upon the insufficiency of the evidence, (II) Whether the trial court erred by failing to instruct the jury on the lesser included offense of possession of cocaine, and (III) Whether the defendant was denied his right to due process by the prosecutor's comments during closing argument. We find no prejudicial error.

I.

[1] Defendant first contends the trial court erred in denying his motion to dismiss based upon the insufficiency of the evidence. In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and allow the State the benefit of every reasonable inference. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The State must offer substantial evidence of defendant's guilt on every essential element of the crime charged. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

The defendant was charged with drug trafficking by possessing more than 400 grams of cocaine and drug trafficking by transporting more than 400 grams of cocaine. Under N.C. Gen. Stat. § 90-95(h)(3) (1993), a person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine commits the felony of trafficking in cocaine. It is a Class D felony if the quantity of cocaine is 400 grams or more. N.C.G.S. § 90-95(h)(3). Defendant maintains that the evidence was insufficient to show that he either possessed or transported the cocaine recovered by the police.

A conviction for trafficking in cocaine by possession requires that the State prove either actual or constructive possession. *See State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Constructive possession occurs when a person lacks actual physical possession, but

nonetheless has the intent and power to maintain control over the disposition and use of the substance. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989).

In the subject case, the evidence showed that Officer Cave observed the defendant throw an object into the bushes when the car in which he was a passenger was stopped by the police. Mr. Vestal, defendant's neighbor, discovered a bag, which matched the description given by Officer Cave, in the bushes approximately ten feet from where defendant had stopped and gotten out of the car. This bag was later determined by the SBI lab to contain 990.3 grams of cocaine. Considering this evidence in the light most favorable to the State, a reasonable mind could rationally conclude that the defendant possessed the cocaine.

A conviction for trafficking in cocaine by transportation requires that the State show a "substantial movement." *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991). Determining whether there has been a "substantial movement" involves a consideration of all the circumstances surrounding the movement, including its purpose and the characteristics of the areas involved. *Id.*

In this case, the evidence showed that while Officer Cave was waiting for back-up, defendant entered his house and remained for approximately 30 seconds. The evidence also showed that after the police left the area, several non-law enforcement individuals were seen by Mr. Vestal searching the bushes where the defendant had thrown the package. A reasonable mind could conclude that when the defendant entered his house, he gave instructions to the occupants to retrieve the cocaine from the bushes after the police left. A reasonable mind could further conclude that there was a "substantial movement" of the cocaine when the defendant threw the cocaine into the bushes thus avoiding being caught with the cocaine and making it possible to later retrieve it for his subsequent use and benefit.

Since there was substantial evidence of each element of the offense when considered in the light most favorable to the State, the trial court properly denied the motion to dismiss and submitted the charge to the jury.

II.

[2] Defendant next contends the trial court erred by failing to instruct the jury on the lesser included offense of possession of cocaine. The trial court must instruct the jury regarding a lesser

included offense when "the evidence would permit a jury rationally to find [the accused] guilty of the lesser offense and acquit him of the greater." *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983) (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980)). Trafficking in cocaine by possession requires the possession of at least 28 grams of cocaine. N.C.G.S. § 90-95(h)(3). Possession of cocaine is a lesser included offense of trafficking in cocaine. *See State v. King*, 99 N.C. App. 283, 289, 393 S.E.2d 152, 156 (1990).

The evidence presented in this case indicated that the white bag recovered from the bushes contained 990.3 grams of cocaine. This evidence was uncontradicted. Since the quantity of cocaine in the bag was not in dispute, the only question for the jury to resolve was whether the defendant had possessed that bag. Therefore, the trial court was correct in refusing to instruct the jury on the lesser included offense of possession.

III.

[3] Defendant also contends he was denied his right to due process by the prosecutor's comments during closing argument. During closing argument, the prosecutor stated, "[a]lso please take note that people who can tell us most about this, they didn't have them brought in. You haven't heard from the defendant's wife, Adrian Wilder." The defendant's objection was overruled. The prosecutor went on to say, "Ms. Wilder is here in the courtroom. You didn't hear from them. You didn't hear from anyone." The defendant again objected and the judge sustained the objection saying:

> The jury is to disregard the argument of counsel for the state that you did not hear it from anyone. The Court rules counsel's remarks are improper comment on the defendant's right not to testify. The defendant in this case has not testified. The law of North Carolina gives him this privilege. The same law also assures him his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way.

While it is constitutionally impermissible for a prosecutor to comment on the failure of a defendant to testify at trial, "it is permissible for the prosecutor to bring to the jury's attention 'a defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State.' " *State v. Williams*, 341 N.C. 1, 13, 459 S.E.2d 208, 216 (1995) (citations omitted), *cert. denied*, 133 L. Ed. 2d 870

(1996). In this case, the trial court properly sustained the defendant's objections and gave adequate curative instructions to the jury when the prosecutor's remarks implicated the defendant's right not to testify. The prosecutor's comments regarding the failure of the defendant to call certain witnesses were permissibly directed toward the defendant's failure to offer evidence to rebut the State's case and not toward the defendant's failure to testify. *See Williams*, 341 at 14, 459 S.E.2d at 216. Therefore, the trial court properly overruled the defendant's objections.

[4] Although the defendant did not object at trial, he also assigns as error the following remarks by the prosecutor during closing argument:

> Now, ladies and gentlemen of the jury, you know, when you walk into this courtroom and you hear a defendant plead not guilty what do you automatically think? I remember the first time I walked in a courtroom and a defendant did that. Hair stood up on the back of my neck and I said, the man said he didn't do it. You have a right to know this. And the defense counsel has pointed this out to you. And I'm sure they will again. This defendant has the right to presumption of innocence. You have a right to understand what that really means. There are two ways you plead not guilty in this country. One of them is you say, I didn't do it. But there's another way the. [sic] [o]ther way says, let's see if the people of the State of North Carolina can prove I did it. Unless and until they can turn through all the hoops, jump though all the hurdles, do all the things that need to be done, I'm still presumed innocent. He has a right to that. But you have a right to know which way is this defendant going. Ask yourselves back in the jury room, which way is this defendant going? Is he really saying, I didn't do it, or is he saying, can the State of North Carolina prove it?

To properly preserve for appeal an alleged error in the prosecutor's closing argument to the jury, an objection should be made before the verdict. *State v. Sanders*, 327 N.C. 319, 342, 359 S.E.2d 412, 427 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). "In the absence of such objection, [the appellate court] will review the prosecutor's argument to determine only whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *Id.* (quoting *State v. Allen*, 323 N.C. 208, 226, 372 S.E.2d 855, 865 (1988)).

In this case, the prosecutor's remarks were clearly improper in that they implied that by pleading not guilty in order to put the State to its burden of proving the charge against him, the defendant was really guilty. Such an argument undermines the presumption of innocence which the defendant is guaranteed. Therefore, we must determine whether, considering all the circumstances, the prosecutor's argument rose to the level of gross impropriety.

In *State v. Corbin*, 48 N.C. App. 194, 198, 268 S.E.2d 260, 263, *disc. review denied*, 301 N.C. 97, 273 S.E.2d 301 (1980), this Court found that a prosecutor's argument to the jury that a juror could not believe a person was guilty without also believing it beyond a reasonable doubt, was an erroneous statement of the law, and was improper. However, this Court held that since the trial court properly instructed the jury as to reasonable doubt, the error was not so prejudicial as to require a new trial. *Id.* In *State v. Hardy*, 299 N.C. 445, 453, 263 S.E.2d 711, 717 (1980), the Supreme Court held that a prosecutor's remark during closing argument which implied that the defendant had to prove his innocence, was not "so extreme or clearly calculated to prejudice the jury so that the trial judge should have *ex mero motu* instructed the jury to disregard the remark." The Court went on to note that:

> Whatever error there may have been, it was cured when the trial judge instructed the jury during his charge at the close of the final arguments that the jury was to understand and apply the law as the judge gave it to them. He then immediately, completely and accurately instructed the jury regarding the defendant's presumption of innocence.

Id. at 453-54, 263 S.E.2d at 717.

In the case before us, the prosecutor twice noted during closing arguments that the defendant was entitled to a presumption of innocence. More importantly, after closing arguments the trial court properly instructed the jury on the law regarding reasonable doubt, presumption of innocence, and a plea of not guilty. Considering all the circumstances, we find that the prosecutor's argument, while admittedly improper, did not rise to the level of gross impropriety. Accordingly, we find no prejudicial error.

No error.

Judges JOHNSON and LEWIS concur.

CAROL J. PULLIAM, PLAINTIFF v. FREDERICK J. SMITH, DEFENDANT

No. COA95-1220

(Filed 15 October 1996)

Divorce and Separation § 370 (NCI4th)— homosexual relationship—adverse effect on children—unsupported findings—custody change not warranted

The trial court's findings that the father's homosexual relationship will expose the children to unfit and improper influences, is detrimental to the best interest and welfare of the children, and will cause one of the children emotional difficulties were not supported by the evidence in the record but reflected only the opinions of the trial court, and the evidence and findings thus did not support the trial court's conclusion that the father's homosexual relationship constitutes a substantial change in circumstances which warrants a change of custody of the children from the father to the mother.

Am Jur 2d, Divorce and Separation § 1014.

Custodial parent's sexual relations with third person as justifying modification of child custody order. 100 ALR3d 625.

Initial award or denial of child custody to homosexual or lesbian parent. 6 ALR4th 1297.

Judge JOHN concurring in the result only.

Judge MARTIN, MARK D., joins in this concurring opinion.

Appeal by defendant from judgment entered 30 June 1995 in Henderson County District Court by Judge Deborah M. Burgin. Heard in the Court of Appeals 23 August 1996.

Jackson & Jackson, by Frank B. Jackson and Phillip T. Jackson, for plaintiff-appellee.

N.C. Gay and Lesbian Attorneys, by Sharon A. Thompson, Ellen W. Gerber and John H. Boddie, and Lambda Legal Defense and Education Fund, Inc., by Beatrice Dohrn and Steven M. Tannenbaum, for defendant-appellant.

GREENE, Judge.

Frederick J. Smith (defendant) appeals the judgment entered 30 June 1995 which modifies a previous custody order and grants exclusive custody of the parties' two minor children to Carol J. Pulliam (plaintiff).

This matter came on for hearing before the trial court on the plaintiff's complaint seeking modification of a California judgment granting primary physical custody of the parties' two minor children, Frederick Joseph Smith, II (Joey) and Kenneth August Smith (Kenny), to the defendant.

The evidence reveals the plaintiff and the defendant were married in November 1982 and Joey was born on 8 August 1985 and Kenny was born on 20 May 1988. The parties separated in 1990 and the plaintiff moved to Kansas to live with William Pulliam. A divorce was granted in November 1991 and simultaneously the parties entered into a consent decree with regard to the custody of the children. After the divorce and until August 1994, the children resided in North Carolina with defendant and his grandmother. In February 1993 the plaintiff married William Pulliam and they are living in Wichita, Kansas. In August 1994 Tim Tipton (Tipton) moved into defendant's home and defendant's grandmother moved out of the home. Each summer since the divorce, the children have lived with the plaintiff about two months.

The plaintiff is employed as a waitress/cook in Kansas and earns approximately $250.00 per week. The defendant is employed with General Electric in Hendersonville, North Carolina and earns approximately $449.00 per week. The children are both enrolled in school, have good attendance records and above average grades. The defendant coached Kenny and Joey's tee ball team and helps coach Joey's baseball team. Tipton assists the defendant in the care of the children. Both Tipton and the defendant help the children with their school homework. There was testimony from the plaintiff that she had seen the defendant "slap Joey on two different occasions across the face very hard."[1]

1. The plaintiff does not assert and the trial court did not find that the hitting of the child was a change of circumstance justifying modification of the custody order. This evidence, therefore, becomes relevant only if the plaintiff satisfies her burden of showing a substantial change of circumstances. Because we hold that this record does not support a conclusion of a substantial change of circumstances, we do not address the issue of the hitting of the child. We do note that the record is silent on whether this incident occurred before or after the separation of the parties.

Both Tipton and the defendant are gay. They sleep in the same bed which is located in a bedroom across the hall from the children's bedroom. Although they occasionally openly embrace and kiss each other, sexual activity occurs in the privacy of their bedroom. Tipton had, in a box on the top shelf in the defendant's bedroom closet, four photographs of "men dressed as women." After the defendant informed Joey, at the request of the plaintiff, of his sexual orientation, Joey became "visibly upset" and began to cry.

The defendant has had two parties since Tipton began living with him. At one party there were six homosexual men, not including the defendant and Tipton, and a "woman couple" who are also homosexual. During the party, which lasted from 8:00 p.m until 11:00 p.m., the boys stayed at their great-grandmother's house because the defendant thought there may be drinking and didn't think that was a proper atmosphere for the boys.

Joey testified that Tipton does not make him nervous and he feels comfortable around him. He likes Tipton and his cooking. Joey had no preference as to who he would like to live with. When asked why she thought the children would be better off in her custody, the plaintiff stated that it was the "impact of the homosexual thing."

In addition to findings of fact supported by the above reviewed evidence, the trial court made the following additional pertinent findings of fact:

49. That from the evidence presented the Court would find that the Defendant's conduct is not fit and proper and will expose the (2) minor male children to unfit and improper influences.
50. That there is a possibility of exposing children to embarrassment and humiliation in public because of the homosexuality of the Defendant and his relationship with Tim Tipton.

. . . .

52. That based on the foregoing findings of fact the Defendant is not providing a fit and proper environment for the rearing of the two minor children. Living daily under conditions stemming from active homosexuality practiced in the Defendant's home may impose a burden upon the two minor children by reason of the social condemnation attached to such an arrangement, which will inevitably afflict the two children's relationships with their peers and with the community at large.

53. The activity of the Defendant will likely create emotional difficulties for the two minor children. That evidence was presented that . . . Joey cried when he was told by the Defendant that he (Defendant) was homosexual. This evidence leads the Court to find that the minor child Joey may already be experiencing emotional difficulties because of the active homosexuality of the Defendant. Furthermore the Court finds that it is likely that . . . Kenny will also experience emotional difficulties because of the active homosexuality of the Defendant.

54. That the active homosexuality of the Defendant and his involvement with Tim Tipton by bringing Tim Tipton into the home of the two minor children is detrimental to the best interest and welfare of the two minor children.

The trial court then concluded that the defendant was exposing the children to conduct that is not "fit and proper" and that there had been a substantial change of circumstances since the previous custody order that is "adversely affecting the two minor children or that will likely or probably adversely affect" them. The trial court finally concluded that it is in the best interest of the two children to not reside "under the same roof as [Tipton] or any other person with whom the Defendant is having a homosexual relationship." Exclusive custody of the two children was awarded to the plaintiff.

The issues are (I) whether the conclusion of a substantial change in circumstances is supported by the findings; and if so, (II) whether the findings are supported by the evidence.

A judicially determined custody order of the court "cannot be altered until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the best interest of the child." *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675, 678 (1992) (citations omitted). The party seeking a modification of custody has the burden of showing a change in circumstances, *id.* at 78, 418 S.E.2d at 679, and that the change has had an adverse effect on the child or will likely or probably have such an effect unless custody is altered. *Id.* at 77-78, 418 S.E.2d at 678-79. In other words, there must be "a nexus" between the changes of circumstances and the adverse effects on the child, *Garrett v. Garrett*, 121 N.C. App. 192, 196, 464 S.E.2d 716, 719 (1995); *see MacLagan v. Klein*, 123 N.C. App. 557, 568-69, 473 S.E.2d 778, 586-87 (1996) (religious practices of parent

properly considered in custody case only if it has "detrimental effect on the child's general welfare"), and evidence of " 'speculation or conjecture that a detrimental change may take place sometime in the future' will not support a change in custody." *Ramirez-Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679 (quoting *Wehlau v. Witek*, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985)).

The determination of whether a substantial change in circumstances has occurred "is unequivocally a conclusion of law." *Garrett*, 121 N.C. App. at 197, 464 S.E.2d at 720. A conclusion that a substantial change in circumstances has occurred implies that "a change has occurred among the parties, and that change has affected the welfare of the *children* involved." *Id.* The conclusion must be supported by findings of fact and the findings must be supported by competent evidence in the record. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). Findings of fact which are the equivalent of "speculation or conjecture" are not sufficient to support a conclusion. *Benedict v. Coe*, 117 N.C. App. 369, 378, 451 S.E.2d 320, 325 (1994).

I

In this case the trial court concluded that there has been a substantial change of circumstances. There are findings that a change has occurred since the entry of the prior custody decree, i.e., defendant is living in a homosexual relationship. There are also three findings (Numbers 49, 53 and 54) that this relationship will have adverse effects on the children: "will expose" the children to "unfit and improper influences," "is detrimental to the best interest and welfare of the two minor children," and "it is likely that the minor child Kenny will . . . experience emotional difficulties because of the active homosexuality of the defendant." The other findings, asserted by the plaintiff to support detrimental effects on the children, are mere "speculation and conjecture" and thus are not supportive. Those findings are: "there is a possibility of exposing [the] children to embarrassment and humiliation," "active homosexuality . . . may impose a burden upon the two minor children by reason of the social condemnation attached to such an arrangement," and "Joey may already be experiencing emotional difficulties because of the active homosexuality."

II

The order must nonetheless fail because the findings which do support the conclusion are not supported by evidence in the record. All three of these findings reflect nothing more than the opinion of

the trial court that the conduct of the defendant *necessarily* exposes the children to "improper influences" that will likely cause Kenny "emotional difficulties" and is generally "detrimental to the best interest and welfare" of both children. This was error. Our courts have been consistent in rejecting the opinion that conduct of a parent, *ipso facto*, has a deleterious effect on the children. *See In re McCraw Children*, 3 N.C. App. 390, 395, 165 S.E.2d 1, 5 (1969) (adulterous conduct of parent does not per se render that parent unfit to have custody); *Williford v. Williford*, 303 N.C. 178, 179, 277 S.E.2d 515, 515 (1981) (change of custody not mandated when fiancee of custodial parent "began to live with the family"). There must be evidence that the conduct has or will likely have a deleterious effect on the children. In this case there is no evidence that the defendant's homosexual relationship with Tipton has or will likely have a deleterious effect on the children or that the defendant was otherwise an unfit parent. In fact the evidence reveals that the children are well adjusted, attend school regularly, make good grades, and participate in after school athletics.[2]

This case is thus distinguishable from *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995), relied on by the plaintiff, in that in *Bottoms* the child "demonstrated some disturbing traits." As noted by the Virginia Supreme Court, the child in that case "uses vile language," he "screams, holds his breath until he turns purple, and becomes emotionally upset when he must go to visit his [lesbian] mother. He appears confused about efforts at discipline, standing himself in a corner facing the wall for no apparent reason." *Id.* In this case there is no evidence of any such demonstrations by the children. Although there is evidence that Joey did become upset upon learning that his father is gay, there is no evidence that he was experiencing "emotional difficulties" as suggested by the findings of the trial court.

Because the findings are either speculative or not supported by evidence in the record, the conclusion that there has been a substantial change in circumstances is not supported.[3] Accordingly the judgment of the trial court must be reversed.

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2. The plaintiff points to an incident that occurred at Six Flags amusement park in Atlanta as some evidence that the children have been humiliated as a consequence of the homosexual relationship. We disagree. The record simply does not support the inference that the incident that occurred at Six Flags was in any way related to the sexual orientations of the defendant and Tipton.

3. Because the conclusion that there has been a substantial change in circumstances is not supported in the record, we do not reach the issue of the best interest of the children. *Ramirez-Barker*, 107 N.C. App. at 77, 418 S.E.2d at 678.

Reversed.

Judge JOHN concurs in the result only with separate opinion and Judge MARTIN, Mark D., joins in this concurrence in the result only.

Judge JOHN concurring in the result only.

In the present case, significant portions of the trial court's findings of fact numbered 49, 50, 52, 53 and 54, upon which its determination of a substantial change of circumstances is based, are unsupported by competent evidence of record. Accordingly, under our law the court's order is defective and must be reversed. *See Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). I therefore concur in the result reached in Judge Greene's opinion.

STATE OF NORTH CAROLINA v. GRANVILLE L. HENDRICKSON, DEFENDANT

No. COA95-1062

(Filed 15 October 1996)

1. **Evidence and Witnesses § 653 (NCI4th)— cocaine—motion to suppress—findings—transposed names—harmless error**

   There was only harmless error in the denial of defendant's motion to suppress cocaine seized from his person in an airport where the trial court found that defendant's bag had been seized by Agent Weis when it was really Agent Black who seized the bag. The trial court inadvertently transposed the names of the agents.

   Am Jur 2d, Motions, Rules, and Orders § 26.

2. **Searches and Seizures § 80 (NCI4th)— cocaine—airport stop—reasonable suspicion**

   The trial court did not err in denying defendant's motion to suppress cocaine seized from his person in an airport by concluding that SBI agents had reasonable suspicion based on articulable facts that defendant was engaged in criminal activity at the time of seizure where SBI agents identified defendant from a tip and the drug courier profile, they suspected defendant of concealing contraband in his crotch, they attempted to seize his bag

for a drug dog sniff and defendant attempted to walk away with the bag, an agent said "What's this?" and reached for defendant's crotch, defendant attempted to flee, and cocaine was removed from defendant's crotch after he was subdued. All of the facts known to the narcotics agents at the time of the seizure, taken as a whole, formed a sufficient basis for a reasonable, articulable suspicion that this particular defendant was transporting narcotics.

Am Jur 2d, Searches and Seizures §§ 70, 71, 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.

3. **Arrest and Bail § 69 (NCI4th)— drug courier profile— object under clothes—flight—probable cause**

SBI agents had probable cause to arrest defendant for trafficking in cocaine where the evidence reveals that the agents determined that defendant conformed to the drug courier profile; the agents confirmed by examining defendant's identification that he was the person about whom they had received a tip; defendant made prolonged eye contact with the officers after deboarding the plane and quickly heading towards an airport exit; the agent noticed a round, rigid cookie shaped object in the lower abdomen under defendant's clothes while asking for defendant's identification; the agents were aware of defendant's past criminal conduct; and defendant attempted to flee when the agents seized his bag and again when they tried to arrest him.

Am Jur 2d, Arrest §§ 9, 39, 42; Searches and Seizures §§ 70, 71.

Propriety of stop and search by law enforcement officers based solely on drug courier profile. 37 ALR5th 1.

Appeal by defendant from order entered 20 April 1995 by Judge Jack Thompson in Wake County Superior Court. Heard in the Court of Appeals 15 May 1996.

On 15 August 1994, Special Agent William Weis with the State Bureau of Investigation (SBI), was working drug interdiction at the

Raleigh-Durham Airport in Raleigh, North Carolina with SBI Agent Bruce Black. Agent Weis has worked for the SBI since 1978 and has worked with the narcotics section since 1987. He has worked on over 260 drug interdiction cases. Agent Black has experience with 200-300 drug interdiction cases and testified substantially the same as Agent Weis as to what narcotics agents look for in attempting to intercept drug couriers.

Agent Weis testified that from his experience he has learned that drug couriers carry contraband in particular ways. In general, when carrying less than 10 ounces a male courier will carry it in his crotch area. On 15 August 1995, Weis received information, a tip, that defendant, Granville Hendrickson was traveling on American Airlines flight 863 from New York to Raleigh. Granville Hendrickson had purchased a one-way ticket with cash one hour before the flight and he had not checked any luggage. Weis confirmed the information through American Airlines reservations. Prior to the arrival of the flight Agent Black made inquiries on the U.S. Custom's Computer and the FBI's computer about Granville Hendrickson. The Customs computer showed that defendant had recently made a trip from North Carolina to Puerto Rico. Puerto Rico is also known by agents to be a source area for cocaine. The FBI computer check showed that he had been convicted for possession of stolen property in Goldsboro, North Carolina.

Before the flight arrived the agents positioned themselves near the arrival gate and watched defendant get off the flight. As defendant walked into the gate, he made prolonged eye contact with Agent Weis and stared at two other officers. He walked at a rapid pace near the left hand wall and against the regular flow of pedestrian traffic towards the airport exit. Defendant made eye contact several more times with the agents and he put his right hand in his pants pocket in such a manner as it looked like he was reaching towards the center of his body and grabbing something and lifting it up as he walked. Defendant exited the airport terminal building and walked towards the taxi stand. Weis and Black approached him, identified themselves as officers, and asked if they could see his airline ticket. He responded that he did not have a ticket and he proceeded to hail a taxi. The agents then asked to see some identification and as he turned to get his passport out of his bag Weis noticed that defendant's nylon jogging pants pulled tight across his lower abdomen area revealing a round, cookie shape that appeared very rigid. Weis believed the object to be crack cocaine. The agents then asked

defendant if he had anything on his person or in his bag that he should not have and he responded no. Weis asked defendant if they could look in his bag and defendant again said no. Weis then seized the bag and told defendant that they were going to hold his bag so that a drug dog could sniff it for contraband. Defendant tugged on the bag as if he was not going to turn it over to the agents and attempted to walk away from them. As defendant was attempting to leave, Weis reached towards defendant's lower abdomen area and asked him "what's this?" Weis felt the bulge that he had seen earlier. The bulge was hard and it confirmed Weis' suspicions. Defendant attempted to flee and the agents subdued him. Defendant was taken to a police substation at the airport. After defendant was arrested Weis removed cocaine from defendant's crotch and found a bag of crumbled crack cocaine in defendant's pants pocket.

Defendant was charged with two counts of trafficking more than 200 but less than 400 grams of cocaine, by transportation and by possession. Defendant waived his right to a probable cause hearing and the Grand Jury of Wake County returned true bills of indictment on these charges 10 January 1995. On 6 February 1995, defendant filed a written waiver of arraignment, reserving his right to file a motion to suppress evidence. On 13 February 1995, defendant filed a motion to suppress evidence obtained in violation of his state and federal constitutional rights. Defendant appeals from the order denying his motion to suppress evidence.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert T. Hargett, for the State.

Law Offices of George W. Hughes, by George W. Hughes and John F. Oates, Jr., for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress because the findings of fact are not supported by competent evidence in the record. We disagree.

"This Court must determine whether these findings of fact support the trial court's conclusions of law, and if so, the trial court's conclusions of law are binding on appeal." *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57 (citing *State v. Brooks*, 337 N.C. 132, 140-141, 446 S.E.2d 579, 585 (1994)), *disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995).

Defendant specifically assigns error to Finding of Fact 13:

> 13. Upon refusal to allow agent Weiss [sic] to look into the bag the Defendant was carrying, agent Weiss [sic] seized the bag from the Defendant and informed the Defendant that drug sniffing dog would be called to check out the bag.

Defendant is correct that the trial judge erroneously found in Finding of Fact 13 that Agent Weis seized defendant's bag when it was really Agent Black who seized the bag. However, we find this to be harmless error. The trial court heard all of the evidence and inadvertently transposed the names of the agents in the order denying defendant's motion to suppress.

[2] Defendant's second assignment of error is that the trial court erred by concluding that the agents had reasonable suspicion based on articulable facts that defendant was engaged in criminal activity at the time of seizure and that they had probable cause to arrest defendant. We disagree with the defendant and find that reasonable suspicion and probable cause existed.

Defendant argues that the agents conducted an unreasonable seizure of him which exceeded the scope of a permissible stop and frisk procedure, and that the arrest was not supported by probable cause.

We first address whether defendant was seized within the meaning of the Fourth Amendment. The United States Supreme Court created a limited exception to the general rule that seizures of a person require probable cause in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). "That approach, adopted by our Supreme Court in *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979), 'requires only that the officer have a "reasonable" or "founded" suspicion as justification for a limited investigative seizure.' " *State v. Perkerol*, 77 N.C. App. 292, 297, 335 S.E.2d 60, 64 (1985), *disc. review denied*, 315 N.C. 595, 341 S.E.2d 36 (1986).

Furthermore, the United States Supreme Court detailed a reasonableness requirement for seizures after its decision in *United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497, *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980).

> While the court has recognized that in some circumstances a person may be detained briefly without probable cause to arrest him,

> any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.

Reid v. Georgia, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893-894 (1980). This standard "requires that the court examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of [defendant], and the rational inferences which the officers were entitled to draw from those facts." *State v. Casey*, 59 N.C. App. 99, 107, 296 S.E.2d 473, 478 (1982). The circumstances leading to the seizure "should be viewed as a whole through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979).

Airport search cases based on "drug courier profiles" must be reviewed on a case by case basis. *State v. Grimmett*, 54 N.C. App. 494, 498, 284 S.E.2d 144, 148 (1981), *disc. review denied*, 305 N.C. 304, 290 S.E.2d 706 (1982). Likewise, the Supreme Court of the United States reversed the Ninth Circuit in *United States v. Sokolow*, 490 U.S. 1, 6, 104 L. Ed. 2d 1, 9-10 (1989), because the Ninth Circuit's approach was "contrary to the case-by-case determination of reasonable articulable suspicion based on all the facts."

A "reasonable, articulable suspicion" is not based on factors that "taken as a whole, could easily be associated with many travelers and would therefore subject them to . . . intrusions into their privacy." *State v. Odum*, 119 N.C. App. 676, 681, 459 S.E.2d 826, 829 (1995) (Greene, dissenting), *rev'd*, 343 N.C. 116, 468 S.E.2d 245 (1996). A trained narcotics agent forms a reasonable, articulable suspicion that an individual is a drug courier on the basis of identifiable behaviors that are usually associated with drug couriers as opposed to law abiding citizens. This Court must review all the facts known to the narcotics agents at the time of the seizure to determine whether, taken as a whole, those factors formed a sufficient basis for a reasonable, articulable suspicion that this particular defendant was transporting narcotics. *Id.*

The facts in the present case show that Agent Weis received a tip from a source that the following would occur: (1) A man named Granville Hendrickson would be flying in on American Airlines Flight 863 from New York, a source city for narcotics, to Raleigh-Durham Airport; (2) he checked no bags and traveled only with a small black

gym bag; (3) he purchased his ticket within an hour before departure of his flight from LaGuardia Airport, and (4) he purchased a one-way ticket with cash. Agent Weis confirmed this information with American Airlines reservations in Raleigh and Agent Black ran computer background checks on defendant in the U.S. Customs and F.B.I. computers. The agents discovered that defendant had made a recent trip to Puerto Rico, also a known source for drugs, and that he had a prior conviction for possession of stolen property in Goldsboro, North Carolina. Adding to these factors was that once defendant arrived at the airport: (1) He made prolonged eye contact with Agents Weis and Black and Alston and appeared to be nervous; (2) upon making eye contact he began to walk at a rapid pace through the airport against the regular flow of traffic; (3) he made eye contact twice with Agent Weis while on the escalator to go to the baggage claim area; and (4) Agent Black observed him put his right hand in the pocket of his nylon jogging pants in such a way as it looked like he was reaching towards the center of his body and grabbing something and lifting it up as he walked. Other relevant factors in this case are: (1) Agent Weis has worked with the narcotics division of the SBI since 1987, started with the SBI in 1978 and has worked on over 260 drug interdiction cases; (2) Agent Black has worked with the narcotics division of the SBI since 1988, started with the SBI in 1977 and has worked on approximately 200 to 300 drug interdiction cases; (3) both agents testified that there are two main ways that drug couriers carry drugs, either on their person, in the crotch area if a male courier, or in their baggage; (4) the agents identified Miami, the Southern Florida area, the New York metropolitan area, Los Angeles and Southern Texas as being main source cities for North Carolina; and (5) Agent Black testified that New York City is a primary source city for North Carolina and that 90 percent of drug interdiction arrests made are of people traveling from New York to the Raleigh-Durham Airport.

When deciding to approach defendant the agents took all of the above factors, the "totality of the circumstances," into consideration. When asked for his identification, defendant turned to open his duffle bag. This caused his jogging pants to pull a little tighter across his crotch area and allowed Agent Weis to notice a round, cookie shape that appeared very rigid under the clothes covering defendant's lower abdomen area. Agent Weis noted that this looked unnatural and he believed it to be contraband. At this time, the agents had a reasonable, articulable suspicion to seize defendant's bag and to hold it for a drug dog sniff. Up until the time that Agent Black seized defendant's

bag, no seizure had occurred. Defendant was still free to leave and he even hailed a taxi during his conversation with the agents. Thus we find that based on the totality of the circumstances summarized above, the agents had a reasonable, articulable suspicion to stop defendant and to seize his bag.

[3] The final issue to be addressed is whether the agents had the requisite probable cause to arrest defendant. With regards to the issue of probable cause, the North Carolina Supreme Court stated that a reviewing court's role "is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, believed the suspect committed the crime for which he [i]s later charged." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 147 (1984).

> Factors which a court may consider in determining whether probable cause to arrest exists include: (1) the time of day; (2) the defendant's suspicious behavior; (3) flight from the officer or the area; (4) the officer's knowledge of defendant's past criminal conduct, and . . . one's reputation for relevant criminal conduct may contribute to probable cause.

State v. Watson, 119 N.C. App. 395, 399, 458 S.E.2d 519, 523 (1995) (citations omitted). The evidence presented in the instant case reveals: (1) The agents determined that defendant conformed to the drug courier profile; (2) the agents confirmed by examining defendant's identification that he was Granville Hendrickson, the same person about whom they had received a tip; (3) defendant made prolonged eye contact with the officers after deboarding the plane and quickly heading towards an airport exit; (4) while being asked for his identification, Weis noticed a round, rigid cookie shaped object under the clothes covering defendant's lower abdomen; (5) the agents were aware of defendant's past criminal conduct; and (6) defendant attempted to flee when the agents seized his bag and again when they tried to arrest him. Accordingly, we find that the agents had probable cause to arrest defendant.

No error.

Judges JOHN and McGEE concur.

JAMES E. DUNN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF MEDICAL ASSISTANCE, RESPONDENT

No. COA95-1129

(Filed 15 October 1996)

1. Public Officers and Employees § 41 (NCI4th)— State employment—most qualified applicant—issue not appealable

Provisions of N.C.G.S. § 126-4, the Intergovernmental Personnel Act, and federal and state regulations implementing the Act do not give an unsuccessful applicant for employment by the Department of Human Resources a right to a contested case hearing and appeal to the State Personnel Commission on the issue of whether the most qualified applicant was chosen. Rather, the Commission has jurisdiction to resolve only those issues which are specifically defined as contested case issues in N.C.G.S. § 126-34.1.

Am Jur 2d, Civil Service §§ 79-81.

2. Public Officers and Employees § 47 (NCI4th)— veteran's preference—inapplicability to reemployment

The State Personnel Commission did not err by concluding that the veteran's preference did not apply to an applicant for employment by the Department of Human Resources because the application was not for "initial selection" where the applicant had previously worked for the Department after leaving military service but had left the Department to pursue private employment. The Commission's rule that the veteran's preference applies only to "initial selection" and "reduction in force" situations is reasonable and permissible. N.C.G.S. §§ 126-80, 126-82(a) and (c).

Am Jur 2d, Civil Service §§ 36 et seq.; Veterans and Veterans' Law §§ 95 et seq.

Appeal by petitioner from order entered 19 June 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 23 May 1996.

Janine W. Dunn for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Robert M. Curran, for respondent-appellee.

LEWIS, Judge.

In this appeal, petitioner seeks to challenge respondent's decision not to hire him.

From October 1977 through January 1986, petitioner, a veteran, was employed with respondent, first as a Health Standards Officer II and later as a Health Standards Officer III. During four of these years, he was Manager of the Community Alternatives Program ("CAP"). He voluntarily resigned in January 1986 to pursue private employment.

On 11 October 1990, as a private citizen, petitioner applied for the position of Health Standards Officer III, CAP Manager. The State hired another applicant and informed petitioner of this decision in May 1991.

On 6 June 1991, petitioner filed a petition for a contested case hearing. The issues presented at the hearing were: (1) whether the most qualified applicant was selected and (2) whether the failure to hire petitioner violated State law provisions establishing a veteran's preference. After a hearing, the Administrative Law Judge ("ALJ") issued a decision recommending that petitioner be given the position and partial back pay.

On 3 September 1993, the State Personnel Commission ("Commission") issued an order in which it declined to adopt the ALJ's recommended decision, concluded that the veteran's preference did not apply, and dismissed the appeal for lack of jurisdiction. On review in Superior Court, Judge Narley L. Cashwell remanded the case to the Commission to enter a final decision with the required findings of fact and conclusions of law.

On 14 October 1994, the Commission entered a second final agency decision in which it concluded that the veteran's preference did not apply to petitioner's application and that it did not have jurisdiction to review the issue of whether respondent selected the most qualified applicant. Petitioner petitioned for judicial review in Wake County Superior Court. On 19 June 1995, Judge Robert L. Farmer entered an order affirming the Commission's decision. Petitioner appeals.

[1] Petitioner first contends the superior court did have jurisdiction under Chapter 126 of the General Statutes to determine whether the most qualified applicant was selected.

Chapter 126 gives applicants for state employment and designated state employees specific rights in regard to their employment. It also creates the State Personnel Commission which is given the power to establish various policies and rules. *See* N.C. Gen. Stat. § 126-2 (1995) (establishing the Commission), N.C. Gen. Stat. § 126-4 (1995) (assigning powers and duties to the Commission).

Petitioner specifically relies on the following subsections of G.S. section 126-4:

> Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:
>
> * * *
>
> (4) Recruitment programs designed to promote public employment, communicate current hiring activities within State government, and attract a sufficient flow of internal and external applicants; *and determine the relative fitness of applicants for the respective positions.*
>
> * * *
>
> (6) The *appointment*, promotion, transfer, demotion and suspension of employees.
>
> * * *
>
> (9) *The investigation of complaints and the issuing of such binding corrective orders or such other appropriate action concerning employment*, promotion, demotion, transfer, discharge, reinstatement, *and any other issue defined as a contested case issue by this Chapter* in all cases as the Commission shall find justified.

G.S. § 126-4 (emphasis added).

Although these subsections give the Commission the power to make rules and policies regarding the selection of State employees, they do not give applicants specific hearing and appeal rights. G.S. section 126-4(9) generally gives the Commission the authority to investigate complaints concerning employment. However, this authority is further defined by the phrase "and any other issue defined as a contested case issue by this Chapter . . . ." G.S. § 126-4(9). We construe this language to mean that the General Assembly only

intended to give the Commission the jurisdiction to resolve, through the appeal and contested case hearing process, those issues which are specifically defined as contested case issues in Chapter 126.

Other provisions of Chapter 126 directly confer applicants and employees with specific rights to appeal to the Commission and to have a contested case hearing under Article 3 of Chapter 150B of the General Statutes. *E.g.*, N.C. Gen. Stat. §§ 126-5(h), 126-36, 126-36.1, 126-36.2 (1995). Since the General Assembly specifically granted hearing and appeal rights on these other issues, we infer that it did not intend, by enacting G.S. 126-4 (4), (6), and (9), to grant additional appeal rights to applicants. *Inclusio unius est exclusius alterius. See Laurel Park Villas Homeowners Assoc. v. Hodges*, 82 N.C. App. 141, 143, 345 S.E.2d 464, 465, *disc. review denied*, 318 N.C. 507, 349 S.E.2d 861 (1986). We conclude that G.S. section 126-4 does not confer petitioner with specific grounds for appeal on the issue of whether the most qualified applicant was chosen.

This conclusion is consistent with the recent action of the General Assembly in amending Chapter 126 to add N.C. Gen. Stat. section 126-34.1. *See* 1995 N.C. Sess. Laws ch. 141, § 7. This section, effective on 1 June 1995, was added after the Commission rendered its decision in this case but prior to entry of the superior court judgment. It is not necessary to determine whether this provision applies to petitioner because we have held that other provisions of Chapter 126, even absent this provision, do not give the Commission jurisdiction to consider this issue. However, we note that this new provision reinforces our holding by providing:

> (e) Any issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically authorized by this section shall not be grounds for a contested case hearing under Chapter 126.

G.S. § 126-34.1(e) (1995). By so legislating, the General Assembly has indicated its intent to create grounds for appeal to the Commission through a contested case hearing only on issues for which appeal has been specifically authorized in G.S. section 126-34.1. G.S. section 126-34.1 does not specifically authorize appeal on the issue raised by petitioner.

Petitioner also asserts that the requirements of the Intergovernmental Personnel Act ("Act"), 42 U.S.C. § 4701 *et. seq.*

(1995), and federal and state regulations implementing the Act require the Commission to review whether the most qualified applicant was chosen for the position he sought. We disagree.

Because of its participation in a federally funded Medicaid program, respondent is required by the Act to establish and maintain personnel standards on a merit basis. *See* 42 U.S.C. 4728(b) (1995); 5 C.F.R. §§ 900.601 to 900.606 (1996); Appendix A to 5 C.F.R., Pt. 900, Subpt. F (1996). Consequently, the Office of State Personnel has set forth, in its Personnel Manual, Standards for a Merit System of Personnel Administration which mirror the federal standards. North Carolina Office of State Personnel, Personnel Manual, section 13, 33-35 (November 1989) ("Personnel Manual").

Both the federal and state versions of these standards contain the following provision:

> (b) Resolution of Compliance Issues
>
> * * *
>
> (2) The merit principles apply to *systems* of personnel administration. The Intergovernmental Personnel Act does *not* authorize OPM [federal Office of Personnel Management] to exercise any authority, direction or control over the selection, assignment, advancement, retention, compensation, or other personnel action with respect to any *individual* State or local employees.

5 C.F.R. § 900.604(b) (1996); Personnel Manual, 900.604(b)(2), § 13, 34 (emphasis added). The federal and state provisions cited by petitioner simply require the state to implement a *system* of personnel administration based on merit. We are not persuaded that any of these provide petitioner with a right to a contested case hearing and appeal to the Commission on the issue of whether the most qualified applicant was selected for the position.

[2] Petitioner next asserts that the superior court erred by upholding the Commission's conclusion that the veteran's preference did not apply to his application for employment because his application was not for an "initial selection."

N.C. Gen. Stat. sections 126-80 through 126-83 establish a veteran's preference for employment in State government. G.S. section 126-80 declares the State's policy in regard to the veteran's preference as follows:

> It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and *in recognition of the time and advantage lost toward the pursuit of a civilian career*, veterans shall be granted preference in employment for positions subject to the provisions of this Chapter with every State department, agency, and institution.

G.S. § 126-80 (1995) (emphasis added).

The Commission has promulgated rules implementing the preference. *See* N.C. Admin. Code tit. 25, r. 1H.0610—1H.0615 (1987). Rule 1H.0614(a) provides that "the preference . . . shall apply in initial selection and reduction in force situations only." N.C. Admin. Code tit. 25, r. 1H.0614(a) (December 1987). The term "initial selection" is not defined in the rules.

Petitioner argues that the Commission's interpretation of the applicable statute and rules is "merely a convenient litigation position" and is not reasonable or permissible. We disagree.

G.S. section 126-82 provides for application of the veteran's preference when an eligible veteran's qualifications are evaluated against the minimum requirements "for obtaining a position" and permits application of the preference in certain reduction in force situations. G.S. § 126-82(a) and (c) (1995). Given these provisions, we conclude that the Commission's rule that the veteran's preference applies only to "initial selection" and "reduction in force" situations is reasonable and permissible.

In addition, we conclude that the Commission's decision that petitioner's application was not for "initial selection" is also reasonable and permissible in light of the findings of fact made by the Commission, findings which we conclude are supported by substantial evidence in the whole record. The policy of the veteran's preference is to recognize veterans for "time and advantage lost toward the pursuit of a civilian career." G.S. § 126-80. At the time of petitioner's re-application in 1990, he had over eight years of employment with respondent and its predecessor agency. This period of time was not interrupted by military service, but by his decision to pursue private employment. The statutory purpose of compensating veterans for time and advantage lost toward the pursuit of a civilian career is given effect by application of the preference to first-time applicants and to employees in reduction in force situations. The preference

would have exponential effect if applied each time an eligible veteran reapplied for employment with the State.

We also disagree with petitioner's assertion that the definition of "initial employment" set forth in N.C. Admin. Code tit. 25, r. 01D.0201(a) (1988) controls. We do not find this definition dispositive because it does not define the term "initial selection" used in the veteran's preference regulations.

We hold that the superior court did not err in upholding the Commission's conclusion that the veteran's preference did not apply to petitioner's 1990 application for employment with respondent.

In sum, after review of the whole record in accordance with N.C. Gen. Stat. sections 150B-51(b) (1995) and 150B-52 (1995), we hold that the Commission's findings and decision are supported by substantial evidence, not based on an error of law, not arbitrary and capricious, and that the superior court did not err by so concluding.

Given our resolution of these issues, we need not address petitioner's other arguments.

Affirmed.

Judges JOHNSON and MARTIN, Mark D. concur.

ROY R. ROBINSON AND HILDA ROBINSON, HIS WIFE, PLAINTIFFS v. WILLIAM P. PARKER, JR., M.D., JOHN L. REMINGTON, M.D., AND DELANEY RADIOLOGISTS, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION, DEFENDANTS

No. COA95-890

(Filed 15 October 1996)

Actions and Proceedings § 18 (NCI4th); Process and Service § 59 (NCI4th)— failure to deliver summons to sheriff— validity of alias or pluries summons

N.C.G.S. § 1A-1, Rule 4 does not require delivery of a summons to the sheriff within 30 days of its issuance or a showing of good faith or excusable neglect for failure to promptly deliver the summons to the sheriff in order for the summons to serve as the

basis for the issuance of an alias or pluries summons. Therefore, the trial court erred in allowing defendant's Rule 12(b) motion to quash issuance and service of process in a medical malpractice action on the ground that plaintiffs' failure to deliver the summons to the sheriff before the alias or pluries summons was issued was not done in good faith.

Am Jur 2d, Appellate Review § 149; Process §§ 56, 407; Prohibition §§ 14, 53.

Tolling of limitation period as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations. 27 ALR2d 236.

Necessity and sufficiency of service of process under due process clause of Federal Constitution's Fourteenth Amendment—Supreme Court cases. 100 L. Ed. 2d 1015.

Judge LEWIS concurring.

Appeal by plaintiffs from order entered 9 May 1995 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 16 April 1996.

On 2 April 1993, plaintiffs filed a medical malpractice action alleging that defendants' negligence caused plaintiff Roy R. Robinson both physical and emotional pain and suffering and left him permanently partially disabled. In answering, defendants generally denied plaintiffs' allegations. Thereafter, plaintiffs voluntarily dismissed their action without prejudice on 13 August 1993.

On 12 August 1994, plaintiffs commenced the present action by filing a complaint and obtaining issuance of summonses directed to defendants. These summonses, however, were not served on defendants, and on 9 November 1994, plaintiffs caused alias and pluries summons to be issued, directed to defendants. Defendants Parker and Delaney Radiologists were served with these summonses on 2 December 1994. Defendant Remington was served on 5 December 1994.

On 5 January 1995, defendants Remington and Delaney Radiologists answered asserting no service, process or jurisdictional defenses. Thereafter, on 9 January 1995, defendant Parker filed a motion to quash issuance and service of process, but made no motion to dismiss pursuant to Rule 41(b) or for sanctions pursuant to Rule

11(a). On 20 January 1995, defendants Remington and Delaney Radiologists filed a substantially similar motion to quash issuance and service of process.

Defendants' motions were heard on 4 April 1995 and, after hearing, the court took the matters under advisement. On 11 April 1995, plaintiffs filed and served a request pursuant to Rule 52(a)(2) that the trial court make findings of fact and conclusions of law. On 9 May 1995, the trial court entered an order including the following findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

4. The Motion to Quash Issuance and Service of Process was noticed for hearing on January 19, 1995, to be heard on March 13, 1995; this hearing was continued to April 4, 1995. During this time plaintiffs have failed to show by affidavit or otherwise any reason or excuse for the delay in obtaining service of process. The Court further finds that plaintiff violated the statutory requirements for the service of process by failing to deliver the Complaint and Summons to the Sheriff, or by otherwise obtaining service within thirty (30) days as required by N.C.G.S. 1A-1, Rule 4(a). There has been no showing made by the plaintiff of any reason which would constitute excusable neglect, and the Court specifically finds that the failure to deliver the Summons and Complaint to the Sheriff of the county for service, or to otherwise obtain service as required by Rule 4 was not done in good faith and was an attempt to gain unfair advantage over the defendants which warrants the quashing of the Alias and Pluries Summons issued herein and service thereon.

5. The Court has carefully considered the holding in Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986) and specifically finds that the holding in Smith v. Starnes does not apply to the facts of this case and specifically the Court finds that the failure to deliver the duly issued Summons to the Sheriff for service within thirty (30) days was not done in good faith. The Court has also considered the holding in Sellers v. High Point Memorial Hospital, 97 N.C. App. 299, 388 S.E.2d 197 (1990) and finds same to be controlling and applicable to the facts of this Action

. . . .

CONCLUSIONS OF LAW

> Plaintiffs irresponsible and dilatory handling of issuance and service of process was not done in good faith and was an attempt to delay or gain unfair advantage over the defendants, thereby prejudicing their cause.

Having so concluded, the trial court granted defendants' motions to quash issuance and service of process.

Plaintiffs appeal.

Larry M. Coe and Bailey & Dixon, L.L.P., by Gary S. Parsons and John M. Kirby, for plaintiff-appellants.

Baker, Jenkins, Jones & Daly, P.A., by R.B. Daly, Jr., and Kevin N. Lewis, for defendant-appellees John L. Remington, M.D., and Delaney Radiologists, P.A.

Harris, Shields & Creech, P.A., by Thomas E. Harris and R. Brittain Blackerby, for defendant-appellee William P. Parker, Jr., M.D.

EAGLES, Judge.

We note at the outset that each defendant's "motion to quash issuance and service of process" fails to cite "the rule number or numbers under which [defendants are] proceeding." General Rules of Practice for the Superior Court, Rule 6 (1985). While this defect itself at times may be fatal, *Sherman v. Myers*, 29 N.C. App. 29, 30, 222 S.E.2d 749, 750, *disc. review denied*, 290 N.C. 309, 225 S.E.2d 830 (1976), the trial court in its discretion did not find it so here. We treat each defendant's motion as one challenging the sufficiency of process pursuant to Rule 12, and we review the trial court's ruling accordingly. *See Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 494, 315 S.E.2d 97, 98 (1984). We note also that defendants concede in their briefs that we should review their motions to quash as Rule 12(b) motions.

Plaintiff argues that the trial court erred in quashing plaintiff's issuance and service of process. We agree.

G.S. 1A-1, Rule 4, governs the issuance and service of process in civil cases. In *Smith v. Starnes*, 317 N.C. 613, 617-18, 346 S.E.2d 424, 427 (1986), our Supreme Court applied G.S. 1A-1, Rule 4, under facts similar to the instant case and explained as follows:

> We do not believe that a correct interpretation of Rule 4 requires delivery of the summons to the sheriff within thirty days of its issuance in order that the summons may later serve as a basis for the issuance of an alias or pluries summons. Although section (a) provides that the complaint and summons shall be delivered to the sheriff of the county where process is to be made, the rule provides no sanction for a party's failure to make such a delivery. Section (c) expressly provides that the sheriff's failure to make service within the time allowed under the statute shall not invalidate the summons. Nor will the sheriff's failure to return an unserved summons invalidate the summons. N.C.G.S. § 1A-1, Rule 4(c) (1983). Section (e) controls in determining when an action is discontinued. It provides that a summons is discontinued as to any defendant not served within the time allowed when there is "neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d) . . . ." There is no provision in section (e) concerning a party's failure to deliver the summons to the sheriff for service. In light of the clear language of Rule 4(e) on the discontinuance of a summons, there is no justification for construing the rule to require delivery of the summons to the sheriff within thirty days of its issuance to keep the summons alive.

Id. This language is controlling. The Supreme Court makes no mention of any requirement under Rule 4 that plaintiffs must prove good faith, excusable neglect or even give any reason at all to justify their failure to promptly deliver the summons to the Sheriff. In fact, the *Starnes* court specifically states that Rule 4 "provides no sanction for a party's failure to make such a delivery." *Id.* at 617, 346 S.E.2d at 427. Accordingly, we find no fatal defect in plaintiff's issuance and service of process pursuant to Rule 4.

Defendants nonetheless argue that *Starnes* is distinguishable. Specifically, defendants argue that the following dicta limits *Starnes*' applicability to cases where the trial court made no finding of bad faith:

> There is no evidence or contention in this case that the complaint and summons were filed or issued in bad faith or that they were interposed for delay or otherwise subject to dismissal as a sham and false pleading pursuant to Rule 11(a) of the North Carolina Rules of Civil Procedure. . . . Nor are we presented with a motion for involuntary dismissal for failure of the plaintiff to prosecute an action pursuant to Rule 41(b).

Starnes, 317 N.C. at 615-16, 346 S.E.2d at 426 (citing *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986)). We are not persuaded by defendants' argument, however, because we conclude that this dicta serves only to remind us that a different result may be required where the dispositive motion is one pursuant to either Rule 11(a) or Rule 41(b). It is clear that the "bad faith" referred to in *Starnes* relates only to the Rule 11(a) good faith standard; it does not create a separate good faith standard under Rule 4. That this interpretation is correct is clear upon reading *Estrada* (the authority cited by the *Starnes* court), as *Estrada* discusses bad faith only in the context of a Rule 11 motion. *Estrada v. Burnham*, 316 N.C. 318, 324-26, 341 S.E.2d 538, 542-43 (1986)

Defendant's final argument, and the argument erroneously adopted by the trial court, is that the instant case is controlled by *Sellers v. High Point Mem. Hosp.*, 97 N.C. App. 299, 388 S.E.2d 197, *disc. review denied*, 326 N.C. 598, 393 S.E.2d 882 (1990), instead of *Starnes*. Here again, we are not persuaded because we conclude that *Sellers* is distinguishable on its face. In *Sellers*, we reviewed the trial court's grant of defendant's motion to dismiss pursuant to Rule 41(b). *Sellers*, 97 N.C. App. at 302-03, 388 S.E.2d at 198-99. Here, no Rule 41(b) motion was ever made and absent a motion pursuant to either Rule 41(b) or Rule 11(a), we conclude that *Starnes* is controlling. Accordingly, we conclude that the order of the trial court quashing plaintiff's issuance and service of process must be reversed. We need not address plaintiff's remaining assignments of error.

Reversed and remanded.

Judge McGEE concurs.

Judge LEWIS concurs with separate opinion.

Judge LEWIS concurring.

While I feel bound by the decision in *Starnes* to concur, I do not believe the result we reach in this case nurtures good practice. Accordingly, I urge the Supreme Court to reconsider this issue.

Allowing a party to obtain issuance of a summons, make no effort at service, and then obtain a subsequent alias and pluries summons and thereby additional months, makes a mockery of the statutes of limitation. This is true whether the delay be due to negligent over-

sight or counsel's tactics. In the present case, defendants were served four years and seven months after their alleged negligent acts. Plaintiffs, in effect, tacked on over a year and a half to the original statute of limitations.

This behavior should not be condoned. I would require some reasonable effort at service be made by one of the statutory methods in order to keep a summons viable. Only when such reasonable effort is shown, should an alias and pluries summons be deemed acceptable to extend the time for service. If no effort at service has been undertaken, the summons should expire.

FRED G. WILSON, JR. AND RACHEL PATRICIA WESTBROOK, PLAINTIFF-APPELLEES v. ROBERT SUTTON, ROBERT SUTTON MOTORS, INC., JAMES W. HAM AND JAMES W. HAM D/B/A HAM'S USED CARS AND HAM'S BODY SHOP, DEFENDANT-APPELLANTS

No. COA95-824

(Filed 15 October 1996)

Automobiles and Other Vehicles § 227 (NCI4th); Evidence and Witnesses § 43 (NCI4th)— sale of wrecked van—damage disclosure certificate not supplied—DMV inspection certification

The trial court properly denied the Sutton defendants' motion for judgment notwithstanding the verdict in an action arising from the sale of a previously wrecked van where the jury found for the plaintiffs and the trial court trebled damages for unfair and deceptive acts and practices and for intent to defraud. A motion for judgment notwithstanding the verdict is treated as a renewal of a prior motion for directed verdict. The evidence, considered in the light most favorable to plaintiffs, shows that the van had been appraised as a total loss after a collision; defendant Sutton received a Damage Disclosure Statement that the van had been damaged by collision to the extent that the damages exceeded twenty-five percent of its fair market retail value at the time of the collision; defendant Sutton did not disclose to plaintiffs that the van had been damaged by collision; and the van was not more than five model years old when plaintiffs purchased it in March 1992. Although the Sutton defendants argue that the DMV

inspector's examination of the van and verification as to the cost of defendant Ham's purchase of repair parts and use of those parts in the repair of the van should create a conclusive presumption that the repairs did not exceed twenty-five percent of the van's fair market value and that the Sutton defendants were therefore in complete compliance with the statutory process, the presumption that a public officer has performed his duty cannot be used as proof of an independent and material fact. Moreover, the DMV inspector testified that he had no opinion as to whether the cost of defendant Ham's repairs to the van was reasonable. N.C.G.S. § 20-71.4.

Am Jur 2d, Judgments §§ 330, 331.

Appeal by defendants Robert Sutton and Robert Sutton Motors, Inc., from judgment entered 24 January 1995 by Judge Howard R. Greeson in Wayne County Superior Court. Originally heard in the Court of Appeals 17 April 1996.

Defendants Robert Sutton and Robert Sutton Motors, Inc., filed a Petition for Rehearing of our decision filed 6 August 1996, dismissing their appeal in this case. On 17 September 1996, we withdrew our original opinion and allowed the Petition for Rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure for the purpose of considering the merits of the appeal.

The case arises out of plaintiffs' purchase of a 1989 Plymouth Voyager van from defendant Robert Sutton, owner and operator of the car dealership Robert Sutton Motors, Inc., in Goldsboro, North Carolina (hereinafter collectively referred to as "the Sutton defendants"). Defendants, James W. Ham and his businesses, Ham's Used Cars and Ham's Body Shop (hereinafter collectively referred to as "the Ham defendants") are in the van's chain of title.

Plaintiffs filed a complaint seeking compensatory and punitive damages, alleging that they were not given a written damage disclosure statement that the van had been involved in a collision to the extent that the cost of the van's repairs exceeded twenty-five percent of its fair market retail value in violation of G.S. § 20-71.4. Plaintiffs also alleged that defendants' conduct constituted unfair and deceptive acts and practices in violation of G.S. § 75-1.1.

After filing answers denying plaintiffs' allegations, all defendants moved for summary judgment. The trial court granted the Ham

defendants' motion for summary judgment and denied the Sutton defendants' summary judgment motion. The trial court also denied the Sutton defendants' motion for judgment on the pleadings.

Briefly summarized, the evidence at trial tended to show the following: James A. Heikkila purchased the Plymouth Voyager van as a new vehicle on 6 July 1989. In June 1991, the van was involved in an accident. Mr. Heikkila's insurance company assessed the van's damages at $7,500.00, declared it a total loss, and paid Mr. Heikkila $12,500.00 for the van. Upon taking ownership of the vehicle, the insurance company secured in its name a salvage certificate of title from the North Carolina Department of Motor Vehicles (DMV), and then assigned ownership of the van to a salvage company. The salvage company sold the van to Crutchfield Garage, who in turn, sold the van to defendant Ham.

According to defendant Ham's records, he rebuilt the van for $1,518.07 and secured a new certificate of title for the vehicle from DMV. The certificate of title did not show that the vehicle was a salvage vehicle or that it had been damaged in excess of twenty-five percent of its fair market retail value. After defendant Ham's wife used the van for a short period of time, he sold it to defendant Sutton for $8,500.00. When defendant Sutton purchased the van, he received the new certificate of title and a Damage Disclosure Statement. On the Damage Disclosure Statement, defendant Ham certified and defendant Sutton acknowledged that the van had been damaged by collision to the extent that the damages exceeded twenty-five percent of its value at the time of the collision.

Thereafter, defendant Sutton sold the van to plaintiffs for $11,000.00. Both plaintiffs testified that, at the time of their purchase, no disclosures were made to them as to whether the van had or had not been damaged. After they had owned the van for approximately a month, plaintiffs experienced problems with its transmission. Plaintiff Wilson also testified that the van's tires wear out faster on the right side than on the left side; that attempts to have the front-end of the van "lined up" have been unsuccessful; and that when the van turns left or right, the right front tire "rubs."

The Sutton defendants offered evidence, including the testimony of Robert Sutton and James Ham, tending to show that the damage to the van did not exceed twenty-five percent of its fair market value. Robert Sutton also testified that a DMV officer had certified the repairs to have been properly done, and, therefore, Sutton did not dis-

close the damage to plaintiffs. The DMV officer testified that he had inspected the vehicle, had verified that Mr. Ham had purchased parts necessary for the repairs to the van and that the parts had been used in the repairs that were made. Based on the officer's report, DMV had issued a title which did not indicate that the van was a salvage vehicle. However, the DMV officer did not have an opinion as to whether the cost of repairs as represented by Mr. Ham was a reasonable price for the repairs to the van.

The Sutton defendants' motions for directed verdict at the close of plaintiffs' evidence and at the close of all the evidence were denied. The jury found that: (1) the van had been damaged in excess of twenty-five percent of its fair market retail value; (2) the Sutton defendants failed to disclose this fact to plaintiffs in writing, and intended to defraud plaintiffs; and (3) plaintiffs were injured as a proximate result of the Sutton defendants' conduct in the amount of $3,300.00. The trial court entered judgment for plaintiffs and trebled the damages awarded, first, for violation of unfair and deceptive acts and practices under G.S. § 75-1.1, and second, for intent to defraud under G.S. § 20-348(a). The trial court denied the Sutton defendants' motion, pursuant to G.S. § 1A-1, Rule 50(b) for judgment notwithstanding the verdict, and in the alternative, for a new trial. The Sutton defendants appeal.

Braxton H. Bell, and Coleman and Perez, by Mario E. Perez, for plaintiff-appellees.

Cecil P. Merritt and Aida Fayar Doss for defendant-appellants.

MARTIN, John C., Judge.

On appeal, the Sutton defendants assert in a single assignment of error that "[t]he trial court erred and abused its discretion by denying Defendant's [sic] motion for summary judgment, motion for judgment on the pleadings, motion to set aside the verdict, and motion for judgment notwithstanding the verdict because it misinterpreted and misapplied N.C. Gen. Stat. §§ 20-71.2 through 20-71.4 and 20-109.1." The trial court's denial of the Sutton defendants' motions for summary judgment and judgment on the pleadings is not reviewable on appeal because the trial court rendered a final judgment after a trial on the merits. *Canady v. Cliff*, 93 N.C. App. 50, 376 S.E.2d 505, *disc. review denied*, 324 N.C. 432, 379 S.E.2d 239 (1989). We find no error in the other rulings challenged by the Sutton defendants' assignment of error.

A motion for judgment notwithstanding the verdict is treated as a renewal of a prior motion for directed verdict. *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 427 S.E.2d 149 (1993). The standard for granting a motion for judgment notwithstanding the verdict is the same as that for granting a motion for directed verdict, which is whether, as a matter of law, the evidence offered by the plaintiff, when considered in the light most favorable to the plaintiff, is sufficient for submission to the jury. *Northern Nat'l Life Ins., v. Miller Machine Co.*, 311 N.C. 62, 316 S.E.2d 256 (1984).

The Sutton defendants contend that the trial court erred in denying their motion for judgment notwithstanding the verdict because plaintiffs failed to establish a *prima facie* case that they violated G.S. § 20-71.4(a). G.S. § 20-71.4, as it was in effect at all times pertinent to this case provides in part:

> (a) It shall be unlawful and constitute a misdemeanor for any transferor who knows or reasonably should know that a motor vehicle has been involved in a collision or other occurrence to the extent that the cost of repairing that vehicle exceeds twenty-five percent (25%) of its fair market retail value . . . to fail to disclose that fact in writing to the transferee prior to transfer of any vehicle up to five model years old. Failure to disclose any of the above information will also result in civil liability under G.S. 20-348.

In order to establish a *prima facie* case under G.S. § 20-71.4(a), plaintiffs must show that: "(1) defendant was a transferor, (2) who knew or reasonably should have known that the [vehicle] had been involved in a collision or other occurrence to the extent that the cost of repair exceeded 25% of its fair market value, and (3) who failed to disclose that fact in writing to plaintiff prior to the transfer, and that the vehicle at the time of transfer (4) was not a vehicle more than five model years old." *Payne v. Parks Chevrolet, Inc.*, 119 N.C. App. 383, 387, 458 S.E.2d 716, 719 (1995).

Considering the evidence in the light most favorable to plaintiffs, it shows that the van had been appraised as a total loss after the collision; that when defendant Sutton bought the van from defendant Ham, he received a Damage Disclosure Statement that the van *had* been damaged by collision to the extent that the damages exceeded twenty-five percent of its fair market retail value at the time of the collision; that defendant Sutton did not disclose to plaintiffs that the van had been damaged by collision; and that the van was not more than five model years old when plaintiffs purchased it in March 1992.

The Sutton defendants argue, citing Brandis, *North Carolina Evidence*, § 235, pp. 255-57 (3d ed. 1988), that the DMV inspector's examination of the van and verification as to the cost of defendant Ham's purchase of repair parts, and his use of those parts in the repair of the van, should create a conclusive presumption that the certification was correct, that the repairs did not exceed twenty-five percent of the van's fair market value, and that the Sutton defendants were, therefore, in complete compliance with the statutory process and were not required to make the damage disclosure.

The presumption that a public officer has performed his duty cannot be used as proof of an independent and material fact. *Hall v. Fayetteville*, 248 N.C. 474, 103 S.E.2d 815 (1958); *see also Civil Service Bd. v. Page*, 2 N.C. App. 34, 162 S.E.2d 644 (1968) (this Court holding that the presumption of the regularity of official acts is one of law, and not of fact, and may be rebutted or overthrown by competent evidence). Not only is the Sutton defendants' contention without merit, but the DMV inspector testified that he had no opinion as to whether the cost of defendant Ham's repairs to the van was reasonable.

We find the evidence, taken in the light most favorable to plaintiffs, was sufficient for the jury. Accordingly, the trial court properly denied the Sutton defendants' motion for judgment notwithstanding the verdict.

No error.

Chief Judge ARNOLD and Judge SMITH concur.

TIMES-NEWS PUBLISHING COMPANY, INC., D/B/A TIMES NEWS, PLAINTIFF v. STATE OF NORTH CAROLINA AND STEVE A. BALOG IN HIS CAPACITY AS DISTRICT ATTORNEY FOR PROSECUTORIAL DISTRICT 15A OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA95-1321

(Filed 15 October 1996)

Records of Instruments, Documents, or Things § 1 (NCI4th)—trial exhibits—return to prosecutor for retrial—not public records subject to disclosure

Even though exhibits may have become public records subject to disclosure when they were admitted into evidence at a

criminal defendant's original murder trial and in the possession of the clerk of court, the exhibits once again became "records of criminal investigations" which were exempt from disclosure under the Public Records Act when they were returned to the district attorney for use in the reinvestigation and retrial of defendant for the murders. N.C.G.S. §§ 132-1.4(a) and (c).

Am Jur 2d, Records and Recording Laws §§ 27, 29.

Appeal by defendants from order entered 27 September 1995 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 27 August 1996.

The Law Firm of John A. Bussian, P.A., by John A. Bussian, for plaintiff-appellee.

Attorney General Michael F. Easley, by Chief Deputy Attorney General Andrew A. Vanore, Jr. and Assistant Attorney General K. D. Sturgis, for defendants-appellants.

WALKER, Judge.

In November 1992, Mark E. Crotts was convicted of first degree murder. Following the Supreme Court's decision granting Crotts a new trial, the clerk of court was ordered to return to the parties the evidence which was introduced at trial, including but not limited to the murder weapon, blood scrapings, crime scene photographs, fingerprints, and clothing worn by the victims at the time of their deaths.

On 30 June 1995, the plaintiff, Times-News Publishing Company, Inc. (Times News), requested pursuant to the Public Records Act that "[the District Attorney] make available to the Times-News a transcript of the original trial, all photographs, documents or other written or taped correspondence submitted as evidence during the October, 1992 trial and any judgments or other documentation that falls in the public domain" (collectively referred to as trial exhibits). Crotts' defense counsel and the district attorney filed motions for a protective order in the criminal proceeding. Following a hearing, the court denied both motions for a protective order and ordered the district attorney to "provide access to the plaintiff of the physical exhibits introduced at the trial in *State v. Crotts*, 91 CrS 19956, 19957, now in his custody. . . ." The court declined to compel disclosure of the copy of the trial transcript in the district attorney's possession.

The sole question presented on appeal is whether the trial court erred by ordering the district attorney to provide plaintiff access to previously admitted trial exhibits which were returned to the district attorney's office for use in the reinvestigation and preparation for retrial.

The Public Records Act, N.C. Gen. Stat. § 132-1 to -10 *et seq.* (1995) (The Act), affords the public a broad right of access to records in the possession of public agencies and their officials. "Public records" as defined by the statute may include the following:

> all . . . material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government. . . .

N.C. Gen. Stat. § 132-1(a). Our courts have interpreted The Act to allow the public access to all public records in an agency's possession unless either the agency or the record is specifically exempted from the statute's mandate.

The defendants contend that the trial exhibits at issue are specifically exempted from classification as public records pursuant to N.C. Gen. Stat. § 132-1.4(a) which provides:

> (a) Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies **are not public records** as defined by G.S. 132-1. Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.

N.C. Gen. Stat. § 132-1.4(a) (1995) (emphasis added). The General Assembly amended the law to clarify that "[d]isclosure of records of criminal investigations and criminal intelligence information that have been transmitted to a district attorney or other attorney authorized to prosecute a violation of law shall be governed by this section and Chapter 15A of the General Statutes [relating to criminal discovery procedures]. *See* N.C. Gen. Stat. § 132-1.4(g). The Act also clarifies that only the following limited materials may be available to the public from a district attorney's case file:

> (1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.

(2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.

(3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.

(4) The contents of "911" and other emergency telephone calls received by or on behalf of public law enforcement agencies, except for such contents that reveal the name, address, telephone number, or other information that may identify the caller, victim, or witness.

(5) The contents of communications between or among employees of public law enforcement agencies that are broadcast over the public airways.

(6) The name, sex, age, and address of a complaining witness.

N.C. Gen. Stat. § 132-1.4(c). Thus, it is clear from the statute's plain language that the criminal investigative materials transmitted to the district attorney's office in preparation for the initial prosecution of Crotts were exempted from classification as public records.

Plaintiff, however, contends that the exhibits lost their exemption when the exhibits were released into the "public domain" upon their admission into evidence during the first Crotts' trial. As support for its argument plaintiff relies on the case *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 474, 412 S.E.2d 7, 12 (1992). In their brief, plaintiff espouse that "*Poole* specifically holds that records once-exempt from the Public Records Act's mandatory disclosure requirement lose their exempt status when introduced into the public domain." We decline to adopt such an interpretation of *Poole* in the instant case.

Poole involved the issue of whether SBI investigative records retained their N.C. Gen. Stat. § 114-15 exemption after the SBI submitted its reports to the Poole Commission, a Commission appointed by the president of the University of North Carolina. *Id.* The Supreme Court held that:

When such reports become part of the records of a public agency subject to the Public Records Act, they are protected only to the

> extent that agency's records are protected. When the SBI investigative reports here became Commission records, they . . . became subject to disclosure under the Public Records Law to the same extent as other Commission records.

Id. at 474, 412 S.E.2d at 12-13. Thus, "*Poole's* legacy is therefore that the public records law mandated the release of draft reports and minutes from closed meetings of state commissions." *Thomas H. Moore*, Comment, *You Can't Always Get What You Want: A Look at North Carolina's Public Records Law*, 72 N.C.L. Rev. 1527, 1560 (1994). However, investigative reports by the SBI in the possession of district attorneys and local law enforcement are still not subject to release. *Id.* Thus, the analysis remains primarily a statutory one. To determine whether particular material is exempted from classification as a public record depends upon whether the agency or the record is specifically exempted from the statute's mandate.

Notwithstanding the fact that the exhibits may have been accessible when they were admitted into evidence and in the possession of the clerk of court, the trial exhibits were returned to the district attorney's office at the conclusion of the trial in *State v. Crotts*, 91 CrS 19956 and 19957 for use in the reinvestigation and preparation of Crotts' retrial. Therefore, unlike *Poole* where exempted materials were transmitted to an agency whose records were subject to disclosure, here the exempted exhibits have been transmitted to the district attorney's office and as such are specifically exempted from disclosure under N.C. Gen. Stat. § 132-1.4(g). Accordingly, based on the plain meaning of N.C. Gen. Stat. § 132-1.4(a), these exhibits are once again "records of criminal investigations" and as such are "not public records."

To hold otherwise in this case would permit access to files in the possession of the district attorney thereby creating the potential for disruption in the reinvestigation and renewed prosecution of a double murder case. Furthermore, even though plaintiff previously printed numerous stories about the case and the evidence introduced during Crotts' initial murder trial, there are sound policy reasons for denying public access to criminal investigative materials. It remains important to minimize the danger that a suspect will be tried in the press before he/she is tried in court, to assure effective criminal investigations and prosecutions, and to safeguard the adversarial process from disruption. Accordingly, we reverse the decision below and remand the case

to the trial court with instructions to vacate its order requiring disclosure of the trial exhibits.

Reversed and remanded.

Judges EAGLES and McGEE concur.

R. STANLEY MORGAN, AND A. DEAN BRIDGES, PETITIONERS V. N.C. DEPARTMENT OF TRANSPORTATION, RIGHT OF WAY BRANCH, RESPONDENT

No. COA95-1208

(Filed 15 October 1996)

Public Officers and Employees § 41 (NCI4th); Costs § 37 (NCI4th)— state employee—posting of position—attorney's fees

The trial court's award of attorney's fees under N.C.G.S. § 6-19.1 was reversed where petitioners had been interviewed for an area negotiator position at DOT but were not selected; a new area negotiator position was created shortly afterwards which was not posted because it could be filled from the applicant pool for the first vacancy; the Administrative Law Judge held that DOT violated posting requirements but declined to order attorney's fees under N.C.G.S. § 126-4(11) since there was no discrimination, reinstatement, or back pay; the State Personnel Commission upheld the denial of attorney's fees; and the Forsyth County Superior Court allowed attorney's fees under N.C.G.S. § 6-19.1. The trial court correctly found no basis for reversing or modifying the Commission's denial of an award under N.C.G.S. § 126-4(11), but was not authorized to circumvent the application of N.C.G.S. § 126-41 by looking to N.C.G.S. § 6-19.1. In cases involving the State Personnel Commission, the legislature has preempted the application of N.C.G.S. § 6-19.1 to matters before the Commission that arise prior to judicial review; those matters are specifically provided for by N.C.G.S. § 126-41. A contrary interpretation would permit the reviewing court to award attorney's fees that could not be awarded by the Commission for services rendered before it.

Am Jur 2d, Civil Service §§ 8 et seq.; Costs §§ 57-70.

Appeal by respondent from order entered 21 August 1995 by Judge Julius A. Rousseau in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 1996.

Pete Bradley and David V. Liner, for petitioners-appellees.

Michael F. Easley, Attorney General, by Robert O. Crawford, III, Associate Attorney General and Melanie Lewis Vtipil, Associate Attorney General, for the State.

WYNN, Judge.

In early 1994, the North Carolina Department of Transportation (DOT) posted a vacancy notice for the position of area negotiator. Petitioners R. Stanley Morgan and A. Dean Bridges interviewed for the position, but were not selected.

Shortly thereafter, DOT created a new area negotiator position; however, this additional position was not posted because the personnel director determined that the position could be filled from the applicant pool for the first vacancy. In reaching his decision, the personnel director relied on a memorandum from the Office of State Personnel which stated:

> This is in response to your question concerning the necessity of posting and/or listing a vacancy which is identical to one previously announced. We have consistently granted a waiver of the posting/listing requirement when a second vacancy occurs within 60 days of the listing date of the first vacancy as long as the vacancies are identical, including the description of the position, the knowledge and skill requirements, and geographical location.

Petitioners alleged at a hearing before an Administrative Law Judge (ALJ) that DOT violated the posting requirements of N.C. Gen. Stat. § 126-7.1(a) (1995) when it failed to post the second vacancy. The ALJ agreed and ordered DOT to discharge the person selected for the unposted position. The ALJ declined to order attorney's fees under N.C. Gen. Stat. § 126-4(11) (1995) since there was not discrimination, reinstatement, or back pay.

The State Personnel Commission ("Commission") upheld the ALJ's denial of attorney's fees. The petitioners then appealed to Forsyth County Superior Court which issued an order allowing attorney's fees under N.C. Gen. Stat. § 6-19.1 (1986). DOT appeals from that order.

The issue is whether the trial court erred in awarding attorney's fees under N.C.G.S. § 6-19.1 in this case. Finding error, we reverse.

N.C.G.S. § 126-4(11) authorizes the State Personnel Commission to establish rules regarding the assessment of attorney's fees "[i]n cases where the Commission finds discrimination or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level." Acting under that authority, the State Personnel Commission determined that it may *only* award attorney's fees where there has been discrimination, reinstatement or back pay. N.C. Admin. Code tit. 25, r. 1B.0414 (February 1996). Since the subject case involved none of these, the Commission concluded that "GS 126-4(11) does not authorize the award of reasonable attorney fees in this case."

N.C. Gen. Stat. § 126-41 (1995) which provides for judicial review of the Commission's decision to award or not award attorney's fees under N.C.G.S. § 126-4(11) states:

> The decision of the Commission assessing or refusing to assess reasonable witness fees or a reasonable attorney's fee as provided in G.S. 126-4(11) is a final agency decision appealable under Article 4 of Chapter 150B of the General Statutes. *The reviewing court may reverse or modify the decision of the Commission if the decision is unreasonable or the award is inadequate.* The reviewing court shall award court costs and a reasonable attorney's fee for representation in connection with the appeal to an employee who obtains a reversal or modification of the Commission's decision in an appeal under this section. (emphasis added).

Thus, upon appeal of the Commission's decision not to award attorney's fees under N.C.G.S. § 126-4(11), N.C.G.S. § 126-41 constrains the Superior Court to reverse or modify the Commission's order only if it is deemed unreasonable or inadequate.

In the case before us, the record indicates that the trial court made no findings as to the reasonableness or inadequacy of the Commission's decision pursuant to N.C.G.S. § 126-41. Further, the petitioners make no argument as to why the Commission's decision not to award attorney's fees under N.C.G.S. § 126-4(11) was either unreasonable or inadequate. In any event, since the Commission had statutory authority to award attorney's fees only in cases involving discrimination, reinstatement or back pay, we conclude that the

Commission properly denied an award of attorney's fees to petitioners under N.C.G.S. § 126-4(11).

Nonetheless, petitioners contend that N.C.G.S. § 6-19.1 offers another avenue for the award of attorney's fees for services performed prior to judicial review. The trial court apparently agreed with that contention holding that "[t]he provisions of GS 6-19.1 regarding this Court's authority to award reasonable attorney fees applies in this case." We hold that N.C.G.S. § 6-19.1 does not empower the trial court to award attorney's fees in State Personnel cases for services rendered prior to judicial review.

N.C.G.S. § 6-19.1 provides:

> In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150A-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

This statute has a broad application and it provides a punitive type remedy. However, in cases involving the State Personnel Commission, the legislature has preempted the application of N.C. Gen. Stat. § 6-19.1 to matters before the Commission that arise *prior* to judicial review. Those matters are specifically provided for by N.C.G.S. § 126-41 which limits the review of the Commission's award or denial of attorney's fees under N.C.G.S. § 126-4(11). Thus, in reviewing State Personnel Commission decisions, the trial court's authority to award attorney's fees to a prevailing party under N.C.G.S. § 6-19.1 is limited to *services rendered on judicial review* if it finds that the agency was unjustified in pursuing the judicial review of its claim.

Petitioners rely on *North Carolina Dept. of Correction v. Harding*, 120 N.C. App. 451, 462 S.E.2d 671 (1995), *disc. review denied*, 342 N.C. 658, 467 S.E.2d 720 (1996), as authority for the award of attorney's fees under N.C.G.S. § 6-19.1 in this case. Their reliance on *Harding* is misplaced. In *Harding*, this Court found that the trial

court was *not* reviewing the Commission's discretionary authority to award or deny attorney's fees under N.C.G.S. § 126-4(11). *Id.* at 455, 462 S.E.2d at 674. We stated:

> Since the Commission in this case had not entered an award of attorney's fees pursuant to its discretionary powers under N.C.G.S. § 126-4(11), it follows that the trial court in setting the hourly rate was not reviewing an award of the Commission. Rather, it acted under authority granted to it under N.C.G.S. § 6-19.1.

Id. Most significantly, *Harding* limited the application of N.C.G.S. § 6-19.1 to the award of attorney's fees for *judicial review* of the Commission's actions, not for services rendered prior to judicial review. *Id.*

In the case before us, the petitioners appealed to the trial court the Commission's denial of attorney's fees under N.C.G.S. § 126-4(11). Such an appeal is permitted only under N.C.G.S. § 126-41 which allows the trial court to reverse or modify the Commission's award if the award were found to be unreasonable or inadequate. Apparently the trial court found no basis for reversing or modifying the Commission's denial of an award under N.C.G.S. § 126-4(11), and our examination of the record indicates that the trial court acted correctly in this regard. However, the trial court was not authorized to circumvent the application of N.C.G.S. § 126-41 in this case by looking to N.C.G.S. § 6-19.1. From the foregoing discussion, we conclude that N.C.G.S. § 6-19.1 allows for an award of attorney's fees in State Personnel Commission cases only for services rendered on judicial review.

Finally, we note that a contrary interpretion allowing the trial court to award attorney's fees under N.C.G.S. § 6-19.1 for services rendered before judicial review would permit the reviewing court to award attorney's fees that could not be awarded by the Commission for services rendered before it. We do not believe that the Legislature intended that result.

For the foregoing reasons, we reverse the trial court's award of attorney's fees under N.C.G.S. § 6-19.1.

Reversed.

Judges JOHNSON and LEWIS concur.

[124 N.C. App. 185 (1996)]

BOBBY HOOPER AND WIFE, ZELDA HOOPER, PLAINTIFFS v. ALLSTATE INSURANCE COMPANY, DEFENDANT

No. COA95-1408

(Filed 15 October 1996)

Arbitration and Award § 39 (NCI4th)— motion to confirm appraisers' report—simple denial improper

Where defendant homeowners insurer moved for confirmation of the appraisers' report in an arbitration proceeding, the trial court could not simply deny the motion but was required to confirm the arbitration award, to vacate the award after finding one of the statutory grounds for vacating, or to modify the award so as to effect the intent of the parties and then confirm the award as modified. N.C.G.S. §§ 1-567.12, 1-567.13.

Am Jur 2d, Alternative Dispute Resolution §§ 218, 229, 234.

Appeal by defendant from order entered 26 July 1995 by Judge H.W. Zimmerman, Jr., in Haywood County Superior Court. Heard in the Court of Appeals 23 September 1996.

Russell L. McLean, III, for plaintiff appellees.

Roberts & Stevens, P.A., by Frank P. Graham and Wyatt S. Stevens, for defendant appellant.

SMITH, Judge.

On 4 February 1994, plaintiffs filed a complaint against defendant Allstate Insurance Company (Allstate), alleging that plaintiffs had suffered a fire loss to their residence and personal property on 24 February 1993, which was insured by Allstate under a homeowners' policy. On 7 April 1994, defendant Allstate filed a Tender of Judgment. On 8 April 1994, plaintiffs filed a motion to strike, a motion demanding arbitration, a motion to dismiss and a motion for judgment on the pleadings. Plaintiffs' motion for arbitration was allowed and all other motions were stayed pending completion of arbitration. The parties were ordered to name their appraisers. Allstate named Mr. C. Grayson Williford, and plaintiffs named Mr. Danny Ferguson. Because the parties' appraisers could not come to an agreement and resolve the differences between the parties, defendant made a motion pursuant to

the insurance policy for the trial court to appoint an independent appraiser. The trial court appointed Mr. Fredrick Spenser to serve as an independent appraiser to resolve the differences between the parties' two appraisers. However, prior to his being appointed by the court to serve as an independent appraiser, plaintiffs hired Spenser for a fee to review the appraisal submitted by the original appraisers and to provide plaintiffs with his opinion of the appraisal. Spenser was permitted to withdraw as an independent appraiser in the case, and the trial court appointed Mr. Jack McKenney to serve as the independent appraiser.

On 22 June 1995 defendant filed a motion for order setting loss. In an order dated 24 July 1995, entered 26 July 1995 and amended 13 August 1995, defendant's motion for order setting loss was denied. From the amended order, defendant appeals.

Defendant assigns error to the trial court's denial of defendant's motion to set loss in accordance with the appraisers' report, which determined the value of plaintiffs' residence as $88,693.00. We vacate the trial court's order and remand.

Pursuant to Article 45A of the North Carolina General Statutes, entitled "Arbitration and Award," the trial court has three options when presented with an arbitration award. First, the trial court can *confirm* the award as it is. Second, upon application of a party, the court can *vacate* an award and order a new hearing before the original arbitrators, or before newly appointed arbitrators depending upon the statutory grounds for vacating the award. Finally, upon application of a party, the trial court can *modify or correct* the award so as to effect the intent of the parties and then confirm the award as modified and corrected. These three options are set forth in Chapter 1 of the North Carolina General Statutes. N.C. Gen. Stat. § 1-567.12 (1983) (emphasis added) provides:

> **Confirmation of an award.**
>
> Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 1-567.13 and 1-567.14.

N.C. Gen. Stat. § 1-567.13 (1983) (emphasis added) provides:

Vacating an award.

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in subdivision (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with G.S. 1-567.4, or, if the award is vacated on grounds set forth in subdivisions (3) or (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with G.S. 1-567.4. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

N.C. Gen. Stat. § 1-567.14 (1983) (emphasis added) provides:

Modification or correction of award.

(a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall *modify or correct the award* where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

In the present case the trial court failed to exercise any of these options. Defendant Allstate made a motion to set the loss which was in reality a request for confirmation of the appraisers' report, which the trial court denied. Pursuant to the North Carolina General Statutes, the trial judge was required to confirm the award, vacate the award after finding one of the statutory grounds for vacating, or the trial court could have modified the award so as to effect the intent of the parties and then confirm the award as modified. We further note that it would be helpful to the courts if counsel used the appropriate terminology, as set forth in the statutes, when making motions. Instead of filing a "Motion for Order Setting Loss," defendant should have filed a "Motion to Confirm the Appraisers' Report," and plaintiffs

should have then requested the trial court to "vacate" or to "modify and correct" the appraisers' report, instead of requesting the court to deny the "Motion for Order Setting Loss."

While a final arbitration award is not properly before us for our review, we note that, "[j]udicial review of an arbitration award is limited to the determination of whether there exists one of the specific grounds for vacating the award under the arbitration statute." *Sentry Building Systems v. Onslow County Bd. of Education*, 116 N.C. App. 442, 443, 448 S.E.2d 145, 146 (1994). We see no evidence in the record of any of the statutory grounds set forth in N.C. Gen. Stat. § 1-567.13. The exclusive grounds for vacating an award are (1) the award was procured by corruption, (2) there was evident partiality by an arbitrator, (3) the arbitrators exceeded their powers, (4) the arbitrators refused to postpone the hearing upon show of sufficient cause, (5) they refused to hear evidence material to the controversy, or (6) there was no arbitration agreement. N.C. Gen. Stat. § 1-567.13. Furthermore, "G.S. § 1-567.14 provides the exclusive grounds and procedure for modifying or correcting an arbitration award." *J.M. Owen Bldg. Contractors, Inc. v. College Walk, Ltd.*, 101 N.C. App. 483, 487, 400 S.E.2d 468, 470 (1991) (citing *Crutchley v. Crutchley*, 306 N.C. 518, 523 n.2, 293 S.E.2d 793, 797 n.2 (1982)).

There is no evidence in the record that plaintiffs made a motion for the trial court to modify or to correct the award. However, plaintiffs argue in their brief that the appraisers improperly calculated the fair market value of their residence, because the appraisers' method of determining the fair market value of the property was inconsistent with the method set forth in the insurance policy. If upon motion of plaintiffs the trial court determines that the award should be modified or corrected pursuant to N.C. Gen. Stat. § 1-567.14, the trial court should so modify and correct and confirm the award. Otherwise, the trial court should confirm the award as presented.

Accordingly, we vacate and remand to the trial court for proceedings consistent with this opinion.

Vacated and remanded.

Judges EAGLES and MARTIN, John C., concur.

IN THE MATTER OF: TOMMY BROWNING AND ROBERT BROWNING

No. COA95-1405

(Filed 15 October 1996)

1. **Appeal and Error § 89 (NCI4th)— investigation of child abuse—order for psychological evaluation—religious objections—appeal not interlocutory**

A motion to dismiss an appeal as interlocutory was denied where respondent had refused to consent to a psychological evaluation for his children as a part of a child protective services investigation, contending that his objection was based upon his religious beliefs and that he would prefer that his children undergo counseling through their minister, and the trial court found that respondent had interfered with the investigation without lawful excuse and prohibited further interference. The order from which respondent appealed affects a substantial right and would result in respondent's loss of that right if erroneous and not corrected prior to final judgment.

Am Jur 2d, Appellate Review § 120.

2. **Constitutional Law § 119 (NCI4th); Infants or Minors § 78 (NCI4th)— child protective services investigation—psychological evaluation—religious objections—compelling state interest**

A trial court order prohibiting further interference with a child protective services evaluation was affirmed where respondent had refused to consent to a psychological evaluation of his children on religious grounds. The freedom to exercise one's religious beliefs is not absolute and the Constitutional provisions providing freedom of religion do not provide immunity for every act; however, one may not be compelled to do that which is contrary to his religious belief in the absence of a compelling state interest in the regulation of a subject within the State's Constitutional power to regulate. The protection of neglected and abused children is undeniably a compelling state interest. Respondent's rights as custodian of the children are secondary and must give way to the protection of his children. N.C.G.S. § 7A-544.

Am Jur 2d, Constitutional Law § 484; Infants § 16.

Validity of guardianship proceeding based on brainwashing of subject by religious, political, or social organization. 44 ALR4th 1207.

Power of court or other public agency to order medical treatment over parental religious objections for child whose life is not immediately endangered. 21 ALR5th 248.

Appeal by respondent from order entered 7 September 1995 by Judge Jimmy L. Myers in Davie County District Court. Heard in the Court of Appeals 23 September 1996.

Burns, Price & Arneke, L.L.P., by Robert E. Price, Jr., and Gail C. Arneke, for petitioner-appellee.

Martin, Van Hoy, Smith & Raisbeck, L.L.P., by Tamara A. Fleming, for respondent-appellant.

MARTIN, John C., Judge.

On 14 February 1995, a report of abuse was made to the Davie County Department of Social Services concerning Tommy Browning, the juvenile son of respondent Bobby Daniel Browning. An investigation was initiated by Lucinda Shay, a social worker, on that same day. Based upon discussions by Ms. Shay with Tommy Browning and his juvenile brother, Robert Browning, the investigation was expanded to include Robert Browning.

After Ms. Shay met with respondent and his two sons, respondent requested through his attorney that Ms. Shay have no further contact with his sons except as arranged through his attorney. Ms. Shay continued to meet with the boys at school, but did not seek to have further contact with Tommy and Robert during the summer school vacation period.

Ms. Shay requested that respondent sign consent forms for his sons to undergo a Child Mental Health Evaluation. The evaluation is conducted by a psychologist and generally involves eight sessions. Respondent indicated that he would consent for his sons to participate in one session, but would not consent to the complete evaluation.

Ms. Shay filed a petition to prohibit respondent from interfering with the child protective services investigation. Respondent testified that his objection to the investigation was based upon his religious

beliefs. In particular, he said he did not believe in psychologists and would prefer that his children undergo counseling through their minister.

The trial court found, based on clear, cogent and convincing evidence, that respondent had interfered with the investigation of the Davie County Department of Social Services by refusing to allow a Child Mental Health Evaluation of his two sons. The court also found, based on clear, cogent and convincing evidence, that respondent had no lawful excuse for refusing to allow the evaluation. The trial court entered an order prohibiting respondent from interfering with the Department of Social Services investigation. Respondent appeals.

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[1] Petitioner has moved to dismiss this appeal because the order appealed from is interlocutory. Ordinarily there is no right of immediate appeal from an interlocutory order; however, where the order affects a substantial right, the loss of which will injure the party appealing if not corrected prior to final judgment, it is immediately appealable. N.C. Gen. Stat. §§ 1-277(a) (1983), 7A-27(d) (1995); *Travco Hotels v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 403 S.E.2d 593 (1991), *affirmed*, 332 N.C. 288, 420 S.E.2d 426 (1992). The order from which respondent has appealed in this case affects a substantial right and, if erroneous and not corrected prior to final judgment, would result in respondent's loss of that right. Accordingly, we deny petitioner's motion to dismiss the appeal and decide this case on the merits.

[2] By three assignments of error combined in a single argument, respondent contends that the trial court erred in its conclusions that respondent's religious beliefs are not a lawful excuse for his refusal to consent to the Child Mental Health Evaluation of his two sons, and that he had obstructed or interfered with petitioner's investigation into allegations that he had abused the children. We reject his argument and affirm the trial court's order.

Upon receiving a report of suspected abuse, the director of the county's Department of Social Services is required to initiate an investigation within 24 hours. N.C. Gen. Stat. § 7A-544 (1995). Section 7A-544.1(a) specifically authorizes the director to file a petition seeking an order directing any person obstructing or interfering with an abuse investigation to cease such interference. The statute requires the DSS to prove by clear, cogent and convincing evidence that the respondent named in the petition has, without lawful excuse, obstructed or interfered with a child protective services investiga-

tion. N.C. Gen. Stat. § 7A-544.1(c) (1995). Obstruction of or interference with an investigation is defined by the statute as follows:

> refusing to disclose the whereabouts of the juvenile, refusing to allow the director to have personal access to the juvenile, refusing to allow the director to observe or interview the juvenile in private, refusing to allow the Director access to confidential information and records upon request pursuant to G.S. 7A-544, refusing to allow the director to arrange for an evaluation of the juvenile by a physician or other expert, or other conduct that makes it impossible for the director to carry out the duty to investigate.

N.C. Gen. Stat. § 7A-544.1(b) (1995). In the present case, respondent refused to permit the director to arrange a Child Mental Health Evaluation for his two sons. His refusal meets the statutory definition of "obstruction of or interference with" the investigation.

The next question is whether respondent's interference was for a lawful reason. At the hearing, respondent stated, "I prefer not my children to go through that sort of thing," and when asked for his reason, stated, "Well, first, I do not believe in psychiatrists and stuff—just the way I believe and the way I've been raised—the way I've been taught by—the way I—in my religion and all that, I feel in my heart to me myself." Respondent also denied that he had done anything to cause himself and his children to be subjected to the investigation. Assuming his testimony was sufficient to support his argument that his objection was based on religious grounds, the reasons stated do not constitute a lawful excuse for his refusal to permit the evaluation.

. The liberties secured by the First Amendment to the United States Constitution and by Article I § 26 of the Constitution of North Carolina are basic and fundamental. However, the freedom to exercise one's religious beliefs is not absolute. *In re Williams*, 269 N.C. 68, 152 S.E.2d 317, *U.S. cert. denied*, 388 U.S. 918, 18 L. Ed. 2d 1362 (1967). The Constitutional provisions regarding freedom of religion do not provide immunity for every act, "nor do they shield the defendant from a command by the State that he do an act merely because he believes it morally or ethically wrong. It is the right to exercise one's religion, or lack of it, which is protected, not one's sense of ethics." *Id.* at 78, 152 S.E.2d at 325. One may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a "compelling state interest in the regulation of a subject

within the State's Constitutional power to regulate." *Id.* at 80, 152 S.E.2d at 326 (citations omitted).

The intent of the statutes requiring the Department of Social Services to screen and investigate complaints of child abuse is the protection of neglected and abused children, G.S. § 7A-542, which is undeniably a compelling state interest. Respondent's rights as custodian of the children are secondary and must give way to the protection of his children. Accordingly, his refusal to permit the evaluation based upon his beliefs is not constitutionally protected conduct and cannot afford him a lawful excuse for his interference with the Department of Social Services investigation. Therefore, the trial court's order that respondent cease his interference with the investigation and directing the Department of Social Services to proceed with the Child Mental Health Evaluation is affirmed.

Affirmed.

Judges EAGLES and SMITH concur.

CHEMIMETALS PROCESSING, INC. PLAINTIFF v. JEFFREY W. MCENENY AND VIBRA-CHEM COMPANY, DEFENDANTS

No. COA95-1432

(Filed 15 October 1996)

Monopolies and Restraints of Trade § 21 (NCI4th)— agreement not to manufacture competing product—validity

A provision of an exclusive distributorship agreement for a metal finishing product prohibiting defendant distributor from directly or indirectly manufacturing or creating a competing product by using the composition, technology and process utilized by plaintiff manufacturer was not an improper covenant not to compete or a contract in restraint of trade but was valid and enforceable as reasonably related to the legitimate business interest of protecting the manufacturer's confidential information.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 846.

Appeal by defendants from order entered 25 October 1995 in Mecklenburg County Superior Court by Judge Claude S. Sitton. Heard in the Court of Appeals 27 August 1996.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr. and Richard W. Wilson, for plaintiff-appellee.

Moore & Van Allen, PLLC, by Jeffrey J. Davis and Meredith W. Holler, and James, McElroy & Diehl, P.A., by William K. Diehl, Jr., John S. Arrowood, and Ann L. Hester, for defendant-appellants.

GREENE, Judge.

Jeffrey W. McEneny (McEneny) and Vibra-Chem Company (Vibra-Chem) (defendants), a corporation owned solely by McEneny, appeal an order granting ChemiMetals Processing, Inc.'s (ChemiMetals) (plaintiff) motion for a preliminary injunction.

The complaint in this action seeks damages for breach of the 25 April 1986 "Agreement" (Agreement) between ChemiMetals and P.J. Products, Ltd. (later known as Vibra-Chem). An amended complaint requests the issuance of a preliminary injunction requiring Vibra-Chem and McEneny, the president and sole shareholder of Vibra-Chem, to comply with section 3(b) of the Agreement. Section 3(b) of the Agreement provides in pertinent part:

> [Defendants] shall not directly or indirectly manufacture or otherwise create or recreate (or attempt to) the VC 17/18/19/20 Product Line or Process, or any similar chemical agent or compound, or any chemical agent or compound in direct competition with the VC 17/18/19/20 Product Line, except as required by this Agreement or with the express prior written consent and approval of ChemiMetals.

It was also agreed that ChemiMetals would manufacture the VC 17/18/19/20 Product Line (Product Line) and that Vibra-Chem would purchase the Product Line from ChemiMetals and be the "exclusive distributor" of the Product Line. The agreement also provided that "the makeup or composition of the [Product Line] and the knowledge or technology of ChemiMetals regarding the [Product Line] and [its] Process are proprietary to ChemiMetals, highly valuable to ChemiMetals . . . and are confidential to ChemiMetals." The Product Line is used to accelerate metal removal in metal finishing processes.

In August 1995, ChemiMetals demanded that the defendants pay it $228,836.43, which it claimed was due for the Product Line it had supplied to the defendants. When full payment was not received, ChemiMetals notified the defendants that it would no longer supply the Product Line to the defendants, as it considered its obligation to do so terminated. After ChemiMetals refused to supply the Product Line to the defendants, the defendants began to manufacture and distribute the Product Line. Vibra-Chem's sales of the Product Line constituted approximately thirty-five percent of its total sales.

On 25 October 1995, Judge Sitton issued a preliminary injunction ordering the defendants:

> (i) not to manufacture directly or indirectly, or otherwise create, or recreate or attempt to create or recreate any of the products or processes within the Product Line or any similar chemical agent or compound or any chemical agent or compound in direct competition with the products or processes within the Product Line, or any improvement or enhancements or processes thereto;
>
> (ii) not to supply information and/or trade secrets regarding the Product Line, VC-3 or any improvements or enhancements thereto to others who would manufacture such products for the Defendants; and
>
> (iii) to deliver immediately to the Plaintiff all copies, drawings, notes, records, manuals, menus, photographs, tapes and all other information relating to the manufacture and processing of the Product Line, including enhancements.

The issue is whether this Agreement, limiting the defendants' right to manufacture Product Line, is a contract in restraint of trade.

The defendants argue that the Agreement imposes restrictions on their "ability to compete" with ChemiMetals and thus constitutes an "unenforceable restraint of trade." ChemiMetals argues that the Agreement is "not a covenant not to compete such as those imposed upon an employee or upon someone who sells an existing business and therefore, is not" properly considered a contract in restraint of trade. We agree with ChemiMetals.

Our Courts have a long history of carefully scrutinizing "covenants that preclude a seller of a business from competing with the new owner" and covenants that prevent an employee from competing with his former employer. *E.g.*, *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988); *Hartman v. Odell*, 117 N.C. App. 307, 311, 450 S.E.2d 912, 916 (1994), *disc. rev. denied*, 339 N.C. 612, 454 S.E.2d 251 (1995); *Jewell Box Stores v. Morrow*, 272 N.C. 659, 663, 158 S.E.2d 840, 843 (1968). These covenants, to be valid, are required to be (1) in writing, (2) part of the contract of employment or sale of the business, (3) based on valuable consideration, (4) reasonably necessary for the protection of the promisee's legitimate business interest, and (5) reasonable as to time and territory. *Professional Liab. Consultants v. Todd*, 122 N.C. App. 212, 215, 468 S.E.2d 578, 580 (1996). An agreement is not in restraint of trade, however, if it does not seek to prevent a party from engaging in a similar business in competition with the promisee, but instead seeks to prevent the disclosure or use of confidential information. *Glucol Mfg. Co. v. Schulist*, 214 N.W. 152 (Mich. 1927); *Hayes-Albion v. Kuberski*, 364 N.W.2d 609, 613 (Mich. 1984); *State Farm Mut. Auto. v. Dempster*, 344 P.2d 821, 826 (Cal. Ct. App. 1959); *see* 14 *Williston on Contracts* § 1633 (3d ed. 1972) (defining restraint of trade). Such agreements may, therefore, be upheld even though the agreement is unlimited as to time and area, *see* 17 C.J.S. *Contracts* § 254, upon a showing that it protects a legitimate business interest of the promisee. *See Rollins Protective Servs. Co. v. Palermo*, 287 S.E.2d 546, 550 (Ga. 1982).

In this case, the purpose of the Agreement is not to preclude the defendants from competing with ChemiMetals in a similar business. The Agreement simply prevents the defendants from using the "composition," "technology," and "[p]rocess" utilized by ChemiMetals in the manufacture of the Product Line, which information the defendants acknowledged to be the property of and confidential to ChemiMetals. It follows that the prohibition against the manufacturing of the Product Line is reasonably related to the protection of the confidential information and thus serves a legitimate business interest of ChemiMetals.

Because ChemiMetals has made a showing that the defendants have breached the Agreement, the trial court correctly determined that ChemiMetals was likely to succeed on the merits of the case and was thus entitled to a preliminary injunction. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983).

We do not address, because the defendants do not raise this issue on appeal, whether this record shows that ChemiMetals has made a showing that it will suffer irreparable loss unless the injunction is issued, the second requirement necessary for the issuance of a preliminary injunction. *Id.*

We have considered and rejected the defendants' argument that the manufacturing restriction is not binding on them because ChemiMetals terminated the Agreement. The record reveals that ChemiMetals, after a dispute arose regarding defendants' nonpayment for Product Line "already sold," refused to furnish any additional Product Line to the defendants. ChemiMetals argues that the defendants' nonpayment constituted a material breach of the Agreement and thus excused it from its obligation to provide Product Line to the defendants. *See* 6 Williston, *Contracts* § 864 (3d ed. 1962). Although we need not finally determine that issue on this record, we do hold that ChemiMetals has shown a likelihood of success on this issue. We also fail to see any error in the order of the trial court requiring the defendants to deliver to ChemiMetals "all copies, drawings, notes, records, manuals, menus, photographs, tapes, and all other information relating to the manufacture and processing of the Product Line." We agree with the trial court that upon ChemiMetals' showing of a likelihood of success on the merits it was entitled to possession of these materials pending resolution of the dispute.

We have reviewed the remaining assignments of error asserted by the defendants and without discussion overrule them.

Affirmed.

Judges JOHN and MARTIN, Mark D., concur.

PHILIP T. HOWERTON, M.D., RAY M. ANTLEY, M.D., AND BLUE RIDGE RADIOLOGY ASSOCIATES, P.A., PLAINTIFFS v. GRACE HOSPITAL, INC., AND PIEDMONT MEDICAL IMAGING, P.C., DEFENDANTS

No. COA95-1414

(Filed 15 October 1996)

1. Courts § 19 (NCI4th)— parallel federal action—stay pending appeal—denied

An appeal from the denial of a motion for a stay of state court proceedings was dismissed as interlocutory where plaintiffs filed a complaint in federal court which included state claims; plaintiffs filed a complaint in state court; the state claims in the federal action were voluntarily dismissed without prejudice; defendant Grace Hospital filed its first motion to stay proceedings in the state action on the grounds that a final decision in the federal case would be *res judicata* and bar all issues in the state case; summary judgment was granted for defendant Grace Hospital on the federal claims and plaintiffs appealed; defendants' motions for a stay were denied; and defendants brought this appeal. The denial of a stay did not dispose of any claims or parties, the trial court did not and could not certify the case for immediate appeal, and defendants failed to show that a substantial right would be lost. The state and federal actions do not, at present, have complete identity as to causes of action, no ruling regarding the applicability of the doctrine of *res judicata* has been made, and none of the state claims have been litigated in federal court because they were voluntarily dismissed without prejudice.

Am Jur 2d, Injunctions § 203.

2. Appeal and Error § 510 (NCI4th)— request for sanctions —frivolous appeal—denied—issue on appeal not previously addressed

A request for sanctions for a frivolous appeal was denied where the appellees did not file a motion for sanctions, the Court of Appeals declined to impose sanctions on its own initiative, and the issue on appeal had not been previously addressed by the appellate courts of this state. N.C. R. App. P. 34(a).

Am Jur 2d, Appellate Review §§ 939, 941.

Appeal by defendants from an order denying a motion to stay proceedings entered 13 October 1995 by Judge Claude S. Sitton in Burke

County Superior Court. Heard in the Court of Appeals 23 September 1996.

Law Offices of Robert N. Meals, P.L.L.C., by Robert N. Meals; and Wayne M. Martin, for plaintiff appellees.

Tate, Young, Morphis, Bach & Taylor, by Thomas C. Morphis; and Patton Starnes Thompson Aycock Teele & Ballew, P.A., by Thomas M. Starnes, for defendant appellants.

SMITH, Judge.

On 1 October 1990, plaintiffs filed a complaint in U.S. District Court, Western District of North Carolina seeking injunctive and monetary relief from defendants on claims for alleged violations of the Sherman Antitrust Act, Due Process violations and state claims. On 26 January 1993, plaintiffs voluntarily dismissed the pendent state law claims without prejudice. On 25 February 1993, defendant Grace Hospital moved for summary judgment. On 13 September 1993, U.S. Magistrate Judge J. Toliver Davis issued a memorandum and recommendation that defendant's motion for summary judgment be allowed. U.S. District Court Judge Lacy H. Thornburg adopted the recommendation of the magistrate and granted summary judgment for the defendants on 7 July 1995. Plaintiffs gave notice of appeal to the U.S. Fourth Circuit Court of Appeals from Judge Thornburg's order on 28 July 1995.

On 25 September 1992, plaintiffs filed a complaint in the case *sub judice* in the Superior Court Division of Burke County. Plaintiffs alleged breach of contract, violation of plaintiffs' rights of privacy, wrongful interference with business relationships, unfair and deceptive trade practices and civil conspiracy. Plaintiffs sought injunctive relief, a sum in excess of $10,000.00 in actual damages and a sum in excess of $10,000.00 in punitive damages. On 31 October 1994, defendant Grace made its first motion to stay the trial proceedings in the state action on the grounds that, without final resolution of the pending federal case, defendant Grace would be prejudiced because a final decision in the federal case would be *res judicata* and bar all issues in the state case. Defendant Piedmont Medical Imaging (PMI) made a motion to stay on the same grounds as that of defendant Grace. On 25 September 1995 and 5 October 1995, defendant Grace and PMI made second motions for stay of the trial proceedings. On 13 October 1995, defendants' motions were denied. From this denial, defendants appeal.

The trial court's denial of defendants' motions to stay is an interlocutory order from which no right to immediate appeal lies. We dismiss this appeal.

An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy. *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993). There is generally no right to appeal an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). The purpose of this rule is " 'to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.' " *Id.* (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985)). However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. *Id.*

[1] Defendants purportedly appeal the order denying their motion for a stay of the state court proceedings. Defendants cite no authority for the proposition that denial of a stay is appealable. We find no such authority in North Carolina. We do, however, find caselaw in other jurisdictions holding that the denial of a stay is not immediately appealable. *General Motors Corporation v. Koscielski*, 564 A.2d 114 (Md. Ct. Spec. App.) (1989); *Grimme Combustion, Inc. v. Mergentime Corp.*, 560 A.2d 793 (Pa. Super. Ct.) (1989); *Waterbury Teachers Assoc. v. Freedom of Information Commission et al.*, 645 A.2d 978 (Conn.) (1994); *Federal Land Bank of Spokane v. L.R. Ranch Co.*, 926 F.2d 859 (9th Cir. 1991). The denial of defendants' motions for stay did not dispose of any of the claims or parties, and the trial court did not and could not certify the case for immediate appeal pursuant to N. C. Gen. Stat. § 1A-1, Rule 54(b) (1990). Therefore, defendants must show that the trial court's decision deprives them of a substantial right which will be lost absent immediate review.

Defendants argue that they have the right to appeal from the interlocutory order, because the result of the federal appeal will have a preclusive effect in the state case under the doctrine of *res judicata.* The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). "Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.*

> The pendency of a prior suit in federal court is not an absolute bar to a suit in state court by the same plaintiff against the same defendant for the same cause of action. However, as a matter of comity and discretion, a state court may stay its proceedings pending the outcome of related federal litigation, and will generally do so where the action before it involves the same parties and the same issues as a previously filed action in federal court. *In the absence of complete identity as to parties, causes of action, and remedies sought, however, a stay of the state proceedings may properly be denied.*

1 Am. Jur. 2d *Actions* § 79 (emphasis added) (footnotes omitted) (1994). The two actions do not, at the present time, have "complete identity as to . . . causes of action . . . ."

No ruling regarding the applicability of the doctrine of *res judicata* has been made in this case. Moreover, the only claims addressed in the federal suit were violations of the Sherman Antitrust Act and violations of Due Process. None of the state claims brought forth by plaintiffs have been litigated in federal court, because they were voluntarily dismissed without prejudice. Thus, defendants improperly argue that they are going to be deprived of the defense of *res judicata.* Defendants have failed to show that a substantial right will be lost.

[2] Appellees request sanctions in their brief because the defendants' appeal is "frivolous." Rule 34(a) of the North Carolina Rules of Appellate Procedure provides:

> A court of the appellate division may, *on its own initiative or motion of a party*, impose a sanction against a party or attorney

or both when the court determines that an appeal or any proceeding in an appeal was frivolous . . . .

(Emphasis added.) The appellees did not file a motion with this Court for sanctions, and we decline to impose sanctions on our own initiative. Furthermore, we decline to impose sanctions because the issue of whether denial of a stay is immediately appealable had not been previously addressed by the appellate courts of this state.

Appeal dismissed.

Judges EAGLES and MARTIN, John C., concur.

LYNWOOD E. SMITH, PLAINTIFF-APPELLANT v. FRED MOODY AND JOHNNIE L. MOODY, DEFENDANTS-APPELLEES

No. COA95-1257

(Filed 15 October 1996)

1. Appeal and Error § 209 (NCI4th)— IRS sale of property—action to quiet title—notice of appeal—from directed verdict rather than summary judgment—jurisdictional

Plaintiff's attempted appeal of summary judgment for defendants as to personal property was dismissed in an action to quiet title arising from an IRS sale of property where plaintiff had designated in his notice of appeal a directed verdict as the order from which appeal was being taken. Appellate Rule 3(d) requires that a party specify the judgment or order from which appeal is taken and Appellate Rule 3 is jurisdictional. Even if the issue is properly raised, the trial court's ruling that the IRS sale was in accordance with the law would be upheld.

Am Jur 2d, Appellate Review §§ 325 et seq.

2. Taxation § 178 (NCI4th)— IRS tax sale—notice and sale sufficient

The trial court correctly ruled that the IRS properly served plaintiff with notice of seizure of his real property where plaintiff admitted at trial that a revenue officer personally served him with notice. Also, both parties agree that a revenue officer posted a notice of sale on the side of plaintiff's repair shop and plaintiff

admits that, even though he no longer conducted business at the shop, he went to the shop and saw the notice. Finally, although the public notice advertised that the sale would be conducted on the front steps of the courthouse and the sale was moved just a few feet inside the building because of inclement weather, a revenue officer waited outside for approximately twenty minutes to ensure that interested bidders would know of the new location. The trial court correctly ruled that the sale was substantially in compliance with the statute.

Am Jur 2d, Taxation §§ 869, 873.

Appeal by Plaintiff from Judgment entered 29 June 1995 by Judge James D. Llewellyn in Lenoir County Superior Court. Heard in the Court of Appeals 26 August 1996.

Lynwood Smith, *Plaintiff-Appellant, pro se.*

James S. Perry and David F. Turlington for Defendants-Appellees.

WYNN, Judge.

Plaintiff Lynwood Smith failed to pay approximately $60,000 in federal taxes for 1984 through 1991. In December 1991, Internal Revenue Officer Teresa Richardson personally served plaintiff with a notice of seizure as to the real and personal property that made up plaintiff's truck repair business. The shop was padlocked and plaintiff was forced to cease operations. In February 1992, Internal Revenue Officer Teresa Varnell posted a notice of sale on the side of the repair shop in plain view. She also mailed plaintiff a copy by regular and certified mail. Officer Varnell testified that she chose not to personally serve plaintiff because she knew him to be a tax protestor and feared for her safety.

On 25 February 1992, Officer Varnell conducted a sealed bid sale of plaintiff's property at the Lenoir County Courthouse. The public notice published in the newspaper advertised that the sale would take place on the front steps of the courthouse at 11:00 a.m. However, due to the cold weather, Officer Varnell conducted the sale in a room a few feet inside the courthouse. Officer Varnell testified that she waited on the front steps of the courthouse from 10:45 a.m. until 11:05 a.m. for potential purchasers. Defendants Fred and Johnnie Moody were the successful bidders at the tax sale. Officer Varnell

explained to plaintiff the process through which he could redeem his property within 180 days. Plaintiff failed to do so and thereafter, Officer Varnell prepared a certificate of sale and a deed of real estate naming defendants as the purchasers of plaintiff's real and personal property.

In September 1992, plaintiff sued defendants to quiet title to the truck repair shop alleging that the Internal Revenue Service ("IRS"), through its agents, failed to strictly comply with the seizure and sale provisions contained in Title 26 of the United States Code. In March 1994, both parties moved for summary judgment. The trial court granted defendants' motion for summary judgment but only as it pertained to plaintiff's personal property. As per the summary judgment order, the only issue at trial was the sufficiency of the notices of sale and seizure pertaining to the real property. On 24 April 1995, the trial court granted defendants' motion for a directed verdict at the close of all the evidence. From this order, plaintiff appeals.

The issues on appeal are: (I) Whether the trial court erred in ruling that the IRS' certificate of sale was conclusive evidence that the seizure and sale of plaintiff's personal property was in accordance with the law; and (II) Whether the trial court erred in ruling that the IRS' seizure and sale of plaintiff's real property complied with federal regulations.

We note at the outset that defendants attempted to remove this suit to federal court; however, the Fourth Circuit Court of Appeals, in an unpublished decision, ordered the district court to remand the case to state court pursuant to 26 U.S.C. § 1447(c), declaring that plaintiff's claim was "strictly a state law claim to quiet title." Notwithstanding that court's determination, resolution of this matter requires the application of *federal* law.

A motion for a directed verdict presents the same question for both trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, is sufficient for submission to the jury. *Alston v. Herrick*, 76 N.C. App. 246, 332 S.E.2d 720 (1985), *aff'd*, 315 N.C. 386, 337 S.E.2d 851 (1986). "A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 294, 401 S.E.2d 837, 838 (1991) (citation omitted).

I.

[1] In his first assignment of error, plaintiff challenges the trial court's decision to grant defendants' motion for summary judgment regarding the sale of his personal property. Yet, in his notice of appeal, plaintiff only designates the directed verdict as the order from which appeal is being taken. Appellate Rule 3(d) requires that a party specify the judgment or order from which appeal is taken. "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *appeal dismissed and cert. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990) (citing *Giannitrapani v. Duke University*, 30 N.C. App. 667, 228 S.E.2d 46 (1976)). Therefore, we dismiss plaintiff's attempted appeal of the personal property issue. Even if the issue was properly before us, we would still uphold the trial court's ruling that the IRS' sale of plaintiff's personal property was in accordance with the law. *See* 26 U.S.C. § 6339(a) (1954) (certificate of sale is conclusive evidence of regularity of proceedings).

II.

[2] Plaintiff next contends that the trial court erred in granting a directed verdict in defendants' favor on the grounds that the IRS' seizure and sale of plaintiff's real property complied with the provisions of 26 U.S.C. § 6335. We disagree.

Section 6335 of the Internal Revenue Code provides that a revenue officer is required to (1) personally serve a notice of seizure on the owner of the real property, or (2) leave the notice at the owner's home or usual place of business if he has such within the internal revenue district where the seizure is made. 26 U.S.C. § 6335(a) (1954).

At trial, plaintiff admitted that Revenue Officer Richardson personally served him with a notice of seizure on 6 December 1991. Therefore, we affirm the trial court's ruling that the IRS properly served plaintiff with the notice of seizure as to his real property.

Plaintiff also alleges that the IRS violated Section 6335 in its service of the notice of sale. We disagree.

Just as with a notice of seizure, the IRS has the option of personally serving a notice of sale or leaving it at the property owner's home or usual place of business. *See* 26 U.S.C. § 6335(b) (1954). In the instant case, both parties agree that Revenue Officer Varnell posted

the notice of sale on the side of plaintiff's repair shop. Plaintiff contends that since he no longer conducted business at the shop, he should have been personally served with the notice. However, plaintiff admits that he went to the shop and saw the notice of sale. Since plaintiff received the notice in a manner prescribed by the law, we affirm the trial court's ruling that the IRS properly served him with the notice of sale.

The plaintiff's final contention is that the trial court should not have granted defendants' motion for directed verdict because the sale of his property was not in compliance with 26 C.F.R. § 301.6335-1(c)(1) (1991), which provides in pertinent part: "The sale shall be held at the time and place stated in the notice of sale." We disagree.

26 U.S.C. § 6339(b)(2) (1954) provides that:

> "[i]f the proceedings of the Secretary as set forth have been *substantially in accordance* with the provisions of law, such deed [of sale] shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold . . ."

(emphasis added).

Although the public notice advertised that the sale would be conducted on the *front steps* of the courthouse, the sale was moved just a few feet inside the building because of the inclement weather. In addition, Officer Varnell waited outside for approximately twenty minutes to ensure that interested bidders would know of the new location. Therefore, the trial court was correct in ruling that the sale was substantially in compliance with the statute.

For the foregoing reasons, the judgment of the trial court granting defendants' motion for directed verdict is,

Affirmed.

Judges JOHNSON and LEWIS concur.

[124 N.C. App. 208 (1996)]

EDWARD C. LAURENT, APPELLANT v. USAIR, INC., APPELLEE

No. COA96-19

(Filed 15 October 1996)

Limitations, Repose, and Laches § 157 (NCI4th)— nonresident plaintiff—injuries received in another state—action barred under borrowing statute

A nonresident plaintiff's claim against a foreign airline which has a place of business in this state for injuries received while in airspace over California or Arizona was time barred under the "borrowing statute," N.C.G.S. § 1-21, where plaintiff's claim was barred by the California and Arizona statutes of limitation, and plaintiff was not a resident of this state at the time his claim accrued, notwithstanding North Carolina still had long-arm jurisdiction over defendant.

Am Jur 2d, Limitation of Actions §§ 55, 67.

Validity, construction, and application, in nonstatutory personal injury actions, of state statute providing for borrowing of statute of limitations of another state. 41 ALR4th 1025.

Appeal by plaintiff from order entered 13 October 1995 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 25 September 1996.

Wilson & Iseman, L.L.P., by Urs R. Gsteiger; and Overbey, Hawkins & Selz, by Bryan K. Selz, for plaintiff appellant.

Bell, Davis & Pitt, P.A., by William K. Davis, Stephen M. Russell and Alan M. Ruley, for defendant appellee.

SMITH, Judge.

Plaintiff Edward C. Laurent is a resident of Goode, Virginia. Defendant, USAir, Inc., is a foreign corporation with its headquarters in Virginia, and a place of business in Winston-Salem, North Carolina. On or about 5 March 1992, plaintiff was a passenger on USAir flight No. 86, traveling from San Diego, California, to Pittsburgh, Pennsylvania. Prior to departure, a briefcase was placed in the storage compartment above plaintiff's seat by an employee of defendant. During the flight, at approximately 5:15 Eastern Standard

Time, another passenger opened the overhead compartment and the briefcase fell out and struck plaintiff on the head and neck. Plaintiff lost consciousness and upon regaining consciousness experienced double vision, dizziness and disorientation. At the time of the accident, the airplane would have been in either California or Arizona airspace.

Over two and one-half years later, on 27 December 1994 plaintiff filed a personal injury and negligence action against USAir in Forsyth County, North Carolina. At the time plaintiff filed his action in North Carolina, his claim was barred by the California and Arizona statutes of limitation. Cal. Civil Procedure Code § 340(3) (West 1982); Ariz. Rev. Stat. Ann. § 12-542 (1992). Defendant USAir filed a motion for summary judgment on the grounds that plaintiff's action was barred by the applicable statutes of limitation. The motion was granted and from the order granting summary judgment, plaintiff appeals.

Plaintiff argues that the trial court erred by granting summary judgment for defendant because plaintiff's claim is not barred by virtue of N.C. Gen. Stat. § 1-21 (1983). Plaintiff contends that N.C. Gen. Stat. § 1-21 does not apply to the case at bar because the second paragraph of the statute says that N.C. Gen. Stat. § 1-21, "shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of G.S. 1-75.4." N.C. Gen. Stat. § 1-21. While we find some merit and logic to plaintiff's argument, we must affirm the order of the trial court.

N.C. Gen. Stat. § 1-21 provides:

> **Defendant out of State; when action begun or judgment enforced.**
>
> If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the

> enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.
>
> The provisions of this section shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of G.S. 1-75.4.

Prior to the 1979 amendment to N.C. Gen. Stat. § 1-21 the second paragraph addressing long-arm jurisdiction did not exist.

> One of the purposes of G.S. 1-21 was said to be to prevent defendants from having the benefit of the lapse of time—the statute of limitations—while they remain beyond the limits of the State and allow their debts to remain unpaid, it not being the policy of the State to drive its citizens to seek their legal remedies abroad.

Duke University v. Chestnut, 28 N.C. App. 568, 570, 221 S.E.2d 895, 896 (1976) (citing *Armfield v. Moore*, 97 N.C. 34, 2 S.E. 347 (1887)). The issue before this Court in *Duke* was whether the long- arm provisions of N.C. Gen. Stat. § 1-75.4 effectively repealed the tolling provisions of N.C. Gen. Stat. § 1-21 because the tolling statute would otherwise have permitted the plaintiff to start his action against the individual nonresident defendants more than three years after the cause of action arose. *Duke*, 28 N.C. App. at 569, 221 S.E.2d at 896.

> [T]he court chose to give effect to both the tolling statute and the long-arm statute by holding that the enactment of the long-arm statute making nonresident defendants amenable to process did not result in the pro tanto repeal of the provision tolling the statute of limitations, but merely afforded plaintiffs an additional procedural option. Deferring to what it considered the proper boundary between judicial and legislative functions, the court invited the General Assembly to consider the wisdom of allowing plaintiffs this option.

Reginald Combs, *Civil Procedure-Tolled Statute of Limitations v. Long-Arm Statute Amenability*, 12 Wake Forest L. Rev. 1041, 1042-43 (1976) (footnote omitted). In *Duke*, this Court adopted the minority position that the statute of limitations was tolled during the time the defendant was outside the state despite his continued amenability under the provisions of the long-arm statute, but it also espoused the majority position. *Id.* at 1049-50. This Court adopted the minority position because it was reluctant to amend the tolling statute by judicial declaration and left any such amendment for

the consideration of the General Assembly. *Duke*, 28 N.C. App. at 572, 221 S.E.2d at 898.

In an attempt to remedy this situation, the General Assembly amended N.C. Gen. Stat. § 1-21 in 1979 by adding the second paragraph of the statute which provides, "[t]he provisions of this section shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of G.S. 1-75.4." Although unartfully drafted, what the legislature intended was for the second paragraph to nullify the *tolling* provision of N.C. Gen. Stat. § 1-21, not to nullify the *"borrowing provision"* of the statute.

In *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 323 S.E.2d 470 (1984), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985) this Court stated:

> First, we note that the "borrowing statute" [N.C. Gen. Stat. § 1-21] is not applicable if a defendant is subject to long-arm jurisdiction under G.S. § 1-75.4 (1983). Second, after the cause of action has been barred in the jurisdiction where it arose, *only a plaintiff, who was a resident of this State at the time the cause of action originally accrued, has the right to maintain an action in the courts of this State.*

Id. at 113, 323 S.E.2d at 475 (emphasis added) (citations omitted). In *Glynn v. Stoneville Furniture Co.*, 85 N.C. App. 166, 169, 354 S.E.2d 552, 553, *disc. review denied*, 320 N.C. 512, 358 S.E.2d 518 (1987), plaintiff contended that N.C. Gen. Stat. § 1-21 did not apply because defendants were subject to long-arm jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4 at the time that plaintiff brought the action and that plaintiff was thus entitled to the benefit of the longer North Carolina statute of limitations. This Court applying N.C. Gen. Stat. § 1-21, held that plaintiff's action was barred in the courts of North Carolina since plaintiff was not a resident of this state at the time his cause of action accrued, and plaintiff's action was barred by the applicable California statute of limitations. *Id.* at 169, 354 S.E.2d at 554. Therefore, plaintiff could not avail himself of the longer North Carolina statute of limitations. *Id.*

In the present case plaintiff asserts, pursuant to N.C. Gen. Stat. § 1-21, that, because North Carolina has long-arm jurisdiction over defendant by virtue of the second paragraph of N.C. Gen. Stat. § 1-21, the statute does not apply to the case at bar. This is the precise argu-

ment made by the plaintiff in *Glynn* which argument was rejected by this Court.

While plaintiff's argument is intriguing, we must affirm the order of the trial court. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."*In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we hold that N.C. Gen. Stat. § 1-21 bars plaintiff's action, and the trial court properly entered summary judgment in favor of defendant.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. REX ANDREW ROBINETTE

No. COA96-166

(Filed 15 October 1996)

Automobiles and Other Vehicles § 849 (NCI4th)— DWI—car wash parking lot—public vehicular area—effect of local ordinance

A town's adoption of an ordinance making it a misdemeanor for persons to park on the premises of a specific car wash unless using the car wash facilities did not convert the car wash parking lot from a "public vehicular area" to "private property" within the meaning of the driving while impaired statute, N.C.G.S. § 20-138.1(a). N.C.G.S. § 20-4.01(32)(b).

Am Jur 2d, Automobiles and Highway Traffic §§ 205, 301.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense. 29 ALR3d 938.

Appeal by defendant from judgment entered 5 December 1995 by Judge William C. Griffin, Jr. in Surry County Superior Court. Heard in the Court of Appeals 10 September 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Joseph P. Dugdale, for the State.

W. David White, P.A., by W. David White, for defendant-appellant.

WALKER, Judge.

Speedy Car Wash is a business establishment in Elkin, North Carolina, open year round, twenty four hours a day. At the request of the owner of the car wash, the Town of Elkin (Town) passed an ordinance making it a misdemeanor for persons to park on the premises of Speedy Car Wash unless using the car wash facilities. On the evening of 9 January 1994, Officer Jacob Armstrong of the Town's Police Department noticed several cars parked in the Speedy Car Wash parking lot. Officer Armstrong motioned for the cars to leave the lot because none of them were using the car wash vacuum hoses or wash bays. Officer Armstrong then continued on his routine patrol. When he later returned to the car wash, the defendant was still parked in the car wash parking lot. Upon seeing Officer Armstrong pull into the parking lot, the defendant began to move his car. At this time, Officer Armstrong turned on his blue lights and the defendant stopped his car, but never left the car wash parking lot.

Officer Armstrong approached the defendant's car and noticed a strong odor of alcohol coming from the car, as well as several partially consumed cans of beer in the car, including one can located between the passenger seat and the driver's door. He also observed passengers in the car. Officer Armstrong arrested the defendant and charged him with driving while impaired after the defendant performed poorly on a sobriety test. The defendant later submitted to a chemical analysis of his breath, which measured his blood alcohol content at .10.

At trial, the defendant's motion to dismiss was denied. He then asked for a special jury instruction on the definition of "public vehicular area." The court refused to give the requested instruction and the defendant was found guilty by the jury. The defendant contends that the trial court erred in not giving his requested instruction regarding the definition of "public vehicular area."

The issue in this case is whether the Town, by adopting an ordinance prohibiting loitering on the Speedy Car Wash premises,

changed the Speedy Car Wash parking lot from a "public vehicular area" to "private property." If the parking lot is considered private property, the defendant cannot be convicted of driving while impaired, because a key element of the offense of driving while impaired is that the offense take place on a highway, street, or "public vehicular area." N.C. Gen. Stat. § 20-138.1(a) (1993).

The defendant requested that the court give the jury the following instruction based on the fact that the Town had adopted the ordinance prohibiting loitering on the Speedy Car Wash premises:

> "Public Vehicular Area" is defined by North Carolina General Statute § 20-4.01(32) [as] "any area within the state of North Carolina that is generally open to and used by the public for vehicular traffic." Public Vehicular Area shall not be construed to mean any private property not generally open to and used by the public. The court instructs you, if an area is private, or signs prohibit trespassing, loitering, or lack of use for the general public, then this would not be a public vehicular area.

However, instead of giving the jury the defendant's requested instruction on "public vehicular area," the trial court submitted the complete statutory definition, including the portion which provides that a "public vehicular area" is "[a]ny area within the State . . . generally open to and used by the public for vehicular traffic, including . . . any drive, driveway . . . or parking lot upon the grounds and premises of . . . any business . . . providing parking spaces for customers, patrons, or the public." N.C. Gen. Stat. § 20-4.01 (32)(b) (1993).

The recent case of *State v. Snyder*, 343 N.C. 61, 468 S.E.2d 221 (1996), is instructive in that the Supreme Court clarifies the term "public vehicular area" to encompass privately owned parking lots. In *Snyder*, the defendant was stopped in the parking lot of the Lost Dimensions Nightclub in Greensboro and charged with driving while impaired. *Id.* at 63, 468 S.E.2d at 222. At trial, the club manager testified that the club was private, that entry to the club was restricted to members and their guests during the club's business hours, and that the club was not open to the public. *Id.* at 64, 468 S.E.2d at 223. He further testified that the club did not allow non-members to use the club parking lot, that club members could use the parking lot only when they were inside the club, and that the club prohibited loitering in the parking lot. *Id.* Even though the club was private, the Supreme Court found the club parking lot to be a "public vehicular area" as a

matter of law and upheld the defendant's conviction of driving while impaired. *Id.* at 69, 468 S.E.2d at 226. The Supreme Court stated that "even if an establishment is cloaked in the robe of being a private club, it is still a 'business establishment providing parking space for its customers, patrons, or the public' and cannot escape liability simply because a membership fee is required." *Id.*

As in *Snyder*, it is clear from the facts in the present case that the Speedy Car Wash parking lot is a "public vehicular area." It is open to the public year round, twenty-four hours a day. Patrons can park on the car wash premises any time as long as they are using the car wash facilities. The adoption of an ordinance by the Town evidenced by a sign prohibiting loitering in the parking lot does not change the nature of the property, since the car wash is still a business providing parking for its customers, and as such, the premises remains a "public vehicular area" according to N.C. Gen. Stat. § 20-4.01(32)(b) (1993).

Prohibitions against loitering assist in the operation of businesses open to the public, as loitering by non-patrons can deter customers, distract employees, and overcrowd the premises. Members of the public using the car wash premises, however, deserve no less protection from impaired drivers in its parking lot than they do on public streets or highways.

The trial court properly instructed the jury on the definition of "public vehicular area."

No error.

Judges EAGLES and McGEE concur.

SCHRONCE v. CONIGLIO

[124 N.C. App. 216 (1996)]

SUE SCHRONCE, ADMINISTRATRIX OF THE ESTATE OF SHELTON SCHRONCE, PLAINTIFF V. DR. GERALD CONIGLIO, DEFENDANT

No. COA95-1391

(Filed 15 October 1996)

Abatement, Survival, and Revival of Actions § 16 (NCI4th)—medical negligence—unrelated death of victim—survival of action

A cause of action for negligent medical treatment of a decedent, unrelated to the death, survived the death of the decedent under *McGowen v. Rental Tool Co.*, 109 N.C. App. 688. N.C.G.S. § 28A-18-1.

Am Jur 2d, Abatement, Survival, and Revival §§ 73, 90.

Medical malpractice action as abating upon death of either party. 50 ALR2d 1445.

Appeal by plaintiff from order entered 23 October 1995 by Judge Robert Burroughs in Gaston County Superior Court. Heard in the Court of Appeals 26 August 1996.

Childers, Fowler & Childers, P.A., by Max L. Childers, for plaintiff-appellant.

Dameron and Burgin, by Charles E. Burgin, for defendant-appellee.

JOHNSON, Judge.

Plaintiff's decedent Shelton Schronce was employed by Custom Transport, Inc. On 23 July 1994, decedent fell and injured his shoulder while loading a truck. Following his injury, he was taken to Lincoln County Hospital and was treated by defendant Dr. Gerald Coniglio. Plaintiff alleges that defendant negligently treated decedent, causing his injury to worsen and causing him to be totally disabled. In addition, plaintiff alleges that defendant's negligence caused decedent to suffer additional pain, incur additional medical and hospital bills, and endure a longer period of recuperation.

On 14 December 1992, decedent died from causes unrelated to the alleged negligence of defendant. Plaintiff was appointed administratrix of decedent's estate and brought this action against defendant,

seeking to recover the damages caused by defendant's negligence for the estate.

On 28 September 1995, defendant filed his motion to dismiss for lack of subject matter jurisdiction, personal jurisdiction, insufficiency of process, and failure to state a claim upon which relief can be granted. The trial court granted defendant's motion to dismiss, ruling that plaintiff had failed to state a claim upon which relief could be granted because the cause of action alleged by plaintiff did not survive the death of plaintiff's decedent. Plaintiff appeals.

Plaintiff assigns as error the trial court's ruling that the cause of action does not survive decedent Shelton Schronce's death. A review of the record reveals that the trial court relied upon North Carolina General Statutes section 28A-18-1(b)(3) in reaching its decision to dismiss plaintiff's complaint since plaintiff had failed to state a claim upon which relief could be granted. N.C. Gen. Stat. § 28A-18-1(b)(3) (1984). North Carolina General Statutes section 28A-18-1 provides:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> (1) Causes of action for libel and for slander, except slander of title;
>
> (2) Causes of action for false imprisonment;
>
> (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C.G.S. § 28A-18-1. In the instant case, plaintiff is seeking damages for personal injuries suffered by her decedent as a result of defendant's alleged negligence, it is not a wrongful death action.

Plaintiff argues that the trial court's reliance on section 28A-18-1(b)(3) is misplaced, because this action does not involve a situation where the relief sought could not be enjoyed or would be nugatory. Plaintiff further contends that decedent could have sued defendant had he lived and could have enjoyed the relief

granted; therefore, this action is not one in which the relief could not have been enjoyed or would be nugatory if granted. Consequently, this right passes to his administratrix. Defendant, however, argues that the trial court properly concluded that the action did not survive.

> At common law a person injured by the negligence of another had a right of action to recover consequential damages. But at common law such right of action did not survive the death of the injured person, that is, it died with the person; and if the injured person died as a result of the wrongful act of another, there was at common law no right of action for such death.

Hoke v. Greyhound Corp., 226 N.C. 332, 334, 38 S.E.2d 105, 107 (1946). Hence, defendant alleges since the action would have been barred at common law and no specific provision of the survival statute, section 28A-18-1, exempts this action from operation of common law, this action is barred.

Defendant and plaintiff cite several cases in support of their respective positions; however, after a careful review of the relevant cases, we find that this Court's decision in *McGowen v. Rental Tool Co.*, 109 N.C. App. 688, 428 S.E.2d 275 (1993), controls. In *McGowen*, a case factually similar to the instant case, the plaintiff's decedent died from causes unrelated to the injuries allegedly caused by defendants. *Id.* Our Court stated that section 28A-18-1 "provides that a civil action based upon personal injuries survives the death of the plaintiff." *Id.* at 691, 428 S.E.2d at 276 (citing *Fuquay v. R.R.*, 199 N.C. 499, 155 S.E. 167 (1930)). Thus, pursuant to *McGowen*, the action survives. Therefore, the decision of the trial court is reversed.

Reversed.

Judges LEWIS and WYNN concur.

HATTIE SAUMS, EMPLOYEE, PLAINTIFF-APPELLEE v. RALEIGH COMMUNITY HOSPITAL, EMPLOYER, CONTINENTAL INSURANCE COMPANY (CONTINENTAL LOSS ADJUSTING, ADJUSTING AGENT), CARRIER; DEFENDANT-APPELLANTS

No. COA95-1303

(Filed 15 October 1996)

Workers' Compensation § 234 (NCI4th)— return to work after injury—newly created job—presumption that job ordinarily available in competitive market

The Industrial Commission erred in a workers' compensation action when finding petitioner entitled to temporary total disability compensation for a back injury by failing to give the employer the benefit of the presumption that a newly created job was ordinarily available in the competitive job market.

Am Jur 2d, Workers' Compensation §§ 395, 397.

Appeal by defendants from Opinion and Award for the Full Commission filed 22 August 1995. Heard in the Court of Appeals 28 August 1996.

The Law Offices of John T. Orcutt, by John T. Orcutt, and The Law Offices of Nancy P. White, by Nancy P. White, for the plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Thomas M. Clare and Mallory A. Taylor, for defendant-appellants.

GREENE, Judge.

Raleigh Community Hospital (employer) and Continental Insurance Company (Continental Insurance) (collectively defendants) appeal the award by the North Carolina Industrial Commission (the Commission) of ongoing total disability to Hattie Saums (Saums).

On 22 September 1989, Saums, a fifty-three-year-old female with a ninth-grade education, sustained an injury to her back arising out of her employment as a housekeeper with the employer. In November 1989, she underwent a lumbar laminectomy and a discectomy. She remained at home recovering from the operation until January 1990 when she had a subsequent re-exploratory surgery after reporting pain in her leg.

In March 1990, Saums was released by her orthopedic surgeon, Dr. David Fajgenbaum (Dr. Fajgenbaum), to return to work. She was restricted to not lifting more than thirty pounds and not climbing or crawling for any prolonged period. On 2 April 1990, Saums returned to her former position as a housekeeper. Two days later she reported to Dr. Fajgenbaum that she had begun experiencing back and hip pain. She did not return to work until 21 January 1991 after she had recovered from another surgery on her back. At this time she was offered the position of a quality control clerk (Clerk), "a new position created for [Saums'] return" to the employer. Duties assigned to that position included "office filing, answering the telephone, counting linen occasionally" and other general office duties. The job description for the position listed the "qualifications" of the position as a "high school education or equivalent." It further stated that the applicant "[m]ust be able to read and write and communicate in English."

From January 1991 until February 1992, Saums worked as a Clerk with only infrequent absences due to discomfort from her injury, however, she complained of increasing back pain. On 26 February 1992, Dr. Fajgenbaum performed another myelogram and the test did not reveal "any good reason" for Saums' continued complaints of severe pain. In a letter to the employer dated 5 May 1992, Dr. Fajgenbaum indicated that he could not "find any hard reason as to why this patient should not be allowed to return to the job that was created by you which would eliminate any strenuous activities." Saums, on February 1992, refused to return to her job as a Clerk.

In addition to findings reflecting the above undisputed facts, the Commission found as a fact that "[t]here is insufficient evidence . . . from which to determine . . . that the newly created job position . . . was ordinarily available in the competitive job market." Based on this finding, the Commission concluded that Saums was entitled to "temporary total disability compensation."

The issue is whether the Commission correctly placed the burden on the employer to show that the post-injury job offered to its employee is one available generally in the market.

An employee is entitled to compensation under the Workers' Compensation Act (Act) if there is an "incapacity because of injury to earn the wages which the employee was receiving at the time of

injury in the same or any other employment." N.C.G.S. § 97-2(9) (1991). Thus, an employee's "post-injury earning capacity is the determinative factor in assessing disability." *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991). An employee's post-injury earnings create a rebuttable presumption of earning capacity commensurate with the post-injury earnings. *Id.* An employee may rebut this presumption by showing that the earnings are derived from a job, created by her employer, which is not "available generally in the market." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 440, 342 S.E.2d 798, 807 (1986); *Tyndall*, 102 N.C. App. at 730, 403 S.E.2d at 550 (employee "may attempt to explain 'away the post-injury earnings as an unreliable basis for estimating capacity' "); *Arrington v. Texfi Industries*, 123 N.C. App. 476, 481, 473 S.E.2d 403, 407 (1996) (because employee offered no competent evidence that new position was "made work," earnings received from that job were "strong, if not conclusive, evidence of the employee's earning capacity").

In this case, the Commission failed to give the employer the benefit of the presumption that the newly created job of Clerk was ordinarily available in the competitive job market. Instead, the Commission placed the burden on the employer to show that the newly created job was ordinarily available in the competitive job market. This was error. The employer is entitled to the benefit of the presumption that the newly created job is of a type generally available in the market and the burden rests with Saums to rebut this presumption. Because the Commission misapplied these principles remand is necessary for the entry of a new Opinion and Award. *See* N.C.G.S. § 150B-51(b) (1995).

Reversed and remanded.

Judges JOHN and MARTIN, Mark D., concur.

SMITH v. COCHRAN

[124 N.C. App. 222 (1996)]

JEFF L. SMITH, PLAINTIFF v. ROBERT COCHRAN, D/B/A McDONALD'S RESTAURANT, WILKINSON FOOD COMPANY, A PARTNERSHIP AND TRITON MANAGEMENT COMPANY, A PARTNERSHIP, DEFENDANTS

No. COA95-1284

(Filed 15 October 1996)

Negligence § 106 (NCI4th)— slip and fall in restaurant—wet floor—issue of fact

The trial court should not have granted summary judgment for defendants in a slip and fall action where plaintiff's evidence established that the floor of the McDonald's was wet when he slipped and that there were no warning signs placed on the floor in the area where he fell and defendants' evidence not only conflicted with plaintiff's evidence but conflicted among its three employees. These conflicts raise an issue of fact as to whether defendants were negligent in creating an unsafe hidden condition and in failing to warn plaintiff that the floor was wet.

Am Jur 2d, Premises Liability § 554; Summary Judgment § 27.

Liability of operator of store, office, or similar place of business to invitee slipping on spilled liquid or semiliquid substance. 26 ALR4th 481.

Appeal by plaintiff from order entered 1 August 1995 by Judge Loto Greenlee Caviness in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 1996.

Tim L. Harris & Associates, by Lori A. Shugar, for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Paul R. Dickinson, Jr., for defendants-appellees Wilkinson Food Company and Triton Management Company.

WALKER, Judge.

The plaintiff filed this action on 11 April 1994 seeking to recover damages for injuries he received after falling in a McDonald's Restaurant. The defendants answered and moved for summary judgment which was granted.

The plaintiff's evidence tended to show that on 6 June 1993, he went inside defendants' restaurant for breakfast. After he had purchased his food, he was carrying a tray and walking to find a seat in the dining room when he slipped on the wet floor injuring his back. Immediately after his fall, plaintiff noticed someone mopping the floor near the front of the store. At no time before the fall did plaintiff see any signs warning that the brown to brownish-red tile floor was wet.

Three of defendants' employees, who were working the day the plaintiff fell, testified through depositions. These employees could not agree on the normal time the floor was usually mopped in the mornings, who actually mopped the floor that morning, whether the floor was still wet where the plaintiff fell, or whether or not there were any warning signs placed on the floor.

A defendant is entitled to summary judgment "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 [defendant] is entitled to judgment as a matter of law." N.C.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. *Hotel Corp. v. Taylor and Fletcher v. Foremans, Inc.*, 301 N.C. 200, 202, 271 S.E.2d 54, 57 (1980).

In order to survive defendants' motion for summary judgment, plaintiff must show a *prima facie* case of the defendants' negligence. *Lamm v. Bissette Realty*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990). Here, plaintiff was an invitee on the defendants' premises. Thus, the defendants have a duty to exercise "ordinary care to keep [its store] in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Rone v. Byrd Food Stores*, 109 N.C. App. 666, 669, 428 S.E.2d 284, 285-86 (1993) (*quoting Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963)).

In *Rone*, the plaintiff did not see any warning signs, hear any verbal warnings or observe any water on the floor, as she walked into the wet area and fell. The court noted that defendant's evidence was conflicting as its witnesses could not agree on where the floor was wet, how many warning signs had been placed on the floor, where the warning signs had been placed, or where the plaintiff fell. This Court

said, "there is at least a reasonable inference that defendant was negligent in creating a wet slippery condition and in failing to adequately warn plaintiff of the presence of the slippery floor." *Id.* at 670, 428 S.E.2d at 286.

Here, plaintiff's evidence established that the floor was wet when he slipped and that there were no warning signs placed on the floor in the area where he fell. On the other hand, the defendants' evidence not only conflicted with plaintiff's evidence but conflicted among its three employees. These conflicts raise an issue of fact as to whether defendants were negligent in creating an unsafe hidden condition and in failing to warn the plaintiff that the floor was wet, thus precluding a grant of summary judgment for the defendants.

Reversed.

Judges EAGLES and McGEE concur.

UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF-APPELLEE v. SANDRA V. SCOTT, STEPHANIE S. JOHNSON AND DEBORAH S. GILBERT, DEFENDANTS-APPELLANTS

No. COA95-1271

(Filed 15 October 1996)

Parties § 21 (NCI4th)— appeal—parties in interest

An appeal was dismissed as to defendants Johnson and Gilbert where defendant Scott shot and killed her husband; defendants Johnson and Gilbert, the deceased's daughters, brought a civil action against Scott, their stepmother; Scott entered into a confidential settlement agreement with Johnson and Gilbert which limited Johnson and Gilbert's right to collect to Scott's homeowner's insurance policy from plaintiff, USF&G; plaintiff filed a declaratory judgment action to determine its obligation; and the trial court granted plaintiff's motion for summary judgment. The declaratory judgment action involves only USF&G and Scott, despite Johnson and Gilbert being named as defendants, because Johnson and Gilbert have yet to determine Scott's liability in their claim for negligent infliction of emotional distress and have no interest in the subject matter of the litigation.

Even if they had the right to appeal, the trial court's decision to grant summary judgment would be affirmed on the ground that the insurer had no obligation to Johnson and Gilbert because the insured, Scott, was protected by a covenant not to execute.

Am Jur 2d, Parties §§ 41, 42.

Appeal by Defendants Johnson and Gilbert from Order entered 28 July 1995 by Judge James C. Spencer, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 26 August 1996.

Hunter Law Firm, by R. Christopher Hunter, Elizabeth K. Blake and Gregg Pasternack, for Defendants-Appellants.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Elizabeth Horton, for Plaintiff-Appellee.

WYNN, Judge.

On 19 March 1993, defendant Sandra V. Scott shot and killed her husband, Duke Tyler Scott. Thereafter, defendants Deborah Johnson and Stephanie Gilbert, the deceased's daughters, brought an action against Scott, their stepmother, for wrongful death, intentional infliction of emotional distress and negligent infliction of emotional distress.

In March 1994, Scott entered into a confidential settlement agreement with Johnson and Gilbert. As per the agreement, Johnson and Gilbert dismissed two of the three claims they had against Scott. In return, Scott agreed to plead guilty to voluntary manslaughter, to pay her stepdaughters $415,000 in cash and to release any claim she had to certain real and personal property owned by her and the deceased.

The settlement agreement permitted Johnson and Gilbert to sever their claim for negligent infliction of emotional distress from the original lawsuit and to refile it in a subsequent action. However, the agreement limited Johnson and Gilbert's right to collect on any possible recovery to Scott's homeowner's insurance policy from plaintiff United States Fidelity and Guaranty Company ("USF&G"). The agreement stated:

> In the event that any judgment shall be entered against Defendant [Scott] in this surviving issue, then <u>Defendant's real or personal belongings shall not be subject to execution,</u> it being the under-

standing and agreement by and between the parties that the sole source of collection shall be the Defendant's insurance policy and/or carrier

(emphasis added.)

USF&G filed a declaratory judgment action in Alamance County in November 1994 to determine its obligation to Scott, Johnson and Gilbert under Scott's homeowner's policy. In March 1995, the trial court ordered that defendants turn over a copy of their confidential settlement agreement to USF&G's counsel. Thereafter, the trial court granted USF&G's motion for summary judgment on the ground that the settlement agreement relieved USF&G of any obligation to defend or afford coverage to Scott.

Scott filed a timely notice of appeal, however, she failed to file a supporting brief and USF&G moved to dismiss her appeal pursuant to Rule 13(c) of the North Carolina Rules of Appellate Procedure. Johnson and Gilbert also appeal; however, we conclude that they are not real parties in interest in the litigation and therefore may not appeal from the judgment.

Only a "real party in interest" has the legal right to maintain a cause of action. *Crowell v. Chapman*, 306 N.C. 540, 293 S.E.2d 767 (1982). In order to qualify as a real party in interest, a party must have some interest in the subject matter of the litigation and not merely an interest in the action. *Parnell v. Insurance Co.*, 263 N.C. 445, 449, 139 S.E.2d 723, 726 (1965). In other words, "[a] real party in interest is a party who is benefitted or injured by the judgment in the case." *Id.* at 448, 139 S.E.2d at 726 (quoting *Rental Co. v. Justice*, 211 N.C. 54, 55, 188 S.E. 609, 610 (1936)). Furthermore, a party does not automatically qualify as a real party merely because they have been included as a defendant in a declaratory judgment action. *Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206 (1977), *disc. review denied*, 293 N.C. 159, 236 S.E.2d 704 (1977).

In *Walker*, plaintiff insurance company asked the court to determine its liability for injuries sustained by defendant Walker while on the property of defendant Lewis, plaintiff's insured. This Court held that since Walker had yet to determine Lewis' liability for his injuries, he was not a real party in interest and entitled to appeal the trial court's judgment, notwithstanding the fact that plaintiff's prayer for relief asked the court to determine whether *defendant* Walker was entitled to coverage.

In the instant case, Johnson and Gilbert have yet to determine Scott's liability in their claim for negligent infliction of emotional distress. At this point, they have no interest in the subject matter of the litigation. Therefore, despite Johnson and Gilbert being named as defendants, this declaratory judgment action involves only USF&G and Scott. Moreover, we note that even if Johnson and Gilbert had the right to appeal, we would affirm the trial court's decision to grant summary judgment in USF&G's favor on the ground that the insurer had no obligation to Johnson and Gilbert where Scott, the insured, was protected by a covenant not to execute. *See Lida Manufacturing Co. v. U.S. Fire Ins. Co.*, 116 N.C. App. 592, 448 S.E.2d 854 (1994), *disc. review allowed*, 339 N.C. 738, 454 S.E.2d 653 (1995).

Accordingly, since Johnson and Gilbert are not real parties in interest to this suit, their appeal is,

Dismissed.

Judges JOHNSON and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 OCTOBER 1996

ABRAMS v. SURRETTE No. 95-1317	Wake (93CVS05899)	Affirmed
BAILEY v. CASH BROTHERS, INC. No. 95-1212	Ind. Com. (734057)	Affirmed
CAROLINA COUPON CLEARING v. SHORE No. 96-217	Forsyth (95CVS6434)	Dismissed
CITY OF CHARLOTTE v. AIRPORT CENTER LTD. PART. No. 95-1134-2	Mecklenburg (92CVS13530)	Affirmed
CRANFORD v. HANLEY No. 96-371	Orange (94CVS275)	Affirmed
DILLARD v. LAWSON No. 96-335	Rockingham (94CVS183)	Affirmed
HELPMATE OF MADISON, INC. v. TOWN OF MARSHALL ZONING BD. OF ADJ. No. 95-998	Madison (94CVS245)	Affirmed
IN RE GORAYA No. 95-1265	Rockingham (95J18) (95J19) (95J31)	Affirmed
IN RE L. R., A JUVENILE No. 96-11	Durham (95J171)	No Error
KEATON v. COOL SPRINGS LUMBER CO. No. 95-1309	Ind. Comm. (231084)	Affirmed
PERRITT v. St.PIERRE No. 95-698	Guilford (94CVS3989)	Affirmed
STATE v. CHAVIS No. 96-439	Guilford (94CRS70977)	No Error
STATE v. FREEMAN No. 96-293	Halifax (94CRS1634) (94CRS1635) (94CRS1636) (94CRS1637) (94CRS1638) (94CRS1645) (94CRS1646)	Dismissed

	(94CRS1647) (94CRS2785) (94CRS5223)	
STATE v. HARRELSON No. 96-466	Alamance (95CRS24139) (95CRS24140)	Affirmed
STATE v. LEWIS No. 95-1347	Onslow (94CRS788)	No Error
STATE v. McCLAIN No. 96-463	New Hanover (90CRS16009)	No Error
STATE v. MORGAN No. 96-535	Forsyth (95CRS10497)	Affirmed
STATE v. OWENS No. 96-468	Sampson (94CRS3669) (94CRS3670)	No Error
STATE v. RORIE No. 95-1041	Guilford (93CRS7001) (93CRS7004)	No Error
STATE v. SHERMAN No. 96-376	Wayne (95CRS3820)	No Error
STATE v. SMIKLE No. 96-379	Henderson (93CRS6147) (93CRS6148) (93CRS6149)	No Error
WATKINS v. ESTATE OF WATKINS No. 95-1013	Buncombe (95CVS00035)	Reversed
WILLIAMS v. BOWDEN No. 95-1298	New Hanover (93CVS3074)	Dismissed

FILED 15 OCTOBER 1996

CHEEK v. CHEEK No. 95-1107	Yadkin (90CVD166)	Affirmed
CURTIS v. BRYANT No. 96-41	Wake (95CVS5637)	Affirmed
DIAL CALL COMMUNICATIONS v. DURHAM COUNTY BD. OF ADJUSTMENT No. 95-606	Durham (95CVS00181)	Affirmed
FEDERAL KEMPER LIFE ASSURANCE CO. v. ENCEE CHEMICAL SALES No. 96-24	Craven (93CVS476)	Affirmed and Remanded

GRANT v. GRANT No. 96-35	Durham (91CVD3455)	No Error
GRASS v. SPA HEALTH CLUBS No. 95-1217	Buncombe (94CVS4333)	Affirmed
HOLLIFIELD v. WATAUGA VISTA OWNERS ASSN. No. 95-665	Macon (94CVD224)	Affirmed
HOUSTON v. DOUGLAS No. 95-307	Macon (93CVS110)	The trial court is affirmed in part and vacated and remanded on the issue of costs for further proceedings not inconsistent with this opinion
MALINOWSKI v. GUM AND HILLIER No. 96-44	Haywood (95CVS568)	Affirmed
McCARVER v. PRESBYTERIAN HOSPITAL No. 96-22	Mecklenburg (94CVS8540)	Affirmed
McINTYRE v. FORSYTH COUNTY DSS No. 95-1411	Forsyth (95CVS5202)	Affirmed
O'CONNOR v. O'CONNOR No. 95-1419	Moore (94CVD277)	Affirmed
REISER v. PATE No. 95-1229	Rutherford (93CVD702)	Affirmed
SQUIRES ENTERPRISES v. ASHTON WOODS CAROLINA HOMES No. 95-714	Mecklenburg (94CVS14260)	Affirmed
STATE v. ALSTON No. 95-1404	Randolph (94CRS7008)	No Error
STATE v. BOYD No. 95-1200	Mecklenburg (94CRS35678) (94CRS35679) (94CRS35680)	No Error
STATE v. GARNER No. 96-20	Halifax (94CRS4814)	No Error
STATE v. HASTY No. 95-497	Brunswick (93CRS1145)	No Error

STATE v. HYMAN No. 96-4	Edgecombe (94CRS11157)	No Error
STATE v. JORDAN No. 94-1153	Buncombe (93CRS67427) (94CRS20) (94CRS21) (94CRS22) (93CRS67428) (94CRS23)	No Error
STATE v. MITCHELL No. 96-206	Carteret (94CRS13056) (94CRS13058)	No Error
STATE v. PHILLIP No. 96-18	Guilford (94CRS70261) (94CRS70262)	No Error
STATE v. RANDOLPH No. 95-1295	Alamance (95CRS12694)	No error as to trial; Remanded for a new sentencing hearing
STATE v. REECE No. 95-277	Macon (92CRS196) (92CRS197)	No Error
STATE v. SANDERS No. 95-1249	Mecklenburg (93CRS23649)	Affirmed
STATE v. SMYER No. 95-1285	Craven (94CRS12942)	Vacated and Remanded
STATE v. SQUIRES No. 95-1342	Guilford (94CRS70266) (94CRS70267)	No Error
WATSON v. VANHOOK No. 95-1264	Guilford (93CVS10362)	Affirmed

FIELDCREST CANNON, INC., PLAINTIFF v. FIREMAN'S FUND INSURANCE COMPANY; THE NORTH RIVER INSURANCE COMPANY; AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANTS

No. COA95-721

(Filed 5 November 1996)

1. **Discovery and Depositions § 53 (NCI4th); Trial § 222 (NCI4th)— deemed admissions—effect of voluntary dismissal**

The trial court did not err in an action arising from an insurance company's failure to defend employment discrimination claims by not granting summary judgment for defendant based on admissions which had been deemed admitted due to nonresponse to a request for admissions in a prior action which was voluntarily dismissed where the voluntary dismissal was in part to avoid the effect of the deemed admissions. N.C.G.S. § 1A-1, Rule 36 clearly provides that admissions made in one action may not be raised against the party who made them in any other proceeding.

Am Jur 2d, Dismissal, Discontinuance and Nonsuit § 72; Evidence § 773.

Effect of nonsuit, dismissal, or discontinuance of action on previous orders. 11 ALR2d 1407.

2. **Trial § 222 (NCI4th)— voluntary dismissal—claim preserved—proceeding not preserved**

Admissions obtained under N.C.G.S. § 1A-1, Rule 36 may not be utilized beyond the confines of the pending action; while an original claim may be preserved when a dismissal under N.C.G.S. § 1A-1, Rule 41 is taken, the proceeding is not.

Am Jur 2d, Dismissal, Discontinuance and Nonsuit § 72.

3. **Insurance § 120 (NCI4th)— employment claims—duty to defend—construction of policy—personal injury—bodily injury**

The trial court erred in an action to determine insurance coverage by denying defendant Fireman's Fund's motion for summary judgment on all but one claim in an action involving employment related claims. Defendant Fireman Fund's policies indemnified and required defendant to defend damages because of personal or bodily injury. Personal injury was defined in two

sections of the policies; since the definition under the applicable section explicitly failed to include discrimination as a "personal injury," and none of the underlying claims state a claim within the definition for "personal injury" found in that particular section, no claim for personal injury in any of the underlying actions exists for coverage within that section of defendant Fireman Funds's policies. As for bodily injury, an exclusion prohibits liability for bodily injuries arising out of and in the course of employment and the trial court erroneously found that defendant Fireman's Fund's policies provided coverage for all but one claimant, Rosenthal. The Rosenthal suit does not arise out of and in the course of his employment with plaintiff and, while his complaint fails to make out a claim for intentional infliction of emotional distress, there is a genuine issue as to whether plaintiff negligently caused Rosenthal to suffer severe emotional distress.

Am Jur 2d, Insurance § 1412.

Refusal of liability insurer to defend action against insured involving both claims within coverage of policy and claims not covered. 41 ALR2d 434.

Allegations in third person's action against insured as determining liability insurer's duty to defend. 50 ALR2d 458.

Appeal by defendant Fireman's Fund Insurance Company from order entered 26 April 1993 by Judge Forrest A. Ferrell, and judgment entered 7 December 1994 by Judge John M. Gardner in Mecklenburg County Superior Court. Cross-appeal by plaintiff from orders entered 26 April and 30 June 1993 by Judge Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 March 1996.

Blair Conaway Bograd & Martin, P.A., by Bentford E. Martin, for plaintiff-appellee.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III; and Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey and G. Lawrence Reeves, for defendant-appellant Fireman's Fund Insurance Company.

Wilson & McIlvaine, by Dwight B. Palmer, Jr.; and Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and Edward F. Hennessey, IV, for defendant-appellee North River Insurance Company.

Moore & Van Allen, PLLC, by Christopher J. Blake and Joseph W. Eason, for defendant-appellee North Carolina Insurance Guaranty Association.

JOHNSON, Judge.

Plaintiff Fieldcrest Cannon, Inc. brought this action to recover legal defense costs incurred in defending its predecessor, Cannon Mills, Inc. (hereinafter "Cannon"), against certain employment discrimination claims during the 1980s, and to recover sums paid pursuant to judgments and settlements of certain of those claims. Cannon had been insured by defendant Fireman's Fund Insurance Company (hereinafter "Fireman's Fund") under four (4) consecutive comprehensive general liability policies written as primary insurance and covering occurrences during a period from 15 May 1978 through and including 15 May 1982. All of defendant Fireman's Fund's policies are identical in form and contain the same language and coverages.

Defendant North River Insurance Company (hereinafter "North River") and Mission Insurance Company (hereinafter "Mission") insured Cannon pursuant to "umbrella" liability policies which were written in excess of defendant Fireman's Fund's primary insurance. Defendant North River's policy covered occurrences during a period from 15 May 1977 through 15 May 1980, and the Mission policy covered occurrences during the period of 15 May 1980 through 15 May 1981. Mission became insolvent in 1987, and defendant North Carolina Insurance Guaranty Association (hereinafter "Guaranty") assumed responsibility for certain of Mission's obligations, as provided and limited by the North Carolina Insurance Guaranty Association Act, N.C. Gen. Stat. § 58-48-1, *et seq.*

Plaintiff purchased the above-mentioned insurance policies through an insurance broker, Johnson & Higgins Carolinas, Inc. (hereinafter "Johnson & Higgins"). At all times relevant to this action, Johnson & Higgins also acted as agent for defendant Fireman's Fund pursuant to a written agency agreement. Johnson & Higgins' role as Cannon's insurance broker terminated in 1982.

There are six (6) underlying claims of employment discrimination at issue in this action:

1. Stanley Rosenthal filed a lawsuit against Cannon in the state courts of New York on 6 January 1982, alleging wrongful ter-

mination of employment, individual and systemic age discrimination, individual and systemic religious discrimination, negligent and intentional infliction of emotional distress, mental and emotional pain and suffering resulting in a decreased life expectancy, and damage to reputation. (hereinafter "*Rosenthal* suit").

2. Patricia Price filed three (3) EEOC complaints against Cannon in 1981, alleging individual and systemic sex discrimination, harassment and defamation. (hereinafter "Price EEOC complaint").

3. Nine (9) female employees of Cannon filed EEOC complaints from December 1980 through May 1981 alleging sex discrimination. These complaints were subsequently consolidated for investigation by the EEOC as a potential class action involving sex discrimination in 1981. (hereinafter "EEOC sex class investigation").

4. Nell Wilson filed an EEOC complaint against Cannon on 15 May 1980, amended on 20 August 1980, and a related lawsuit before the United States District Court, District of South Carolina, on 27 May 1981, alleging sex and age discrimination. (hereinafter "*Wilson* suit").

5. Patricia Price filed a lawsuit against Cannon before the United States District Court, Middle District of North Carolina, on 11 May 1982, alleging sex and age discrimination. (hereinafter "*Price* suit").

6. On 18 October 1984, Patricia Price, Nancy Lytton and Agatha Overcash filed a lawsuit against Cannon, including a motion for class certification, before the United States District Court, Middle District of North Carolina, based upon their EEOC complaints, alleging sex discrimination and claims of defamation by Price. (hereinafter "*Overcash*/class action").

In regards to the *Rosenthal* suit, Cannon provided Johnson & Higgins, as defendant Fireman's Fund's agent, with timely written notice of the pending action by letter dated 25 January 1982. By letter dated 12 February 1982, Johnson & Higgins notified defendant Fireman's Fund of the *Rosenthal* suit and defendant Fireman's Fund denied coverage of the claims asserted by Mr. Rosenthal and refused to defend Cannon by letter dated 18 February 1982. Defendant Fireman's Fund's letter of denial characterized the claims in Mr.

Rosenthal's complaint simply as discrimination claims, uncovered by plaintiff's policy.

After defendant Fireman's Fund refused to defend Cannon against the *Rosenthal* suit, Johnson & Higgins reported that suit to Mission, through Mission's general agent, Sayre & Toso, Inc. Johnson & Higgins advised Mission's agent that the primary insurer, defendant Fireman's Fund, had denied coverage and requested that Mission accept Cannon's defense under its umbrella policy. Subsequently, Mission agreed to defend Cannon against the *Rosenthal* suit by reimbursing its defense costs. Thereafter, Mission did reimburse Cannon's defense cost in the *Rosenthal* suit from the beginning of the case through February 1993, in the total of $7,245.72.

In early 1982, one of Cannon's in-house attorneys, Susan Hartzoge Gray, received a copy of a letter from Johnson & Higgins to Cannon's insurance manager, Joe Lambert, regarding the status of Mission's reimbursement of Cannon's defense costs in the *Rosenthal* suit. Upon receiving this letter, Ms. Gray reported the pending claims (the Price EEOC complaint, the EEOC sex class investigation, the *Price* suit and the *Wilson* suit) to Mr. Lambert, Cannon's insurance manager, who immediately reported the claims to Johnson & Higgins.

In February or March 1984, Gray, Lambert and Wayne Johnson, Johnson & Higgins' claims manager, met to discuss defendant Fireman's Fund's refusal to cover the *Rosenthal* suit, and the possibility of insurance coverage for the additional pending claims—the Price EEOC complaint, the EEOC sex class investigation, the *Price* suit and the *Wilson* suit. Because of Johnson's belief that defendant Fireman's Fund's policies would not cover the additional pending claims and that defendant Fireman's Fund would refuse to defend Cannon with respect to those claims—as they had with the *Rosenthal* suit—but that Mission or defendant North River might accept the defense, it was decided to report the additional claims directly to Mission and defendant North River, the umbrella carriers, rather than to defendant Fireman's Fund. In fact, evidence tended to show and the trial court found as fact that defendant "Fireman's Fund did not receive actual notice of the *Price* and *Wilson* lawsuits or the EEOC Class Investigation until the plaintiff filed this action." Later, after receiving notice of the additional pending claims against Cannon, the umbrella carriers acknowledged notice of the additional claims and corresponded with Johnson & Higgins seeking additional information about those claims.

By letter dated 5 February 1985, Cannon notified Johnson & Higgins of the *Overcash*/class action, which was filed in October 1984. Johnson & Higgins subsequently reported this lawsuit, by letter dated 14 February 1985, to defendant North River and Mission, requesting that they provide Cannon with a defense. By letter dated 22 October 1985, Mission's agent, Sayer & Toso, requested coverage determination from defendant Fireman's Fund as to the *Overcash*/class action. Thereafter, on 22 November 1985, Johnson & Higgins sent defendant Fireman's Fund notice of the *Overcash*/class action. By letter dated 4 December 1985, defendant Fireman's Fund notified Cannon's insurance manager, Joe Lambert, that defendant Fireman's Fund's insurance policies did not provide coverage for the *Overcash*/class action.

Following defendant Fireman's Fund refusal to defend Cannon in the *Overcash*/class action, Johnson & Higgins continued to correspond with the agents of the umbrella carriers about that case and the other additional employment discrimination claims throughout 1986 and early 1987. In 1986, agents for both umbrella carriers indicated that they would provide a defense to Cannon, or reimburse Cannon's defense costs—as they had agreed in the *Rosenthal* suit—with respect to said claims.

After Mission became insolvent in early 1987, defendant Guaranty began receiving and responding to the communications from Johnson & Higgins regarding the reimbursement of plaintiff's defense costs in the *Rosenthal* suit and the additional underlying claims. By letter dated 19 October 1987, counsel for defendant Guaranty informed plaintiff that defendant Guaranty would not reimburse plaintiff's defense costs in the *Rosenthal* suit or the additional underlying claims, since defendant Guaranty thought that defendant Fireman's Fund's policies covered those claims. Defendant Guaranty also advised plaintiff that it would not consider further reimbursement of plaintiff's defense costs until plaintiff first exhausted all legal remedies against defendant Fireman's Fund.

Consequently, plaintiff contacted defendant Fireman's Fund and notified the company of defendant Guaranty's position, and requested a meeting to discuss coverage issues regarding the underlying discrimination claims. Upon receiving no response from defendant Fireman's Fund, plaintiff filed an action (88CVS14786), on 5 December 1988, against defendant Fireman's Fund and the umbrella carriers for a declaratory judgment, and for reimbursement of its

defense costs, settlement payments and judgments incurred in the underlying claims. Thereafter, on 2 August 1990, plaintiff filed a notice of voluntary dismissal of the December 1988 action pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

Plaintiff filed its complaint in the present action on 12 April 1991, within one (1) year of its voluntary dismissal of the December 1988 action, seeking declaratory judgment and compensatory damages for defendants' failure to defend and indemnify Cannon with respect to the six (6), above-listed, underlying employment discrimination complaints and/or lawsuits.

Following discovery, all of the parties filed cross-motions for summary judgment. These motions came on for hearing at the 8 March 1993 civil session of Mecklenburg County Superior Court before Judge Forrest A. Ferrell.

On 26 April 1993, Judge Ferrell entered an order finding (1) that defendant Fireman's Fund's general liability policies afforded plaintiff coverage for the underlying discrimination claims; (2) that defendant North River's umbrella policy afforded plaintiff excess coverage for the underlying discrimination claims; (3) that the issues of statute of limitations, late notice, and damages were to be decided by the jury; (4) that defendants Fireman's Fund and North River's motions for summary judgment were denied; and (5) that defendant Guaranty's motion for summary judgment was granted. Further, on 30 June 1993, Judge Ferrell entered an order, granting defendant North River's motion to dismiss on the grounds that defendant North River, as an excess carrier, could not be liable for the underlying discrimination claims because all of the parties had agreed that the value of the discrimination claims would not exceed the limits of defendant Fireman's Fund's primary insurance.

By orders entered 10 August and 11 August 1993, Judge Robert M. Burroughs referred the issue of plaintiff's damages for reimbursement of defense costs to a referee. The referee filed his report on 18 May 1994 and, over objections of defendant Fireman's Fund, the referee's report was adopted in full by the court, pursuant to an order of Judge Beverly T. Beal. Judge Beal's order found that Cannon had incurred reasonable attorneys' fees and expenses of $223,015.77 prior to 5 December 1985 in defending the underlying discrimination claims, and in the amount of $243,210.29 thereafter.

The issues of notice, statute of limitations and plaintiff's damages in recovering settlement and judgment payments with respect to the underlying claims were tried before Judge John M. Gardner during the 19 September 1994 civil session of Mecklenburg County Superior Court. Following a non-jury trial, Judge Gardner entered judgment in plaintiff's favor on 7 December 1994, finding defendant Fireman's Fund liable to plaintiff for damages in the principal amount of $526,726.06. Defendant Fireman's Fund appeals from Judge Ferrell's 26 April 1993 order and from Judge Gardner's 7 December 1994 judgment. Plaintiff cross-appeals from Judge Ferrell's 26 April 1993 order, to the extent that it granted summary judgment in favor of defendant Guaranty, and from Judge Ferrell's 30 June 1993 order dismissing defendant North River from this action.

I.

[1] Defendant Fireman's Fund assigns as error the trial court's grant of plaintiff's motion for summary judgment and denial of its motion for summary judgment. Specifically, defendant Fireman's Fund argues that its request for admissions, served upon plaintiff in the earlier action filed by plaintiff against defendants (88CVS14876), were deemed admitted in regards to both the later and instant action, upon plaintiff's failure to respond to those requests; and thus, there were no material issues of fact and it was entitled to summary judgment as a matter of law. We find this argument to be unpersuasive.

Summary judgment is a mechanism designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. *Hall v. Post*, 85 N.C. App. 610, 355 S.E.2d 819 (1987), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988). On appeal, a trial court's grant of summary judgment is fully reviewable. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 343 S.E.2d 188, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). Appellate review of a trial court's grant of summary judgment addresses the trial court's conclusions as to whether, viewing the evidence in the light most favorable to the non-moving party, (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law. *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (citing N.C.R. Civ. P. 56(c); *Vassey v. Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980)). If the appellate court determines that the trial court's conclusions as to these two questions of law were correct, then summary judgment was properly granted. *Id.*

Rule 36 of the North Carolina Rules of Civil Procedure provides in pertinent part:

> (a) *Request for Admission.*—A party may serve upon any other party a written request for the admission, *for purposes of the pending action only*, of the truth of any matters within the scope of Rule 26(b). . . . The matter is admitted unless, within 30 days after service of the request, or within shorter or longer time as the court may allow . . . .
>
> (b) *Effect of admission . . . Any admission made by a party under this rule is for the purpose of pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.*

N.C. Gen. Stat. § 1A-1, Rule 36 (1990) (emphasis added). If a party fails to respond to Rule 36 requests for admissions within the thirty (30) day period prescribed by the Rule, the facts in the requests are deemed admitted. *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 394 S.E.2d 698 (1990); *Whitley v. Coltrane*, 65 N.C. App. 679, 309 S.E.2d 712 (1983). Further, when facts are admitted pursuant to Rule 36(b), these facts have been held to be sufficient to support a grant of summary judgment. *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637, *disc. review denied*, 306 N.C. 386, 294 S.E.2d 211 (1982). However, Rule 36(b) is clear in its mandate that admissions made in one action may not be used against the party who made them in any other proceeding outside of the one pending. *See Tidwell v. Booker*, 27 N.C. App. 435, 219 S.E.2d 648 (1975), *rev'd on other grounds*, 290 N.C. 98, 225 S.E.2d 816 (1976) (finding that Rule 36(c) of the North Carolina Rules of Civil Procedure prevented the finding of paternity in a 1963 judgment to be admissible in a 1974 civil action as a judicial admission). *See also Matter of Cassidy*, 892 F.2d 637 (7th Cir.), *cert. denied*, 498 U.S. 812, 112 L. Ed. 2d 24 (1990) (finding that admissions obtained in tax court are not allowed in bankruptcy court under a Tax Court Rule, much like Rule 36(b)); *Seay v. International Association of Machinists*, 360 F. Supp. 123, 124 (C.D. Cal. 1973) (noting the importance of admissions in expediting trials, but also noting the limitation placed upon admissions being utilized in the pending action only under Rule 36 of the Federal Rules of Civil Procedure); *Weis-Fricker Exp. & Imp. Corp. v. Hartford Acc. & I. Co.*, 143 F. Supp. 137 (N.D. Fla. 1956) (finding that admissions in Nicaragua "discovery action" were inadmissible in United States District Court).

In the instant case, plaintiff filed its complaint in 88CVS14786 on 5 December 1988. Defendants served their answer by April 1989, and the parties proceeded to engage in extensive discovery. In fact, on 26 April 1990, defendant Fireman's Fund served plaintiff with a request for admissions, which was never answered nor objected to. Subsequently, on 2 August 1990, plaintiff voluntarily dismissed the action (88CVS14786) pursuant to Rule 41(a)(1) of our Rules of Civil Procedure—admittedly, in great part to avoid the effect of any "deemed" admissions to defendant Fireman's Fund's request for admissions. Thereafter, on 12 April 1991, plaintiff instituted the instant action.

It is true, as defendant Fireman's Fund contends, that Rule 36 serves to reduce the amount of trial time needed to resolve oftentimes complicated matters. However, we recognize the necessity of construing Rule 36 to comport with the intent of our legislators. Rule 36 of the North Carolina Rules of Civil Procedure, like Federal Rule 36 (as amended in 1970), specifically limits the effect of a deemed admission. Moreover, our legislators, like the drafters of the Federal Rules of Civil Procedure, in promulgating section (b) of Rule 36, were cognizant of the necessity to weigh the equities in allowing deemed admissions which were products of an earlier action to be utilized in a later action. Therein, they recognized the need to sacrifice earlier-obtained, relevant evidence (e.g., deemed admissions) in later litigation, in order to resolve an action on the true merits. Particularly, we find most instructive that our legislators, comparable to the drafters of the Federal Rules, specifically limited the use of Rule 36 admissions to "the pending action only." *See* N.C.G.S. § 1A-1, Rule 36(a),(b).

[2] Defendant Fireman's Fund references *Bowlin v. Duke University*, 119 N.C. App. 178, 457 S.E.2d 757, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 233 (1995), in support of its argument. However, we find such reliance to be misplaced. While an original claim may be preserved when a Rule 41 dismissal is taken, the proceeding is not. At the juncture where a party takes a Rule 41 dismissal, that action or proceeding ends. Further, when that party refiles that action within the one (1) year period allowed by Rule 41, another "action" or "proceeding" is begun. Thus, *Bowlin* lends no credence to defendant Fireman's Fund's argument that admissions obtained under Rule 36 may be utilized beyond the confines of "the pending action only." Defendant Fireman's Fund's argument, therefore, fails.

II.

[3] Next, defendant Fireman's Fund argues that the trial court committed error in concluding as a matter of law that it provided insurance coverage for the underlying employment discrimination claims and suits brought against plaintiff. An insurer's duty to defend arises when the claim against the insured sets forth facts representing a risk covered by the terms of the policy. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986). The duty to defend is much broader than the duty to indemnify, and may attach even in an action in which no damages are ultimately awarded. *Id.*

Defendant Fireman's Fund's policies indemnified Cannon for "all sums which the insured shall become legally obligated to pay as damages because of personal [or bodily] injury" and required defendant Fireman's Fund to "defend any suit against the insured seeking damages on account of such injury." "Personal injury" is defined in two sections of defendant Fireman's Fund's policies. The "Employee Benefits Liability Insurance" portion of defendant Fireman's Fund's policies provides the following:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages on account of any claim for injury *caused by negligent act or omission in the administration of the named insured's employee benefit program,* and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such injury, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

The "Additional Definitions" section of the "Employees Benefits Liability Insurance" part of the policies further provide:

> "Personal injury" means injury arising out of one or more of the following offenses:
>
> (a) False arrest, detention or imprisonment, or malicious prosecution;

(b) the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy;

(c) wrongful entry or eviction, or other invasion of the right of private occupancy; or

(d) *discrimination.*

(emphasis added). The second definition of "personal injury" is contained in the "Additional Definitions" section of the "Broad Form Comprehensive General Liability Endorsement G222" which is a part of the "Comprehensive General Liability Insurance" portion of the policies, and includes items (a) through (c) of the first definition, but is silent as to discrimination.

"Bodily injury" is defined thusly: " 'bodily injury' means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom[.]" The "Comprehensive General Liability Insurance" section of the policies provides,

> The Company [(defendant Fireman's Fund)] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage even if any of the allegations of the suit are groundless, false or fraudulent, ...

This coverage was explicitly stated to be inapplicable "to bodily injury to any employee of the insured arising out of and in the course of employment by the insured."

A. The Applicable Definition of "Personal Injury"

First, plaintiff argues that the second definition of personal injury (found in the "Broad Form Comprehensive General Liability Endorsement G222" portion of the policies) does not indicate that it is exclusive of the first definition (found in the "Employee Benefits Liability Insurance" section of the policies) and does not expressly remove discrimination from the concept of personal injury. As such, plaintiff contends that any ambiguity between the two definitions must be construed against the drafter, defendant Fireman's Fund. *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 392, 390

S.E.2d 150, 153 (1990). While it is true, as plaintiff contends, that the canons of insurance policy construction provide that an insurance policy must be given the same meaning throughout the various coverages in the absence of a clear expression therein of an intent that the term be given different meanings with reference to the different coverages in the same policy, *Grant v. Insurance Co.*, 295 N.C. 39, 54, 243 S.E.2d 894, 904 (1978), it appears to this Court that the definition of "personal injury" under the "Employee Benefits Liability Insurance" coverage part of plaintiff's insurance policies is not applicable to the remaining coverages of the policies. The "Employee Benefits Liability Insurance" section of the policies are clearly labelled as such, and appears separate and apart from the "Broad Form Comprehensive General Liability Endorsement G222" part of plaintiff's policies. It seems clear, on the face of the policies, then, that the two definitions are exclusive of each other. Moreover, as the underlying actions do not appear to arise out of or during the course of the administration of plaintiff's employee benefits program, the definition of personal injury included therein would not work to plaintiff's advantage in this case. *See Tomlin v. State Farm Mut. Auto. Liability*, 290 N.W.2d 285 (Wis. 1980). We must still, however, examine whether the underlying discrimination claims fall within the applicable definition found in the "Broad Form Comprehensive General Liability Endorsement G222" section of the "Comprehensive General Liability Insurance" part of defendant Fireman's Fund's policies.

B. Coverage for "Personal Injury" Under "Broad Form Comprehensive General Liability Endorsement G222"

While we are aware that some courts have found discrimination claims to be akin to claims for personal injury, *see Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661, 96 L. Ed. 2d 572 (1987); *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254 (1985); *see also Redfield v. Insurance Co. of North America*, 940 F.2d 542 (9th Cir. 1991) (finding that discrimination damages awarded to a terminated employee are tort-type recovery for personal injuries that are excludable from gross income for purposes of federal income tax), we are also cognizant of several courts' decisions that hold that the definitions of a term, when specifically defined in a policy, will govern in a subsequent action. *See Liberty Bank of Montana v. Travelers Idem. Co.*, 870 F.2d 1504 (9th Cir. 1989) (finding that the policy specifically provided coverage only for those claims which arose out of an enumerated tort); *United Pacific Insurance Co. v. First Interstate*

Bancsystems of Montana, 690 F. Supp. 917 (D. Mont. 1988) (referencing *Aetna Cas. & Sur. Co. v. First Sec. Bank of Bozeman*, 662 F. Supp. 1126 (D. Mont. 1987), and finding that the underlying damages did not fall within the specific definitions of bodily injury or property damage contained in the policy); *see also Jefferson-Pilot Fire & Cas. v. Sunbelt Beer*, 839 F. Supp. 376 (D.S.C. 1993) (stating that what is not plainly included within the enumerated torts is by definition excluded). In this case, personal injury is defined in the Broad Form Comprehensive General Liability Endorsement portion of defendant Fireman's Fund's policies to include,

> 1. False arrest, detention, imprisonment, or malicious prosecution;
>
> 2. wrongful entry or eviction or other invasion of the right of private occupancy;
>
> 3. the publication or utterance
>
> (a) of a libel or slander or other defamatory or disparaging material,
>
> (b) or in violation of an individual's right of privacy . . . .

We must now determine, whether the underlying actions fall within the "personal injury" definition found in the Broad Form Comprehensive General Liability Endorsement portion of defendant Fireman's Fund's policies. This is a case of first impression in the state of North Carolina, and therefore, we seek guidance from courts of other jurisdictions which have addressed this same issue. In *Aetna*, 662 F. Supp. 1126, a discharged bank employee alleged claims for breach of the implied covenant of good faith and fair dealing, attendant contracts of employment, and for wrongful termination. She sought punitive damages and damages for lost wages, diminished earning capacity, harm to her reputation, and emotional distress. Aetna brought a declaratory action to discern its liability to provide coverage for damages sought by the discharged bank employee. The insuring clause for personal injury provided that the company would defend and indemnify the insured for all sums which the insured became legally obligated to pay as a result of personal injury. *Id.* "Personal injury" was defined as "injury arising out of one or more of the following offenses committed during the policy period." Pertinently, "(3) a publication or utterance (a) of a libel or slander or other defamatory or disparaging material . . . ." *Id.* at 1131. Aetna contended that because there were no allegations of libel, slander,

defamation or disparagement in the complaint, there was no coverage under the policy. The employer-bank, however, contended that the employee's allegations that another bank employee had told her that she was fired could constitute defamatory or disparaging material; therefore, the language of the endorsement was ambiguous. *Id.* The Montana District Court held that the "personal injury" endorsement "applied only to claims actually arising out of the enumerated torts [in the policy]." *Id.* at 1132 (citing *American & For. Ins. v. Church Sch., Diocese of Va.*, 645 F. Supp. 628 (E.D. Va. 1986)). In the end, the court held that the employee's claims therein were for "injuries arising out of the torts of bad faith and wrongful termination, [and] not out of the defamation torts set forth in the 'Broad Form Comprehensive General Liability Endorsement.' " *Id.* Accordingly, the court held that Aetna's policy afforded the bank no coverage as the complaint in the underlying action failed to allege any cause of action for defamation, as necessary before the "personal injury" endorsement could be applied. *Aetna*, 662 F. Supp. 1126; *accord Liberty Bank*, 870 F.2d 1504. While a complainant may allege damages to reputation, and mental and emotional distress arising from the complainant's discharge or failure to hire, in violation of his/her constitutional rights, such damages do not necessitate a claim for defamation. *See Aetna*, 662 F. Supp 1126; *Liberty Bank*, 870 F.2d 1504; *see also American Motorists v. Allied-Sysco Food*, 24 Cal.Rptr.2d 106 (Cal. Ct. App. 1962) (holding that the American Motorist Insurance Company's excess policy did not provide coverage for "humiliation, anguish, embarrassment and emotional distress" resulting from Allied-Sysco Food Services' sexually discriminatory practices, nor did the discrimination portion of the policy provide coverage for said damages).

The term defamation encompasses two distinct torts, libel and slander. Generally, libel is written, while slander is oral. *Tallent v. Blake*, 57 N.C. App. 249, 291 S.E.2d 336 (1982). "[A] libel *per se* is a publication . . . which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 317, 312 S.E.2d 405, 409 (citing *Flake v. News Co.*, 212 N.C. 780, 787, 195 S.E. 55, 60 (1938)), *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). Slander

per se is an oral communication to a third person which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease. *U v. Duke University*, 91 N.C. App. 171, 371 S.E.2d 701, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988); *Morris v. Bruney*, 78 N.C. App. 668, 338 S.E.2d 561 (1986). "[W]hen defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel." *Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137 (citing *Bell v. Simmons*, 247 N.C. 488, 494, 101 S.E.2d 383, 388 (1958)), *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). With this in mind, we must now entertain defendant Fireman's Fund's argument that the trial court erred in finding coverage for the following six (6) underlying employment discrimination claims.

1. The *Rosenthal* Suit

As to the *Rosenthal* lawsuit, Mr. Rosenthal's complaint, in addition to age and religious discrimination, alleged that Cannon had damaged his reputation. Plaintiff alleges that Mr. Rosenthal's allegations of damage to reputation encompass "personal injury" coverage as this included "utterance of . . . defamatory or disparaging material."

However, Mr. Rosenthal's allegations fail in any manner to make out a prima facie claim for defamation. As such, his claim fails to fall within the Broad Form Comprehensive General Liability Endorsement portion of defendant Fireman's Fund's policies.

2. The Price EEOC Complaint

As to the Price EEOC complaint, alleging sexual discrimination, retaliatory discharge, plaintiff contends that the fact that Cannon had falsely accused Ms. Price of manipulating the job posting system was sufficient to bring the Price complaint within the policies coverage for a "personal injury" since it was an "injury arising out of . . . [an] utterance . . . of . . . defamatory or disparaging material."

The Price EEOC complaint fails, however, to show that any of the false statements were made to anyone other than herself. As an essential element of defamation is the publishing of the falsity to another is not found herein, the Broad Form Comprehensive General Liability Endorsement portion of defendant Fireman's Fund's policies also fails to provide coverage for the Price EEOC complaint.

3. The *Price* Suit

For the reasons listed in subsection 2 above, we find similarly as to the *Price* lawsuit. While plaintiff contends that Patricia Price's allegations of sexual discrimination, retaliatory discharge, intimidation, harassment and defamation (i.e., accusation that Ms. Price manipulated the job posting system), contained allegations which would bring the suit within defendant Fireman's Fund's coverage of "personal injury," we do not agree. Nor do we find the allegations of intimidation and harassment to charge "violation of an individual's right of privacy." Accordingly, the Broad Form Comprehensive General Liability Endorsement portion of defendant Fireman's Fund's policies do not provide coverage for the *Price* lawsuit.

4. The *Overcash*/Class Action

As to the *Overcash*/class action lawsuit, the only hint of personal injury within the definition found in the Broad Form Comprehensive Liability Endorsement portion of defendant Fireman's Fund's policies is the allegations of Ms. Price that she had been harassed and falsely accused of "(i) lying and (ii) causing problems." However, again, we find no evidence of the necessary publishing of this information to a third person by the person who made these false accusations; and therefore, there is no prima facie case for defamation present herein. As such, there is an absence of "personal injury" as defined by the Broad Form Comprehensive General Liability Endorsement part of defendant Fireman's Fund's policies in the *Overcash*/class action lawsuit.

5. The *Wilson* Suit and the EEOC Sex Class Investigation

Plaintiff concedes that the other two underlying claims fail to allege any claims other than discrimination (which we have already determined is not covered in the policies) that are covered under defendant Fireman's Fund's policies. Accordingly, there is no coverage for these underlying actions under the Broad Form Comprehensive General Liability Endorsement portion of defendant Fireman's Fund's policies.

Since the defendant Fireman's Fund's "Broad Form Comprehensive General Liability Endorsement G222" coverage's definition explicitly fails to include discrimination as a "personal injury," and none of the underlying actions state a claim within the definition for "personal injury" found in that particular section, we find no claim for

personal injury in any of the underlying actions to exist for coverage within that section of defendant Fireman's Fund's policies.

C. Coverage for "Bodily Injury" Under "Broad Form Comprehensive General Liability Endorsement G222"

Next, we must inquire whether the underlying actions were covered under defendant Fireman's Fund's "Broad Form Comprehensive General Liability Endorsement G222," included in the "Comprehensive General Liability Insurance" section of the policies as a "bodily injury." "Bodily injury" as defined in the "Definitions" section of the policies means "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."

The *Rosenthal* complaint contained allegations that plaintiff had negligently or intentionally inflicted emotional distress upon Mr. Rosenthal; and plaintiff argues that these allegations of negligent and intentional infliction of emotional distress fall within the "bodily injury" coverage of the policies as North Carolina courts and New York courts (where Mr. Rosenthal instituted his action) have recognized that damages from those two torts (especially decreased life expectancy) are "bodily injuries." Conversely, in the cases of the Price EEOC complaint, the *Price* lawsuit, the *Overcash*/class action, the *Wilson* suit and the EEOC sex class investigation, the record is devoid of any allegations of "bodily injury" within the definition of defendant Fireman's Fund's policies.

It is not necessary, however, that we make a final determination of this question of "bodily injury" coverage for the *Rosenthal* suit, if coverage is excluded for the underlying employment discrimination actions. The "Exclusions" section of the Comprehensive General Liability Insurance section of defendant Fireman's Fund's policies provides that,

> This insurance does not apply:
>
> . . .
>
> (i) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
>
> (j) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obli-

> gation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under an incidental contract . . . .

Plaintiff argues that exclusion (j), as well as (i) applies only to workers' compensation cases. Plaintiff cites *Save Mart Supermarkets v. Underwriters*, 843 F. Supp. 597 (N.D. Cal. 1994), in which the court decided that an exclusion clause much like clause (j) above, was ambiguous and open to more than one interpretation. Accordingly, the court found that there were genuine issues of material fact surrounding its interpretation and thus, summary judgment was inappropriate as to coverage based on the "employee exception." *Id.* at 604.

Defendant, however, cites *Omark Industries v. Safeco Ins. Co. of America*, 590 F. Supp. 114 (D. Or. 1984), in support of its argument to the contrary. In *Omark*, the court construed a provision similar to exclusion (j) in defendant Fireman's Fund's policies. In that case, the court distinguished the line of cases that had found various policies' exclusions were applicable to workers' compensation only—finding that those policies' exclusions had specifically mentioned workers' compensation. In *Omark*, since there was no such mention in the policy therein, the court declined to limit the exclusion to workers' compensation and found that the sex discrimination case was excluded from coverage. *Id. Accord*, *Sunbelt Beer*, 839 F. Supp. 376.

As in the line of cases cited in *Omark*, the policy exclusion (i) herein specifically mentions and excludes liability for any bodily injury for which the insured or any carrier would be liable under workers' compensation law. *See Eagle Star Insurance Company, Ltd. v. Deal*, 474 F.2d 1216 (8th Cir. 1973); *Spain v. Travelers Insurance Company*, 332 So.2d 827 (La. 1976); *I-L Logging Co. v. Manufacturers & Wholesalers Ind. Exch.*, 273 P.2d 212, *reh'g denied*, 275 P.2d 226 (Or. 1954); *but see Federal Rice Drug Co. v. Queen Insurance Co. of America*, 463 F.2d 626 (3rd Cir. 1972) (refusing to limit the scope of an exclusion similar to exclusion (j) herein, to apply to workers' compensation cases only). However, exclusion (j) fails to reference workers' compensation, stating only that coverage would not be provided for bodily injury "arising out of and in the course of [ ] employment by the insured." We find persuasive that exclusion (i) specifically references liability for injuries covered under workers' compensation, while exclusion (j) does not. Contrary to the court in *Save Mart*, we find no ambiguity in the policy exclu-

sion (j). A reading of exclusions (i) and (j) *in tandem* reveals an exclusion of liability for bodily injuries covered under workers' compensation law pursuant to exclusion (i) and a similar exclusion for all other bodily injuries arising out of and in the course of employment by insured pursuant to exclusion (j), with the exception of liability assumed by the insured under an incidental contract for those bodily injuries. Accordingly, we find that bodily injury exclusion (j) prohibits liability for bodily injuries (assuming that such injuries were alleged in the underlying suits) arising out of and in the course of employment with plaintiff.

Hence, the trial court erroneously found that defendant Fireman's Fund's policies provided coverage for the Price EEOC complaint, the *Price* lawsuit, the *Overcash*/class action, the *Wilson* suit and the EEOC sex class investigation. However, as the *Rosenthal* suit does not arise out of and in the course of his employment with plaintiff—Mr. Rosenthal's employer-company was bought by plaintiff and as a consequence, Mr. Rosenthal was informed thereafter that plaintiff would no longer retain his services—this exclusion does not prohibit coverage for his underlying employment discrimination action. We must, therefore, now inquire whether Mr. Rosenthal's suit alleges "bodily injuries" within the meaning of defendant Fireman's Fund's "Comprehensive General Liability Insurance" coverage.

The *Rosenthal* complaint alleged that as a result of plaintiff's actions, he "became tense, nervous, irritable, suffered immense mental and emotional anguish and distress, and anxiety; . . . has become unable to enjoy his life, family and friends, and has been forced to endure tremendous embarrassment which has placed him under great emotional stress and strain which will ultimately decrease . . . [Mr. Rosenthal's] life expectancy . . . ."

The courts of this jurisdiction have recognized the torts of negligent infliction of emotional distress and intentional infliction of emotional distress as actions for bodily injury. *See Johnson v. Ruark Obstetrics*, 327 N.C. 283, 292, 395 S.E.2d 85, 90 (reiterating that " 'the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other.' "), *reh'g denied*, 327 N.C. 544, 399 S.E.2d 133 (1990).

In order to prevail in an action for negligent infliction of emotional distress, a plaintiff must show that "(1) the defendant negli-

gently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Id.* at 304, 395 S.E.2d at 97. Further, a prima facie showing for intentional infliction of emotional distress requires that the plaintiff demonstrate the following: (1) the defendant "engaged in extreme and outrageous conduct, (2) which was intended to cause and did cause (3) severe emotional distress." *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 6-7, 437 S.E.2d 519, 522 (1993), *appeal dismissed and disc. review denied*, 336 N.C. 71, 445 S.E.2d 29 (1994).

In both contexts "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." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. "[M]ere temporary fright, disappointment or regret will not suffice." *Id.* Further, in the context of intentional infliction of emotional distress, the element of "extreme and outrageous conduct," has been defined as " '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 William L. Prosser, *Handbook of The Law of Torts* § 12, at 56 (4th ed. 1971)). Liability for this tort " 'clearly does not extend to mere insults, or indignities.' " *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 586, 440 S.E.2d 119, 123 (quoting *Daniel v. Carolina Sunrock Corp.*, 110 N.C. App. 376, 383, 430 S.E.2d 306, 310, *rev'd in part*, 335 N.C. 233, 436 S.E.2d 835 (1993)), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). Moreover, a plaintiff must set forth specific incidents of conduct which " 'exceed[] all bounds usually tolerated by decent society.' " *Stanback*, 297 N.C. at 196, 254 S.E.2d at 622 (quoting Prosser, *The Law of Torts* § 12, at 56).

After careful examination of the record, there is nothing in the *Rosenthal* complaint alleging that plaintiff's conduct was "extreme and outrageous." Nor are there allegations which indicate that by its conduct plaintiff corporation intended that Mr. Rosenthal suffer severe emotional distress. Accordingly, Mr. Rosenthal's complaint fails to make out a claim for intentional infliction of emotional distress. We do find, however, from a review of the *Rosenthal* complaint, that there is genuine issue of fact as to whether plaintiff negligently caused Mr. Rosenthal to suffer severe emotional distress. As all evi-

dence is to be considered "indulgently" at the summary judgment stage of proceedings, *Fowler v. Valencourt*, 108 N.C. App. 106, 114, 423 S.E.2d 785, 790 (1992) (citing *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972)), *rev'd in part on other grounds*, 334 N.C. 345, 435 S.E.2d 530 (1993), with "the slightest doubt as to the facts entitl[ing] plaintiff to a trial," *id.* (citing *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *appeal dismissed and disc. review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984)), plaintiff is entitled to a trial on the issue of whether Mr. Rosenthal's claim for negligent infliction of emotional distress adequately presents a claim for "bodily injury" within the definition of the "Comprehensive General Liability Insurance" coverage part of defendant Fireman's Fund's policies.

Since the *Rosenthal* suit includes a prima facie showing for negligent infliction of emotional distress, and such is a "bodily injury" within the meaning of defendant Fireman's Fund's policies, we find that the trial court was correct in its decision that defendant Fireman's Fund provided insurance coverage for the *Rosenthal* suit. However, the court was in error in its conclusion that defendant Fireman's Fund's policies provided coverage for the other underlying employment discrimination claims and suits brought against plaintiff.

III.

In light of our finding in Section II, we need not entertain defendant Fireman's Fund's remaining arguments: (1) that the trial court committed reversible error in concluding that notice to Wayne Johnson, defendant Fireman's Fund's agent, constituted notice to defendant Fireman's Fund; and (2) that the trial court committed reversible error in concluding that plaintiff's claims for recovery of the legal fees and expenses incurred in defending the *Overcash*/class action prior to 5 December 1995, the *Price* and *Wilson* lawsuits, the Price EEOC complaint and the EEOC sex class investigation, and the settlement payment for the *Wilson* lawsuit, survived the statute of limitations.

IV.

Plaintiff raises two issues on cross-appeal: (1) In the event that summary judgment against defendant Fireman's Fund on the coverage issue is reversed, the court should reverse summary judgment in favor of defendant Guaranty; and (2) In the event that summary judgment against defendant Fireman's Fund on the coverage issue is reversed, the trial court's order dismissing defendant North River

should be reversed and the trial court's grant of summary judgment against defendant North River on the issue of coverage should be reactivated. Notably, both umbrella carriers' policies provide coverage in the event that defendant Fireman's Fund does not cover the underlying claims.

As the trial court's orders granting summary judgment for defendant Guaranty and granting defendant North River's motion to dismiss were premised upon the proposition that defendant Fireman's Fund was responsible for coverage of all of the underlying employment discrimination claims, and as we find herein that defendant Fireman's Fund did not provide coverage for the Price EEOC complaint, the *Price* lawsuit, the *Overcash*/class action, the *Wilson* suit and the EEOC sex class investigation claims, the trial court's orders granting summary judgment for defendant Guaranty and a dismissal for North River as to these underlying claims must be reversed also. We, however, affirm the trial court's orders for defendants Guaranty and North River as to the *Rosenthal* suit.

In conclusion, we hold (1) that defendant Fireman's Fund's general liability policies afforded plaintiff coverage for the *Rosenthal* lawsuit only—not for the remaining underlying discrimination claims as found by the trial court, and therefore, the trial court erred in denying defendant Fireman's Fund's motion for summary judgment as to those remaining underlying discrimination claims; (2) that the trial court also erred in granting defendant North River's motion to dismiss, as its umbrella policy affords plaintiff excess coverage for the underlying discrimination claims, which are not covered by defendant Fireman's Fund's general liability policies; and (3) that defendant Guaranty's motion for summary judgment was improperly granted as to the remaining underlying discrimination claims which are uncovered by defendant Fireman's Fund's general liability policies. Accordingly, the 26 April 1993 order of the trial court denying defendant Fireman's Fund's motion for summary judgment and granting defendant Guaranty's motion for summary judgment is reversed as to all of the underlying discrimination claims, with the exception of the *Rosenthal* suit; its 30 June 1993 order granting defendant North River's motion to dismiss is similarly reversed; and finally, the 7 December 1994 judgment awarding plaintiff damages against defendant Fireman's Fund for the underlying discrimination claims, save the *Rosenthal* suit, is reversed and the matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN, John C. and McGEE concur.

JANICE ELLEN JANUZIK TATARAGASI, PLAINTIFF v. AHMET IHSAN TATARAGASI, DEFENDANT

No. COA95-1122

(Filed 5 November 1996)

1. Appeal and Error § 107 (NCI4th)— child custody order—denial of motion to vacate—appealable order

The trial court's order denying defendant's motion to vacate and set aside a previous order which was, in effect, a final determination of child custody left no further action to be determined and was an appealable final judgment on the merits.

Am Jur 2d, Appellate Review § 196.

2. Process and Service § 74 (NCI4th)— service in foreign country—Hague Convention—good faith attempt—analysis under Rule 4 standard

Plaintiff wife made a good faith attempt to obtain service of process on defendant husband in Turkey in a child custody action where she attempted to serve defendant pursuant to the Hague Convention but the documents were returned unserved because they had not been translated into Turkish. This good faith effort allows a court to apply the standard of N.C.G.S. § 1A-1, Rule 4 in analyzing the propriety of service of process.

Am Jur 2d, Divorce and Separation § 1113; Process §§ 377-384.

Service of process by mail in international civil action as permissible under Hague Convention. 112 ALR Fed. 241.

3. Process and Service § 74 (NCI4th)— service in foreign country—mailing by attorney rather than clerk—acceptance by housekeeper

Service of process by mail on the defendant in Turkey in a child custody action was not improper because the summons and

complaint were addressed and mailed by plaintiff's attorney rather than by the clerk of court where defendant received actual notice of plaintiff's action against him. Furthermore, service of process was effectively made under Rule 4(j3) where it was accepted by defendant's housekeeper. N.C.G.S. § 1A-1, Rule 4(j3).

Am Jur 2d, Process §§ 377-384.

Personal service upon nonresident spouse as prerequisite of court's power to modify its decree as to child support in matrimonial action. 62 ALR2d 544.

Service of process by mail in international civil action as permissible under Hague Convention. 112 ALR Fed. 241.

4. **Divorce and Separation § 494 (NCI4th)— child custody—nonresident defendant—home state of children—jurisdiction under UCCJA**

Personal jurisdiction over a nonresident defendant was not required under the Uniform Child Custody Jurisdiction Act where this state is the home state of the children. N.C.G.S. § 50A-3(a)(1).

Am Jur 2d, Abduction and Kidnapping § 37; Divorce and Separation § 964; Infants § 35.

When does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A. 83 ALR4th 742.

Domicile and residence jurisdiction of court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(b). 5 ALR5th 550.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A). 6 ALR5th 1.

5. **Divorce and Separation § 491 (NCI4th)— child custody—pending action in Turkey—jurisdiction under UCCJA**

The trial court did not err by exercising subject matter jurisdiction in a child custody proceeding, even though defendant father had initiated a custody proceeding in Turkey before the present action was filed, where Turkey did not exercise jurisdic-

tion in substantial conformity with the Uniform Child Custody Jurisdiction Act and state law because the Turkish court's order did not consider the best interests of the children but instead discussed only defendant's position and status in the community and the importance of Islam, circumcision and defendant's place in society. N.C.G.S. § 50A-3.

Am Jur 2d, Infants § 38.

Validity, construction, and application of Uniform Child Custody Jurisdiction Act. 96 ALR3d 968.

6. Divorce and Separation § 497 (NCI4th)— child custody—action pending in Turkey—emergency jurisdiction under UCCJA

The trial court had emergency jurisdiction under N.C.G.S. § 50A-3(a)(3) to determine the custody of children whose father had filed a custody action in Turkey where the children were physically present in this state and the trial court found that defendant had repeatedly abused the children.

Am Jur 2d, Infants §§ 37, 55.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(C). 5 ALR5th 788.

Appeal by defendant from order entered 8 May 1995 by Judge J. Bruce Morton in Guilford County District Court. Heard in the Court of Appeals 23 May 1996.

Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr., for plaintiff-appellee.

Hill, Evans, Duncan, Jordan & Davis, A Professional Limited Liability Company, by William W. Jordan and Michele G. Smith, for defendant-appellant.

JOHNSON, Judge.

Plaintiff and defendant were married on 30 October 1982 in Greensboro, North Carolina. Mrs. Tataragasi is an American citizen, and Dr. Tataragasi is a citizen of Turkey. The couple moved to Ankara, Turkey after their marriage. Plaintiff alleges that defendant insisted

that they move to Turkey under the pretense that he needed to complete his military training. Plaintiff and her family understood that this was to be a temporary move for six (6) months. Afterward, plaintiff alleges that defendant admitted to plaintiff and to plaintiff's family that he lied about the move being temporary.

While residing in Turkey, plaintiff and defendant had two children—Eren Deniz Tataragasi born 3 July 1984 and Kenan Haluk Tataragasi born 2 October 1987. After the birth of the children, defendant made it clear that he had no intention of returning to the United States.

Throughout the marriage, defendant had a history of violent and abusive behavior toward family members and non-family members, but particularly toward the female child, Eren. On numerous occasions, defendant hit, beat, kicked, grabbed and threatened Eren. Defendant was also physically and sexually abusive toward plaintiff.

Frequently, defendant threatened to kill plaintiff if she tried to leave with the children. Further, he refused to allow plaintiff to separate from him and refused to share the children with plaintiff if she did separate.

Plaintiff and her children came to the United States to visit her family in June 1991. While in the States, she attempted to become sterilized since the United States, unlike Turkey, did not require permission of the husband for the procedure. However, before conducting the procedure, the physician encouraged plaintiff to seek counseling. At this time, plaintiff told her physician that she was planning to return to Turkey. Therapy enabled plaintiff to realize that she and her children were being physically and emotionally abused, that she did have a viable choice and that she could leave the abusive relationship. Plaintiff decided, for the safety of herself and her children, that she needed to separate from and divorce defendant. At that time, plaintiff decided to reside permanently in the United States.

Defendant's family made numerous threats to abduct the children and take them back to Turkey. In December of 1991, defendant's younger sister threatened that defendant could hire people to abduct the children from plaintiff and take the children to Turkey whenever he wished. After 1 January 1992, defendant's brother-in-law threatened that the children were not safe from defendant if he wished to take them back to Turkey.

A lawsuit was initiated by plaintiff on 30 July 1991 in the Guilford County District Court. Judge J. Bruce Morton granted an emergency custody order awarding custody to plaintiff and ordered that defendant not go near plaintiff or the children. On 6 September 1991, Judge Morton granted an amended emergency custody order, again awarding custody to plaintiff and ordering that defendant not go near plaintiff or the children. Plaintiff's counsel communicated with Michael Regan, counsel for defendant, on 9, 10 and 12 September 1991. Plaintiff's counsel was informed that defendant had been made aware of the order.

On 12 September 1991, plaintiff's counsel offered to amend the amended emergency custody order in order to enable defendant to have supervised visitation with the minor children while defendant was visiting the United States. Plaintiff's counsel also inquired of Mr. Regan whether defendant would be willing to accept service through Mr. Regan's office. Plaintiff's counsel sent Mr. Regan copies of orders on 16 September 1991 and 26 September 1991. Orders extending the amended emergency custody order were granted until 1 November 1991.

Having not received a response from Mr. Regan as to whether defendant would accept service through his office, on 28 October 1991, counsel for plaintiff attempted, pursuant to the Convention on the Service Abroad of Judicial and ExtraJudicial Documents in Civil or Commercial Matters (the Hague Convention), to serve upon defendant a copy of the complaint, a copy of the emergency custody order, and copies of all of the orders extending the emergency custody order. Service was rejected. The documents were returned unserved to plaintiff's counsel in damaged condition by the Central Authority in Turkey on 7 January 1992. The documents were returned because they had not been translated into Turkish as required by the Hague Convention.

According to defendant, plaintiff never secured an endorsement or an alias or pluries summons in the 30 July 1991 action and she did not attempt service of any of the documents related to that action until 4 November 1991. Therefore, defendant alleges service of process is insufficient.

On 2 October 1991, defendant filed an action in Turkey for divorce and for the adjudication of custody of the parties' two children. Defendant alleges that plaintiff was properly served with the Turkish petition under the provisions of the Hague Convention and

other applicable law. A hearing on defendant's petition was held in the Twenty-second Basic Peace Court in Ankara, Turkey on 16 June 1992. Plaintiff made an appearance through counsel in the Turkish action, made a written defensive statement, and submitted written statements of witnesses taken under oath. The court granted defendant a divorce and custody of the couple's children. The court also granted plaintiff the right to visit with the children wherever they might reside with their father and the right to contact the children if she did not reside in the same country as defendant and the children.

On 10 January 1992, after defendant initiated the Turkish action, but before the Turkish court issued its final decree, plaintiff initiated this action in Guilford County, North Carolina. Due to the length of time that defendant evaded service, plaintiff took a voluntary dismissal without prejudice on 8 January 1992 and refiled the action on 10 January 1992 because, by this time, the trial court had jurisdiction not only on the basis of the emergency situation resulting from defendant's history of violent and abusive behavior towards plaintiff and the minor children, but also on the basis of home state and significant contacts. On 10 January 1992, the complaint, summons, emergency custody order, and calendar request were sent to defendant by registered mail, return receipt requested. Service was accepted by defendant's maid on 20 January 1992. Defendant alleges that the documents were accepted by a part-time housekeeper who was not a member of defendant's household and who was not authorized to accept service on defendant's behalf.

On 12 February 1992, counsel for plaintiff filed an affidavit of service confirming that the summons and complaint were delivered to, and accepted by, defendant on 20 January 1992. At calendar call on 17 February 1992, counsel for plaintiff was approached in court by Attorney Barbara Morgenstern of Nichols, Caffrey, Hill, Evans & Murrelle, who informed counsel for plaintiff that she had been contacted by defendant and may be representing him at the trial scheduled for 20 February 1992. However, Ms. Morgenstern later telephoned plaintiff's counsel in the afternoon of 17 February 1992 and informed plaintiff's counsel that she would not be making an appearance on behalf of defendant at the scheduled trial.

On 20 February 1992, a trial was held at the Guilford County courthouse in High Point, North Carolina. Defendant did not appear or send counsel, although he had actual notice that the custody matter was to be heard.

On 2 March 1992, Judge Morton entered an order awarding plaintiff custody of the two children and ordering that defendant not be allowed visitation or to go near plaintiff or the children. Judge Morton further directed law enforcement officers to arrest defendant if he made an attempt to take the children away from their mother. He also ordered that all records pertaining to the children and to any name change of the children or their mother be sealed. The order provided that defendant be served with a copy of the order under the North Carolina Rules of Civil Procedure. A copy of the order was mailed to defendant on 19 March 1992 by registered mail, return receipt requested. Defendant again refused to accept service. On 6 August 1992, Judge J. Bruce Morton received a letter from Ihsan Arslan, an attorney in Turkey, concerning the lawsuit and decision. Mr. Arslan requested that all further notices be sent in accordance with the rules of the Hague Convention.

Fourteen months later, on 21 October 1993, defendant, through counsel at the law firm of Nichols, Caffrey, Hill, Evans & Murrelle, filed a motion to set aside and vacate the 2 March 1992 order on the grounds that said orders of the trial court were invalid given plaintiff's failure to serve defendant with lawful process for the summons, complaint, and emergency custody order; and on the grounds that the district court in Guilford County improperly asserted jurisdiction while a custody action was pending in the Turkish court. Defendant's motion was amended on 1 December 1994 to correct any possible discrepancy which may have been created by the difference between the motion as originally filed and defendant's affidavit filed 2 December 1992. By order dated 8 May 1995, the motion was denied. Defendant appeals.

Prior to reaching the merits of this action, we must first address whether this appeal is properly before this Court. In deciding whether a trial court's order is appealable, we are required to determine whether the order represents a final judgment on the merits or whether it is interlocutory.

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which 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, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). *See also* N.C. Gen. Stat. § 1A-1, Rule 54(a) (1990).

[1] In the case *sub judice*, the trial court denied defendant's motion to vacate and set aside its previous order which was, in effect, a final determination of the custody issue of the minor children. In denying defendant's motion, the court determined that the prior order stands; thus, no remaining issues were left to be determined. Plaintiff argues that because the trial judge allowed defendant to submit additional pleadings if he so desired, that the action was not a final judgment and was therefore interlocutory. We disagree. The previous order left no further action to be determined, accordingly, it was a final judgment on the merits. *See Janus Theatres of Burlington v. Aragon*, 104 N.C. App. 534, 410 S.E.2d 218 (1991). Thus, we now address the merits of the action.

Defendant first argues that the trial court erred in denying his motion to vacate and set aside the court's custody orders on the ground that there was insufficient service of process. Specifically, defendant contends that service of process was insufficient because service did not meet the requirements of the Hague Convention.

Both the United States and Turkey are signatories to the Hague Convention. "The Convention 'was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.' " *Hayes v. Evergo Telephone Co.*, 100 N.C. App. 474, 476, 397 S.E.2d 325, 327 (1990) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698, 100 L. Ed. 2d 722, 730 (1988)). The Convention provides numerous methods for service of process in a foreign jurisdiction, including the establishment of a Central Authority by each member of the Convention to receive requests for service of process from other countries and to serve process in accordance with the internal law of the receiving nation. *See id. See also Pochop v. Toyota Motor Co., Ltd.*, 111 F.R.D. 464, 465 (S.D. Miss. 1986). In *Hayes*, this Court held that even though the appellee failed to send a request or documents to the designated Central Authority in Hong Kong, that their claim was not fatally flawed, because this was not the sole means by which to serve a defendant resident in another country. 100 N.C. App. 474, 397 S.E.2d 325. Article 10 of the Convention provides:

> Provided the State of destination does not object, the present Convention shall not interfere with—
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination[,]
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

20 U.S.T. 361, *reprinted in* 28 U.S.C.A. Fed. R. Civ. P. 4 (1992). Defendant contends and we agree that Turkey has stated its opposition to the methods of service of process pursuant to Article 10; therefore, Article 10(a) is not available to plaintiff since defendant resides in Turkey. *See Arco Electronics Control, Ltd. v. Core Intern.*, 794 F.Supp. 1144, 1146 (S.D. Fla. 1992).

[2] Plaintiff attempted to serve defendant pursuant to the Hague Convention, but failed to provide a translated copy of the documents as directed by the Turkish officials in order to obtain valid service in that action. A review of the record reveals that although plaintiff did not strictly comply with the procedures of the Hague Convention set forth to obtain service of process, she did make a good faith effort to comply with the requirements of the Hague Convention. There is also some evidence in the record to suggest that defendant refused to accept service. *See Lutes v. Alexander*, 421 S.E.2d 857, 865-66 (Va. Ct. App. 1992) (holding that where party attempted service "in every conceivable manner[,]" but was unsuccessful due to the husband's refusal to accept service, jurisdiction was not defeated by an arbitrary refusal to accept service).

In *Trask v. Service Merchandise Co., Inc.*, 135 F.R.D. 17 (D. Mass. 1991), the court held that a good faith effort to obtain service of process pursuant to the Hague Convention, allows a court to apply the more liberal standards of Rule 4 of the Rules of Civil Procedure in analyzing the propriety of service. Moreover, "where service has been attempted in good faith under the Convention, defects in the execution of such service [are] not intended under the Convention 'to

supersede the general and flexible scheme' of Rule 4." *Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 17-18 (D. Me. 1987) (citations omitted). Courts have additionally held that "despite the absence of proper service, there is no need to dismiss [a] case without first providing a reasonable opportunity to accomplish such proper service." *Trask*, 135 F.R.D. at 22 (plaintiff given forty-five days to perfect service); *see also Cooper*, 117 F.R.D. at 18 (providing plaintiff additional time to effect proper service where not in compliance with the Hague Convention); *Pochop*, 111 F.R.D. at 467 (allowing party time to serve process pursuant to requirements of Hague Convention).

[3] Defendant, however, also argues that service of process was insufficient even under Rule 4 of the North Carolina Rules of Civil Procedure. He contends that because the summons and complaint were addressed and dispatched by plaintiff's attorney rather than by the clerk of court, and because the record does not contain an affidavit or certificate addressed or mailed by the clerk of court as required by North Carolina General Statutes section 1A-1, Rule 4 (j3) (Cum. Supp. 1995), that service of process under Rule 4 was insufficient. *Greenup v. Register*, 104 N.C. App. 618, 620, 410 S.E.2d 398, 400 (1991) (finding that the requirements of Rule 4 "must be construed strictly and the prescribed procedure must be followed strictly. . . . Unless the requirements are met, there is no valid service"(citations omitted)). Thus, defendant argues that effective service of process was not obtained under Rule 4 of the Rules of Civil Procedure.

However, in child custody cases where actual notice has been received, service of process is proper notwithstanding a person other than the clerk's office mailing the process. *See Dunne v. Dunne*, 560 N.Y.S.2d 77 (N.Y. Fam. Ct. 1990). In *Dunne*, the court in circumstances similar to those in the instant action, held that where the plaintiff mailed the custody papers in violation of the statute, and the defendant received actual notice, "such service constitutes at most a mere irregularity and is not jurisdictional." *Id.* at 80. Thus, the *Dunne* court ruled that "[s]ervice was proper and the Court [found] that personal jurisdiction [had] been obtained." *Id.* "If at all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person who may perhaps conceal his whereabouts, cannot be reached." Comment 5, UCCJA (citing *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 94 L. Ed. 865 (1950); *Schroeder v. New York*, 371 U.S. 208, 9 L. Ed. 2d 255 (1962)).

In this action, it is unquestionable that defendant had actual notice of the Guilford County action. The record reflects that defendant's counsel Mr. Regan had knowledge of the suit; that defendant had contacted the law firm of Nichols, Caffrey, Hill, Evans & Murrelle about representation for this action, according to Attorney Barbara Morgenstern, who had stated that she was going to represent defendant, and then later stated that she would not be making an appearance on his behalf; and finally, that the attorney retained by defendant in Turkey had notice of the action, as shown by his ex parte communication with the trial court concerning the lawsuit. Thus, defendant had actual notice of the proceeding in Guilford County. Further, service of process was made on 10 January 1991 pursuant to Rule 4(j3) of the North Carolina Rules of Civil Procedure. It was accepted by defendant's housekeeper on 20 January 1991. *Gould Entertainment Corp. v. Bodo*, 107 F.R.D. 308, 310 (S.D.N.Y. 1985) (finding that service of process which was delivered to defendant's residence and was accepted by the maid was "reasonably calculated to give actual notice to [defendant] and thus [does] not offend the due process requirements of the federal constitution" (citation omitted)). Thus, the record sufficiently shows that service of process was effectively made. Therefore, this argument fails.

Defendant's second argument is that the trial court erred in denying his motion to vacate and set aside the custody orders in that the court did not have personal jurisdiction over him to make a custody determination. We disagree.

[4] Defendant argues that because service of process was improperly made, personal jurisdiction over him did not exist. *See Harris v. Harris*, 104 N.C. App. 574, 410 S.E.2d 527 (1991). However, as asserted previously, defendant had actual notice of the proceeding in Guilford County. The cases referenced by defendant to support his position are distinguishable from the instant action. *See Henson v. Henson*, 95 N.C. App. 777, 384 S.E.2d 70 (1989); *Copeland v. Copeland*, 68 N.C. App. 276, 314 S.E.2d 297 (1984). In *Henson* and *Copeland*, no attempt was made to serve process whereas in this action, numerous attempts were made to serve process and defendant had actual notice prior to the hearing on the matter. Moreover, pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), personal jurisdiction over defendant, the nonresident parent, is not required. *See Shingledecker v. Shingledecker*, 103 N.C. App. 783, 785, 407 S.E.2d 589, 591 (1991); *Hart v. Hart*, 74 N.C. App. 1, 7, 327 S.E.2d 631, 635 (1985).

> A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (1) This state (i) is the home state of the child at the time of commencement of the proceeding. . . .

Shingledecker, 103 N.C. App. at 785, 407 S.E.2d at 591 (quoting N.C. Gen. Stat. § 50A-3(a)(1) (1989)). Thus, this argument is without merit.

[5] Defendant's next argument is that the trial court erred in denying his motion to vacate and set aside the court's custody orders in that the trial court did not have subject matter jurisdiction where a custody action was pending in another jurisdiction at the time that the instant action was filed. We disagree.

Defendant contends that because he initiated custody proceedings in Turkey before the Guilford County action was filed, that Guilford County should not have exercised subject matter jurisdiction in this case because the Turkish custody proceeding was already pending. Thus, he contends that under North Carolina General Statutes section 50A-6(a), Guilford County should not have exercised subject matter jurisdiction. *See* N.C. Gen. Stat. § 50A-6(a) (1989).

In determining jurisdiction in child custody cases, trial courts are required to follow the UCCJA. N.C. Gen. Stat. § 50A-1 *et seq.* (1989). Section 50A-6(a) provides in pertinent part that:

> If at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction *substantially in conformity with this Chapter*, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

N.C.G.S. Stat. § 50A-6(a) (emphasis added). *See also Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985) (holding that where there is a prior or pending order from another state, North Carolina can exercise jurisdiction pursuant to North Carolina General Statutes section 50A-3 if the court of the other state did not exercise jurisdiction in conformity with the UCCJA).

Accordingly, we must determine whether Turkey exercised jurisdiction in substantial conformity with the UCCJA. The purpose of the UCCJA is to:

> (1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being; . . . [and]
>
> (4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

N.C. Gen. Stat. § 50A-1. Thus, the primary emphasis of the UCCJA is the "best interests of the child."

> The UCCJA marks a shift in the emphasis of policy in the area of child custody. The focus is no longer on what law a court should apply in resolving a custody dispute; instead the focus is on which court is best able to make the decision. The state with the maximum contact with the child will be the one to determine the case. This change indicates the UCCJA is definitely child-centered rather than parent-centered.

Hart, 74 N.C. App. at 9, 327 S.E.2d at 636 (quoting Comment, 4 Campbell L. Rev. 371, 376 (1982)). Furthermore,

> (a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) This State (i) is the home state of the child at the time of commencement of the proceeding, . . . or
>
> (2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or
>
> (3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent . . . .

N.C. Gen. Stat. § 50A-3. *See Shingledecker*, 103 N.C. App. at 785, 407 S.E.2d at 591; *see also Hart*, 74 N.C. App. at 7, 327 S.E.2d at 635.

In the instant case, the trial court found that North Carolina was the home state of the children; that it was in the best interests of the children that North Carolina assume jurisdiction; that plaintiff had significant connections with the State; and that there was substantial evidence relevant to the children's present and future care, protection, training and personal relationships. Moreover, the trial court found that defendant had repeatedly abused the children and plaintiff; thus, the trial court had jurisdiction on the basis of an emergency situation being present.

Defendant relies upon *Klont v. Klont*, 342 N.W.2d 549 (Mich. App. 1983), in support of his position that the trial court did not have jurisdiction. However, *Klont* is factually distinguishable from the instant case. In *Klont*, the foreign court's exercise of jurisdiction substantially conformed with the criteria of the UCCJA. The Turkish court's order did not discuss the best interests of the children, but instead talked about defendant's position and status in the community, the importance of Islam, circumcision and defendant's place in society. Therefore, Turkish law is not in conformity with the UCCJA, nor is it in conformity with the law of North Carolina. Thus, defendant's reliance on *Klont* is misplaced.

[6] Moreover, the trial court in this action had emergency jurisdiction. *See* § 50A-3(a)(3), which provides that a North Carolina court has jurisdiction to make a child custody determination if "[t]he child is physically present in this State and . . . it is necessary in an emergency to protect the child because the child had been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent[.]" Accordingly, the trial court did not err in denying defendant's motion to vacate and set aside the judgment on the grounds that the trial court did not have subject matter jurisdiction.

For all of the reasons discussed herein, the instant action is affirmed.

Affirmed.

Judges LEWIS and MARTIN, MARK D. concur.

STATE OF NORTH CAROLINA v. ANDRE DEMETRIUS GREEN

No. COA95-936

(Filed 5 November 1996)

1. **Infants and Minors § 99 (NCI4th)— juvenile—trial as adult—statute governing transfer to superior court—not unconstitutionally vague**

The challenge of a juvenile defendant to N.C.G.S. § 7A-610, which provides for the transfer of juveniles to superior court for trial as adults, was without merit where defendant contended that the statute was vague and overbroad based on language which required the district court to determine whether the needs of the juvenile or the best interest of the State would be served by transfer to superior court. Identical language in the predecessor statute and was held not to violate a defendant's due process rights.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

2. **Infants and Minors § 99 (NCI4th)— juvenile—trial as adult—discretion of district court judge—statement of reasons—findings not needed**

The decision to transfer a juvenile's case to superior court lies solely within the discretion of the district court judge and, in making this decision, district court judges need only state the reasons for the transfer and need not make findings of fact to support the conclusion that the needs of the juvenile or the best interests of the State would be served by the transfer.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

3. **Infants and Minors § 99 (NCI4th)— juvenile—trial as adult—consideration of rehabilitative potential**

A district court judge considered a juvenile defendant's rehabilitative potential in deciding whether to transfer the juvenile to

superior court for trial as an adult, whether or not such consideration was necessary.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

4. Infants and Minors § 99 (NCI4th)— juvenile—decision to try as adult—history of assaultive behavior—evidence of unadjudicated acts

A district court judge did not abuse her discretion by relying on a juvenile defendant's history of assaultive behavior when transferring him to superior court for trial as an adult where evidence of unadjudicated acts came from a juvenile court psychologist based on information she received directly from defendant and his mother. This information was sufficiently reliable. *State v. Vinson*, 298 N.C. 640, did not address the type of evidence that can validly support a transfer decision.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

5. Infants and Minors § 99 (NCI4th)— juvenile—transfer to superior court for trial as adult—reasons for transfer

A district court judge did not abuse her discretion in transferring a juvenile defendant to superior court for trial as an adult by relying as reasons for the transfer on the victim being a stranger to defendant, the strength of the probable cause evidence, the serious nature of the offenses, the community's need to be aware of and protected from this type of serious criminal activity, and defendant's acknowledgment that he has a temper.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

6. Infants and Minors § 99 (NCI4th)— juvenile—transfer to superior court for trial as adult—reliance of defendant's confession

The district court judge did not err in transferring a juvenile defendant to superior court for trial as an adult by relying on defendant's confession where defendant did not move to suppress the confession in the juvenile proceedings but made such a motion in superior court, where it was denied. The superior court's rulings were supported by competent evidence and there was no error in his conclusions; since the confession was legally obtained, the district court judge did not err in considering it at the transfer hearing.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

7. Infants and Minors § 98 (NCI4th)— juvenile—photo lineup—improper—subsequent confession not the result

There was no plain error in a district court's decision to transfer a juvenile to superior court for trial as an adult where the court relied on a juvenile defendant's confession which defendant contended was the result of an illegal non-testimonial identification proceeding. While the detective did not comply with N.C.G.S. § 7A-596 in conducting a photo lineup, defendant has not produced evidence which tends to show that his subsequent confession was the direct result of the photo lineup; that the confession occurred after defendant learned that the victim had identified him in a photo lineup is too tenuous. Additionally, the court made several findings to support its transfer order which are wholly independent of the State's compliance with N.C.G.S. § 7A-596.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

8. Infants and Minors § 99 (NCI4th)— juvenile—transferred for trial as adult—thereafter treated as adult

The trial court did not err in a prosecution for first-degree sexual offense, attempted first-degree rape, and first-degree bur-

glary by denying defendant's motion to dismiss and in not instructing the jury on the common law doctrine of *doli incapax* where defendant was thirteen years old at the time of the offenses. Although the doctrine of *doli incapax* may still apply in other contexts, the General Assembly has indicated an intent that thirteen year olds transferred pursuant to N.C.G.S. § 7A-608 and N.C.G.S. § 7A-610 are transferred for trial "as in the case of adults" and are thereafter to be treated as adults.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 34 et seq.

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

9. Rape and Allied Sexual Offenses § 132 (NCI4th)— first-degree sexual offense and attempted first-degree rape—use of deadly weapon—infliction of serious bodily harm—disjunctive instruction

There was no plain or constitutional error in a prosecution for first-degree sexual offense and attempted first-degree rape where the trial court charged the jury in the disjunctive on the use of a deadly weapon or the infliction of serious personal injury, which raise both offenses from second to first-degree. Although defendant contends that the instruction deprived him of a unanimous verdict, there is no meaningful difference between this instruction and the instruction in *State v. Belton*, 318 N.C. 141.

Am Jur 2d, Rape §§ 108 et seq.

10. Indigent Persons § 19 (NCI4th)— rape, burglary, and sexual offense—possibility of organic brain disorder—motion for appointment of experts—denied

The trial court did not err in a prosecution for first-degree sexual offense, attempted first-degree rape, and first-degree burglary by denying defendant's motion for a court appointed expert neuropsychiatrist or neuropsychologist where defendant was examined at Dorothea Dix Hospital to determine his capacity to stand trial; the Director of Forensic Psychiatry sent a report stating that defendant was competent to stand trial, with an evaluation attached from a clinical psychologist in which the psychologist noted the possibility of an organic brain disorder; the court

found that only the psychologist mentioned this possibility and that neither of the two psychiatrists who signed the report referred to an organic brain disorder; and the trial court denied defendant's motion but agreed to reconsider if defendant obtained an affidavit from the clinical psychologist or a medical expert based on that expert's review of the report showing that further examination might indicate whether defendant suffers from organic brain disorder. The court did not require defendant to pay for an additional examination; he was only required to obtain affidavits based on his previous examination at Dorothea Dix.

Am Jur 2d, Expert and Opinion Evidence § 192; Witnesses § 736.

11. Rape and Allied Sexual Offenses § 231 (NCI4th); Constitutional Law § 369 (NCI4th)— mandatory life sentence—first-degree sexual offense—thirteen-year-old defendant—not cruel and unusual

The imposition of the mandatory sentence of life imprisonment for a first-degree sexual offense by a defendant who was thirteen when the crime was committed was neither cruel nor unusual punishment under the Constitutions of North Carolina and the United States. It has been held that a life sentence for a first-degree sexual offense does not constitute cruel and unusual punishment and the General Assembly has the discretionary authority to examine our society's evolving standards of decency and to determine when children may be tried as adults.

Am Jur 2d, Rape §§ 114, 115.

Appeal by defendant from judgments and commitments entered 26 January 1995 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 14 May 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth R. Bare, Associate Attorney General T. Brooks Skinner, Jr., and Special Assistant Attorney General Gwynn T. Swinson, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine M. Crawley; and Samuel L. Bridges; for defendant-appellant.

LEWIS, Judge.

Defendant appeals his convictions and sentences for first-degree sexual offense, attempted first-degree rape, and first-degree burglary. We hold that defendant had a fair trial free of prejudicial error.

Evidence presented at trial tends to show the following: On the night of 27 July 1994, the victim was awakened by someone knocking on her door. She immediately telephoned "911," and while on the phone, she heard glass break. Defendant entered her bedroom brandishing a mop stick while she wielded a golf club in an attempt to repel her attacker. Defendant swung the mop stick, and she swung the golf club. Both broke on contact. Defendant then pushed the victim onto her bed, slapped her multiple times, and engaged in various sex acts with her against her will. The police arrived during the assault. As they entered the back door, defendant ran out the front door. At the time, defendant lived with his mother and sister in the same apartment complex as the victim.

Evidence presented at the probable cause and transfer hearing shows the following: When defendant was first questioned in the early morning hours of 28 July 1994, he denied any involvement in the assault. The next day he was questioned at the Fuquay-Varina Police Department and confessed to breaking into and entering the victim's apartment, slapping her twice, and engaging in various sexual acts with her against her will. Evidence presented at the superior court hearing on defendant's motion to suppress shows that his mother was present when he admitted to breaking into the victim's residence; however, when defendant confessed to the sexual assaults, his mother was out of the room.

The State filed juvenile petitions against defendant alleging first-degree sex offense, first-degree rape, and first-degree burglary. At the time of the offenses and the filing of the petitions, defendant was 13 years old.

On 18 August 1994, the petitions came on for hearing in the Juvenile Court Session of Wake County District Court, Judge Joyce A. Hamilton presiding. A probable cause hearing was conducted, and the court found probable cause as to first-degree sex offense, first-degree rape, and first-degree burglary. The State then moved under N.C. Gen. Stat. sections 7A-608 and 7A-610 to transfer the cases to superior court for trial of defendant as an adult. After a hearing, the motion for transfer was granted.

On 13 September 1994, defendant was indicted by grand jury on charges of first-degree sex offense, first-degree rape, and first-degree burglary. Prior to trial, defendant moved to suppress his confession. After hearing, this motion was denied on 20 December 1994 by Judge Donald W. Stephens. The cases were called for trial on 24 January 1995 during the Criminal Session of Wake County Superior Court, Judge Narley J. Cashwell presiding. The jury returned verdicts finding defendant guilty of first-degree sexual offense, attempted first-degree rape, and first-degree burglary. He was sentenced to mandatory life imprisonment for first degree sexual offense, six years imprisonment for attempted first-degree rape to run concurrently with the life sentence, and fifteen years imprisonment for first-degree burglary to run consecutively after the life sentence.

[1] In assignments of error numbers one and six, defendant contends that N.C. Gen. Stat. section 7A-610 fails to guarantee due process because it is vague and overbroad.

N.C. Gen. Stat. section 7A-610 provides, in pertinent part:

> (a) If probable cause is found and transfer to superior court is not required by G.S. 7A-608, the prosecutor or the juvenile may move that the case be transferred to the superior court for trial as in the case of adults. The judge may proceed to determine whether the needs of the juvenile or the best interest of the State will be served by transfer of the case to superior court for trial as in the case of adults.
>
> * * *
>
> (c) Any order of transfer shall specify the reasons for transfer.

G.S. § 7A-610 (1995). A companion statute, N.C. Gen. Stat. section 7A-608, provides, in pertinent part:

> The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult.

G.S. § 7A-608 (1995).

Specifically, defendant challenges that portion of G.S. section 7A-610 which requires the district court to determine "whether the needs of the juvenile or the best interest of the State will be served by

transfer of the case to superior court." G.S. § 7A-610(a). This court has examined identical language in the predecessor statute to G.S. section 7A-610 (G.S. section 7A-280) and has held that G.S. section 7A-280 does not violate a defendant's due process rights. *In re Bullard*, 22 N.C. App. 245, 247-48, 206 S.E.2d 305, 306-307, *appeal dismissed*, 285 N.C. 758, 209 S.E.2d 279 (1974). As G.S. section 7A-610 contains language identical to that challenged in *Bullard*, *Bullard* controls here. We hold that defendant's due process challenge to the constitutionality of G.S. section 7A-610 is without merit.

[2] In assignments of error numbers two and six, defendant asserts that the district court abused its discretion by transferring his cases to superior court because it failed to consider his rehabilitative potential and based the decision on invalid reasons. We find no abuse of discretion. The decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the district court judge and is not subject to review absent a showing of gross abuse of discretion. *In re Bunn*, 34 N.C. App. 614, 615-16, 239 S.E.2d 483, 484 (1977) (reviewing transfer decision under prior transfer statute, G.S. section 7A-280). In making this decision, a district court judge need only state reasons for the transfer, *see* G.S. section 7A-610(c); he need not make findings of fact to support his conclusion that the needs of the juvenile or the best interest of the State would be served by the transfer. *Bunn*, 34 N.C. App. at 616, 239 S.E.2d at 484.

[3] Defendant asserts that the district court did not consider his rehabilitative potential when ordering the transfer. However, he cites no statute or case which requires a district court judge to consider the rehabilitative potential before making a transfer decision. However, assuming for the sake of argument, that such consideration is required, the record shows that the court *did* consider defendant's rehabilitative potential.

Dr. Barbara Gottlieb, a juvenile court psychologist, examined defendant in order to evaluate whether his needs could be addressed within the juvenile system. She testified extensively at the transfer hearing about defendant's needs and other matters related to his potential for rehabilitation, such as his abilities and background. At the end of the transfer hearing, Judge Hamilton stated:

> *. . . I know there's probably a lot more available in juvenile court as far as treatment is concerned . . . . And he may very well be treated better in district court, as far as his problem is*

> *concerned and as far as the ability of the court system to deal with his sexual offenses and to try to do what we can to change that.*
>
> *Be that as it may, . . ., I'm going to bind this case over to superior court.*

(Emphasis added). We conclude that the testimony of Ms. Gottlieb and this statement demonstrate that the court did consider defendant's rehabilitative potential, whether or not such consideration was necessary.

Defendant further asserts that three of the reasons stated by the court in its transfer order are invalid. These are: (1) defendant's history of assaultive behavior (i.e., getting into fights at school); (2) the fact that the victim was a stranger to defendant; and (3) the strength of the probable cause evidence.

[4] Defendant asserts that the court's reliance on his "history of assaultive behavior" was improper because it was not based on reliable evidence. Citing *In re Vinson*, 298 N.C. 640, 260 S.E.2d 591 (1979), he asserts that the court improperly relied on Ms. Gottlieb's testimony concerning the fights in school and his statements to her regarding his temper. *Vinson* dealt, *inter alia*, with a district court's consideration of unadjudicated acts in a dispositional hearing for a juvenile who had been adjudicated delinquent. *See Vinson*, 298 N.C. at 663, 260 S.E.2d at 605. Since it did not address the type of evidence that can validly support a transfer decision, *Vinson* is not controlling in this context.

Furthermore, in *Vinson*, the Supreme Court permitted the consideration of unadjudicated acts so long as the information was reliable and accurate and was competently obtained. *Id.* at 669, 260 S.E.2d at 608. In *Vinson*, the record did not reveal the source of the disputed information or any findings as to its accuracy. *Id.* at 668, 260 S.E.2d at 608. Here, evidence of the unadjudicated acts came from a juvenile court psychologist based on information she received directly from defendant and his mother. We conclude that this information was sufficiently reliable. The court did not abuse its discretion by including this information in its statement of reasons for transfer.

[5] Defendant also takes issue with two other reasons stated by the court: (1) that the victim was a stranger to defendant, and (2) the strength of the probable cause evidence. We note that in the transfer

order, the court also listed additional reasons: the serious nature of the offenses, the community's need to be aware of and protected from this type of serious criminal activity, and defendant's acknowledgment that he has a temper.

This court has upheld a transfer based on reasons similar to those stated by the district court here. *See Bunn*, 34 N.C. App. at 616, 239 S.E.2d at 484 (upholding transfer based on deadly nature of the assault, the defendant's history of delinquency, and the interest of the State in protecting its citizens). In accordance with *Bunn*, we hold that the trial court did not abuse its discretion by relying on the challenged reasons in transferring defendant's cases to superior court.

[6] In assignment of error number three, defendant asserts that the court erred by relying on an illegally obtained confession in deciding whether to transfer his cases to superior court. He contends that his confession to the sexual assaults was illegally obtained because neither his parent nor his attorney was present, as required by N.C. Gen. Stat. section 7A-595(b), when he confessed to these acts and because his waiver of his rights was not knowing and voluntary.

We first note that defendant has failed to preserve this assignment of error for our review. The record shows that defendant did not object to or move to suppress his confession at the juvenile court probable cause and transfer hearing. N.C. Gen. Stat. section 15A-1446(a) provides that error may not be asserted upon appellate review unless the error was brought to the attention of the trial court by appropriate and timely objection or motion. Similar provisions are found in N.C.R. App. P. 10(b)(1) (1996) and N.C.R. Evid. 103(a)(1) (1992). G.S. section 15A-1446(d) provides specific exceptions to this rule; however, none of these exceptions are claimed by defendant here.

Defendant has also failed to preserve any contention that the court committed "plain error" by considering the confession because he has not "specifically and distinctly contended," *see* N.C.R. App. P. 10(c)(4) (1996), that the court committed "plain error" in considering the confession at the juvenile court probable cause and transfer hearing.

However, in the interest of justice, we exercise our discretion to review defendant's contentions. Although defendant did not move to suppress the confession in the juvenile proceedings, he did make such a motion in the superior court. After hearing, Judge Donald W.

Stephens denied the motion in an order in which he ruled that the confession was not illegally obtained and was admissible at trial. The trial court's findings of fact are binding on appeal if supported by competent record evidence. *State v. Rook*, 304 N.C. 201, 212, 283 S.E.2d 732, 740 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). After review, we conclude that Judge Stephens' findings are supported by competent record evidence and we find no error in his conclusions of law. Since the confession was legally obtained, the district court did not err in considering it in the transfer hearing.

[7] In assignments of error numbers three and four, defendant asserts that the court's reliance on his confession in making the transfer decision was plain error because the confession was the fruit of an illegal non-testimonial identification proceeding.

N.C. Gen. Stat. section 7A-596 provides that "[n]ontestimonial identification procedures shall not be conducted on any juvenile without a court order . . . . '[n]ontestimonial identification' means identification by . . . photographs, and lineups . . . ." G.S. § 7A-596 (1995). The record does not show that the detective obtained a court order prior to taking a photograph of defendant. Rather, the detective took a photograph of defendant with his consent shortly after the crime occurred and later used it in a photo lineup in which the victim identified defendant as the perpetrator.

While it is clear that the detective's actions did not comply with G.S. section 7A-596, defendant has not produced any evidence which tends to show that his subsequent confession was the direct result of the photo lineup. The sole basis for his assertion is that the confession occurred *after* he learned that the victim had identified him in a photo lineup. We find this connection too tenuous.

In addition, the trial court made several findings to support its transfer order, including: (1) the serious nature of the offenses; (2) the victim's status as a stranger in relation to the defendant; (3) the community's need to be aware of and protected from this serious type of criminal activity; (4) the defendant's history of assaultive behavior; and (5) strong evidence of probable cause presented based on testimony from the victim and the defendant's confession to law enforcement. Assuming, for the sake of argument, that defendant's confession was the fruit of the illegal identification proceeding, since the trial court's other findings are wholly independent of the State's noncompliance with section 7A-596, the trial court's reliance on defendant's confession constitutes, at best, harmless error under

the facts and circumstances of the present case. *See* N.C. Gen. Stat. § 15A-1443.

In sum, we hold that the trial court did not abuse its discretion by deciding to transfer defendant's cases to superior court.

[8] In assignments of error numbers fifteen and seventeen, defendant asserts that the trial court erred in denying his motion to dismiss and in instructing the jury. He grounds both of these assignments of error on the assertion that the trial court should have applied the doctrine of *doli incapax* when evaluating the sufficiency of the evidence and when instructing the jury.

Under the common law doctrine of *doli incapax*, children below the age of seven are conclusively presumed to be incapable of committing a crime. *State v. Rogers*, 275 N.C. 411, 424, 168 S.E.2d 345, 352 (1969), *cert. denied*, 396 U.S. 1024, 24 L. Ed. 2d 518 (1970); *State v. Yeargan*, 117 N.C. 706, 707, 23 S.E. 153, 154 (1895). According to this doctrine, children between the ages of seven and fourteen are also presumed incapable of committing a crime but the presumption may be rebutted by proof that the child is capable of discerning between good and evil. *Id.*

The State contends that the General Assembly has superseded the doctrine of *doli incapax* for children between the ages of thirteen and fourteen by amending G.S. section 7A-608 to reduce the age at which a juvenile can be transferred to superior court.

N.C. Gen. Stat. section 4-1 provides:

> 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.

G.S. § 4-1 (1986) (emphasis added). When the General Assembly legislates in respect to the subject matter of a common law rule, the statute supplants the common law rule in regard to that matter. *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956).

In cases decided after the juvenile courts were established in 1919, *see* 1919 N.C. Sess. Laws ch. 97, our appellate courts have repeatedly referred to the doctrine of *doli incapax*. *See e.g.*, *Rogers*,

275 N.C. at 424, 168 S.E.2d at 352-53; *Walston v. Greene*, 247 N.C. 693, 695, 102 S.E.2d 124, 125 (1958); *State v. Smith*, 213 N.C. 299, 303, 195 S.E. 819, 821 (1938); *In re Register*, 84 N.C. App. 336, 349, 352 S.E.2d 889, 896 (1987).

However, these cases, decided prior to 1994, do not assess the impact of the 1994 amendment to G.S. section 7A-608 in which the General Assembly reduced the age at which a juvenile may be transferred to superior court from fourteen to thirteen. 1994 N.C. Sess. Laws (Extra Session) ch. 22, § 25. When a thirteen-year-old is transferred pursuant to this statute and G.S. section 7A-610, he or she is transferred for trial "as in the case of adults." G.S. § 7A-610. With the language "as in the case of adults," the General Assembly has indicated an intent that thirteen-year-olds who are transferred are thereafter to be treated *as adults*. Although the doctrine of *doli incapax* may still apply in other contexts, we conclude that G.S. section 7A-608, as amended, expresses legislative intent to supersede the doctrine of *doli incapax* in the context of the transfer of a juvenile, between the ages of thirteen and fourteen, to superior court for trial.

We therefore hold that the trial court did not err in denying defendant's motion to dismiss. There was also no error in omitting an instruction on the doctrine of *doli incapax*.

[9] In assignment of error number eighteen, defendant asserts that the trial court committed plain and constitutional error by instructing the jury in the disjunctive on first-degree sex offense and first-degree attempted rape thus denying him his constitutional right to a unanimous jury verdict.

More specifically, defendant assigns error to the court's instruction on the element, common to both offenses, which elevates both second-degree attempted rape and second-degree sex offense to first-degree. On this element of both offenses, the trial court instructed the jury that "the State must prove . . . that the defendant . . . employed a dangerous or deadly weapon . . . *or*, that the defendant . . . inflicted serious personal injury upon [the victim]." (Emphasis added)

A defendant is entitled to a unanimous jury verdict when convicted of a crime. N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1237(b) (1988). In *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991), our Supreme Court discussed the unanimity requirement in regard to disjunctive instructions and distinguished two separate lines of cases,

represented by *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986) and *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). *Lyons*, 330 N.C. at 301-306, 412 S.E.2d at 311-14.

Under *Lyons*, the unanimity requirement is violated in cases like *Diaz* when the acts charged in the disjunctive each constitute a "separate offense" for which a defendant could be separately punished. *Id.* at 302-303, 306, 412 S.E.2d at 312, 314. However, the unanimity requirement is not violated, in accordance with the *Hartness* line of cases, when the acts charged in the disjunctive constitute " 'a single wrong' " which can be established by " 'a finding of various alternative elements.' " *Id.* at 306, 412 S.E.2d at 314. (quoting *Hartness*, 326 N.C. at 566, 391 S.E.2d at 180.) Our Supreme Court considered an argument similar to that made by defendant in *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986). In *Belton*, the Court applied *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985), a case identified in *Lyons* as belonging with the *Hartness* line of cases. *See Lyons*, 330 N.C. at 306, 412 S.E.2d at 314. The *Belton* Court rejected the defendants' assertion that they were deprived of unanimous verdicts when the trial court instructed the jurors that they could find the defendants guilty of first-degree rape and first-degree sexual offense if they found that defendants employed a deadly weapon *or* were aided and abetted by another. *Belton*, 318 N.C. at 165, 347 S.E.2d at 770. We find no meaningful difference between the disjunctive instruction challenged in *Belton* and the instructions given here. Thus, we find no error.

[10] In his eighth assignment of error, defendant asserts that the trial court violated his due process rights by denying his motion for a court-appointed expert neuropsychiatrist or neuropsychologist to assist in preparation of his defense.

Under N.C. Gen. Stat. section 7A-450(b), the State must provide an indigent defendant "with counsel and the other necessary expenses of representation." G.S. 37A-450(b) (1995); *State v. Freeman*, 93 N.C. App. 380, 385, 378 S.E.2d 545, 548, *disc. review denied*, 325 N.C. 229, 381 S.E.2d 787 (1989). In addition, if a defendant makes a threshold showing that: (1) his sanity at the time of the offense will be a significant factor at trial, or (2) the issue of whether he may pose a danger in the future will be a significant factor at sentencing, the court may be required to provide the defendant access to psychiatric assistance on these issues. *Ake v. Oklahoma*, 470 U.S. 68, 74, 86-87, 84 L. Ed. 2d 53, 60, 68 (1985).

Our Supreme Court has interpreted these requirements to require appointment of expert assistance for an indigent defendant only if the defendant makes "a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992). " '[M]ere hope or suspicion that favorable evidence is available is not enough to require that such help be provided.' " *Id.* at 657, 417 S.E.2d at 471-72 (quoting *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988), *post-conviction relief granted*, 338 N.C. 394, 450 S.E.2d 878 (1994)).

On 20 September 1994, the trial court issued an order committing defendant to Dorothea Dix Hospital for examination to determine his capacity to stand trial. After defendant was examined, the Director of Forensic Psychiatry at Dorothea Dix sent a report to the court stating that defendant was competent to stand trial. Attached to his report was an evaluation by a clinical psychologist. In his evaluation, the clinical psychologist noted that there was a possibility that defendant suffered from an organic brain disorder. In reviewing the report, the Court found that only the clinical psychologist mentioned this possibility and that neither of the two psychiatrists who signed the report made any reference to organic brain disorder.

Based solely on the inconclusive statements by the clinical psychologist, defendant moved the court to appoint an expert neuropsychiatrist or neuropsychologist to assess whether he suffers from an organic brain disorder. The trial court denied defendant's motion but agreed to reconsider if defendant obtained an affidavit showing that further examination might indicate whether defendant suffers from organic brain disorder. He permitted defendant to obtain this affidavit from either (1) the clinical psychologist who examined defendant or (2) a medical expert based on that expert's review of the Dorothea Dix report. Defendant contends that requiring him to obtain this affidavit renders his rights under *Ake* meaningless because, as an indigent, he could not pay to obtain the affidavit.

We conclude that the trial court did not err. By court order, defendant was examined by psychiatrists at Dorothea Dix. He was then given the opportunity to make a particularized showing of organic brain disorder by use of an affidavit, but declined to do so. The court did not require him to pay for an additional examination;

he was only required to obtain affidavits based on his previous examination at Dorothea Dix. Since he failed to make the requisite showing, we conclude that this assignment of error has no merit.

[11] In assignments of error numbers seven and twenty-one, defendant asserts that the mandatory sentence of life imprisonment for first degree sex offense is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and cruel or unusual punishment under Article I, section 27 of the N.C. Constitution. In particular, he asserts that the life sentence is disproportionate to the offense and violates this society's evolving standards of decency given his young age, mental capacity, and lack of a prior criminal record.

Under the statutory sentencing provisions applicable to defendant, first-degree sexual offense is a Class B Felony carrying a mandatory sentence of life imprisonment. *See* G.S. § 14-27.4; N.C. Gen. Stat. § 14-1.1 (1993). Our Supreme Court has held that a life sentence for first-degree sexual offense does not constitute cruel and unusual punishment. *State v. Higginbottom*, 312 N.C. 760, 764, 324 S.E.2d 834, 837 (1985); *State v. Shane*, 309 N.C. 438, 445-46, 306 S.E.2d 765, 770 (1983), *cert. denied*, 465 U.S. 1104, 80 L. Ed. 2d 134 (1984).

Defendant's age, mental capacity, and lack of a prior criminal record do not change this result. He was found competent to stand trial and was tried and sentenced as an adult. The General Assembly has the discretionary authority to examine our society's evolving standards of decency and to determine when children may be tried as adults. By reducing the age at which a juvenile may be transferred to superior court for trial as an adult from fourteen to thirteen, the General Assembly made this choice. We hold that imposition of the mandatory sentence of life imprisonment on defendant for first degree sexual offense was neither cruel nor unusual punishment under the Constitutions of North Carolina and the United States.

Defendant's remaining assignments of error are deemed abandoned. *See* N.C.R. Civ. P. 28(a) (1996).

No error.

Judges JOHNSON and MARTIN, Mark D. concur.

CHARLES B. MIRACLE, PLAINTIFF v. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; E.T. BARNES, DIRECTOR OF THE RETIREMENT SYSTEM DIVISION AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA94-1241

(Filed 5 November 1996)

1. Retirement § 10 (NCI4th)— retired law officer—retroactive statutory salary cap—impairment of contract—violation of contract clause—summary judgment improper

Where plaintiff law enforcement officer's retirement rights had vested and he had retired prior to the effective date of N.C.G.S. § 128-24(5)(c), which required the suspension of retirement benefits from the N.C. Local Governmental Retirement System for retirees whose postretirement earnings exceeded a specified cap, the State's action in limiting plaintiff's benefits in the manner specified in the statute impaired its contractual obligation to plaintiff. However, summary judgment on the issue of whether the application of § 128-24(5)(c) to plaintiff violated the Contract Clause of Art. I, § 10 of the U.S. Constitution was precluded where genuine issues of material fact existed as to whether the disturbance of plaintiff's benefits was "reasonable and necessary to serve an important public purpose."

Am Jur 2d, Summary Judgment § 27.

Constitutionality, construction, and application of statute or ordinance providing for reduction of pension or retirement benefit of public officer or employee because of independent income. 7 ALR2d 692.

Variations in retirement, pension, or death benefit plans as unlawful employment practice under 42 USCS § 2000e-2(a). 35 ALR Fed. 15.

2. Retirement § 10 (NCI4th)— retired law officer—retroactive statutory salary cap—due process—summary judgment improper

Summary judgment was improperly entered for defendants on a claim that the retroactive application of the statutory cap

on postretirement earnings of a law enforcement officer who retired before the effective date of the statute violated the officer's due process rights under the Fourteenth Amendment to the U.S. Constitution where a genuine issue of material fact remained on the issue of whether it was "arbitrary and irrational" for the State to apply the earnings cap to the officer.

Am Jur 2d, Civil Rights § 287; Constitutional Law § 186; Summary Judgment § 27.

Supreme Court's views as to due process requirements of forfeitures. 76 L. Ed. 2d 852.

Retroactive application of federal legislation as violating due process clause of Federal Constitution's Fifth Amendment—Supreme Court cases. 107 L. Ed. 2d 1105.

3. **Retirement § 10 (NCI4th)— retired law officer—retroactive statutory salary cap—Law of the Land Clause—summary judgment improper**

Summary judgment was improperly entered for defendants on a claim that the retroactive application of the statutory cap on postretirement earnings of a law enforcement officer who retired before the effective date of the statute violated the officer's rights under the Law of the Land Clause of Art. I, § 19 of the N.C. Constitution where a genuine issue of material fact remained as to the degree and reasonableness of the deprivation rendered by the statute in relation to the public good likely to result from it.

Am Jur 2d, Constitutional Law §§ 563, 586; Summary Judgment § 27.

Supreme Court's views as to propriety under Federal Constitution's due process guarantees of summary administrative deprivation of property interest. 69 L. Ed. 2d 1044.

4. **Estoppel § 13 (NCI4th)— retired local government employee—retroactive statutory salary cap—State not estopped**

Plaintiff retired law enforcement officer's allegation that the State represented that reemployment following retirement would not affect his benefits but changed this policy subsequent to his retirement by making him subject to a postretirement earnings cap in N.C.G.S. § 128-24(5)(c) did not establish an equitable

estoppel claim against the State because the representation upon which plaintiff allegedly relied was indisputably true at the time it was made and in no way constituted conduct which amounted to a false representation or concealment of a material fact.

Am Jur 2d, Estoppel and Waiver § 133; Pensions and Retirement Funds § 123.

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

Appeal by plaintiff from judgment entered 17 June 1994 by Judge D. Jack Hooks, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 11 September 1995.

Jeffrey S. Miller for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for the State.

JOHN, Judge.

Plaintiff appeals summary judgment entered in favor of defendants on plaintiff's constitutional claims and claim for equitable estoppel regarding termination of his retirement benefits. We affirm the trial court in part and reverse it in part.

Pertinent procedural and background information is as follows: Plaintiff began employment with Onslow County as a law enforcement officer in 1959. As such, he became a member of the Law Enforcement Officers' Benefit and Retirement Fund, later designated as the Law Enforcement Officers' Retirement System (LEO). *See* 1983 N.C. Sess. Laws ch. 468, § 1. Plaintiff retired 1 July 1985. At the time he retired, LEO, governed by N.C.G.S. § 143-166 *et seq.* (repealed 1 January 1986), permitted beneficiaries re-employed upon retirement in the private sector or in a public *non*-law enforcement field to receive full retirement benefits even upon such re-employment. *See* N.C. Admin. Code tit. 20, r. 2K.0609 (repealed 1 January 1986) (if re-employed as law enforcement officer of the State or any political subdivision thereof, retirement allowance shall cease).

On 1 January 1986, by legislative act, all members of LEO employed by or retired from local government agencies were transferred into the North Carolina Local Governmental Employees' Retirement System (LGERS), which assumed responsibility for pay-

ing retirement benefits to former members of LEO, including plaintiff. *See* 1985 N.C. Sess. Laws c. 479, § 196(t); N.C.G.S. § 143-166.50(b) (1993). Further, former members of LEO became subject to an existing LGERS earnings limitation provision imposed upon beneficiaries who retired on early or service retirement and subsequently took employment with another LGERS participating employer. *See* N.C.G.S. § 128-24(5)(c) (1995). This provision required suspension of LGERS retirement benefits of employees whose earnings exceeded a specified cap. However, former members of LEO who retired and were re-employed by a LGERS participating employer prior to 1 January 1986 were exempted from the cap. N.C.G.S. § 128-24(5a) (1995). In addition, former LEO employees who retired prior to 1 January 1986, but were not re-employed by a LGERS participating employer until after that date, were allowed a three-year phase-in period and not subjected to the earnings cap until 1 January 1989. *Id.*

Plaintiff, who retired from his law enforcement position with Onslow County 1 July 1985, accepted employment in a non-law enforcement capacity with the county, a LGERS participating employer, in April 1986. Following the statutory phase-in period, he became subject to the earnings cap of G.S. § 128-24(5)(c) on 1 January 1989.

Plaintiff filed the instant suit 6 July 1989, seeking that G.S. § 128-24(5)(c) be declared unconstitutional as applied to him, as well as temporary and permanent injunctions blocking application of the earnings cap to his retirement benefits. Defendants' 4 May 1993 motion for summary judgment was granted as to each of plaintiff's claims by the trial court 17 June 1994. Plaintiff filed notice of appeal to this Court 15 July 1994.

Plaintiff contends G.S. § 128-24(5)(c) operates to impair his vested contract rights to retirement benefits in contravention of Article I, § 10 of the United States Constitution and also denies him due process of the law in contravention of the Fourteenth Amendment to the federal constitution and Article I, § 19 of the state constitution. Plaintiff further asserts defendants are in any event equitably estopped from restricting said benefits by virtue of his detrimental reliance upon defendants' representations. We discuss each of plaintiff's contentions separately.

I.

[1] Article I, § 10 of the federal constitution (the Contract Clause) provides, *inter alia*: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." This Court has set forth a three-part test, adopted from *United States Trust Co. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92, *reh'g denied*, 431 U.S. 975, 53 L. Ed. 2d 1073 (1977), to measure whether a legislative act violates the Contract Clause. *See Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 371, 424 S.E.2d 420, 427, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993), and *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 225, 363 S.E.2d 90, 94 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988).

Under the test, we first must determine herein whether the state incurred a *contractual obligation* with regards to retirement benefits due plaintiff under the statutes governing LEO. *See Faulkenbury*, 108 N.C. App. at 371, 424 S.E.2d at 427. We hold a contractual relationship existed between the state and plaintiff as a retiree with vested benefits.

> [A] government retiree's pension is correctly characterized as deferred compensation to which the retiree is contractually entitled.

Id. at 370, 424 S.E.2d at 426. An affidavit submitted by defendants concedes that

> [a]t the time the plaintiff commenced service, he was required to render ten years of creditable membership service in order to establish his entitlement to a benefit[,]

and that "plaintiff completed ten years of service on July 1, 1969."

However, defendants insist only "those who had retired *and* returned to work on the effective date of [the earnings cap specified in] G.S. 128-24(5)(c)" could legitimately claim vested contract rights. Defendants' argument fails.

Simpson instructs us that:

> [a] public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs . . . had a contractual right

> to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

88 N.C. App. at 224, 363 S.E.2d at 94. The foregoing directive from *Simpson* was recently reaffirmed by this Court in *Hogan v. City of Winston-Salem*, 121 N.C. App. 414, 419-20, 466 S.E.2d 303, 307, *review granted*, 343 N.C. 122, 468 S.E.2d 781 (1996). Therefore, applying the interpretation of "vested" employed in *Simpson* and *Hogan*, we hold plaintiff's contractual right to his pension "vested" 1 July 1969.

While defendants point to *Griffin v. Bd. of Com'rs. of Law Officers' Retirement Fund*, 84 N.C. App. 443, 445, 352 S.E.2d 882, 884, *appeal dismissed and disc. review denied*, 319 N.C. 672, 356 S.E.2d 776 (1987); *accord, Kestler v. Bd. of Trustees of N.C. Retirement Sys.*, 48 F.3d 800 (4th Cir.), *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 124 (1995), arguing it stands for the proposition that an individual's pension rights do not take effect until retirement, (a stance expressly disavowed in *Hogan*, *see* 121 N.C. App. at 419-20, 466 S.E.2d at 307), plaintiff in any event meets such a deadline. Plaintiff retired 1 July 1985, well before the time G.S. § 128-24(5)(c) became applicable to former LEO beneficiaries on 1 January 1986.

At this juncture, we note plaintiff has expressly limited his argument to the proposition that G.S. § 128-24(5)(c) is inapplicable to him because his retirement rights had vested *and* he had *retired* prior to the effective date of the statute. Our holding herein accordingly is limited to the argument before us. *See* N.C.R. App. P. 28(a) (scope of review is limited to questions presented in the briefs).

The *United States Trust* test directs that we next examine whether the state's action in limiting plaintiff's benefits in the manner specified in G.S. § 128-24(5)(c) *impaired* its contractual obligation to plaintiff. *See Faulkenbury*, 108 N.C. App. at 371, 424 S.E.2d at 427. Our conclusion again is in the affirmative.

Defendants, as the parties moving for summary judgment, maintained the burden in the trial court to show the absence of a genuine issue as to any material fact. *See Atkins v. Beasley*, 53 N.C. App. 33, 38, 279 S.E.2d 866, 870 (1981); *see also Simpson*, 88 N.C. App. at 226, 363 S.E.2d at 95. There was no requirement for plaintiff to come forward with evidence unless defendants "offered evidence which negate[d]" the claim of the plaintiff in its entirety. *See Mace v. Construction Corp.*, 48 N.C. App. 297, 302, 269 S.E.2d 191, 194 (1980).

In *Simpson*, this Court held the plaintiffs' contractual rights were impaired "inasmuch as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge." *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. The same may be said of plaintiff's circumstance herein. Further, the record contains no evidence of defendants having negated plaintiff's claim that application of G.S. § 128-24(5)(c) would result in forfeiture of his retirement benefits.

The final determination under the tripartite test is whether the disturbance of plaintiff's benefits under G.S. § 128-24(5)(c) was "reasonable and necessary to serve an important public purpose." *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94 (quoting *United States Trust*, 431 U.S. at 25, 52 L. Ed. 2d at 112). When examining legislative modification of a state's own financial obligations under the Contract Clause,

> complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust, 431 U.S. at 26, 52 L. Ed. 2d at 112.

Regarding this issue, we observe initially that defendants have advanced in their appellate brief numerous bases upon which they contend that the statute in question may be deemed "reasonable and necessary." However, it is elementary that assertions of fact in a brief may not go to support a motion for summary judgment. *See Fowler v. Williamson*, 39 N.C. App. 715, 717, 251 S.E.2d 889, 890 (1979) ("Statements of fact made in briefs . . . may be assumed as true as *against* the party asserting them." (emphasis added)).

Significantly, the record lacks any showing by defendants upon which it might be determined that G.S. § 128-24(5)(c) satisfies the third prong of Contract Clause analysis as a matter of law. Moreover, such a determination would likely involve the resolution of factual disputes and therefore would be before this Court prematurely. *See Simpson*, 88 N.C. App. at 225-26, 363 S.E.2d at 95-95 ("reasonable and necessary" issue not "properly resolved in the court below," defend-

ants not having met burden "to show that there are no genuine issues as to any material fact").

In sum, summary judgment in favor of defendants on plaintiff's claim under the Contract Clause was improvidently allowed and must be reversed.

II.

[2] We next address plaintiff's alternative claim that his pension is a property right of which he has been deprived without due process of law. *See Pineman v. Oechslin*, 488 A.2d 803, 810 (Conn. 1985) ("the due process approach protects public employees from legislative confiscation of the retirement fund and arbitrary forfeiture of pension benefits").

The 14th Amendment to the United States Constitution (the Due Process Clause) guarantees that a person may not be deprived of property by the State without due process of law. Similarly, Article I, § 19 of the North Carolina Constitution (the "law of the land" clause) provides that the State may not deprive a person of his or her property except by the "law of the land."

Plaintiff contends G.S. 128-24(5)(c), "as applied to [him]," *i.e.*, an individual who retired before the statute became applicable to former LEO beneficiaries, "is irrational and arbitrary, and the trial court committed reversible error in finding it constitutional." Plaintiff asserts the statute operates retroactively to deprive him of benefits already earned.

It is undisputed that the statute has been applied to plaintiff in a retroactive manner. Retroactive legislation includes not only statutes which "take effect from a time anterior to their passage," but "all statutes, which, though operating only from their passage, affect vested rights and past transactions." *Landgraf v. USI Film Products*, 511 U.S. 244, 268-69, 128 L. Ed. 2d 229, 254 (1994) (citation omitted).

As opposed to the "reasonable *and necessary* to serve an *important* public purpose," standard, *United States Trust*, 431 U.S. at 25, 52 L. Ed. 2d at 112 (emphasis added), against which alleged violations of the Contract Clause are measured, the standard of review applied regarding due process challenges to retrospective legislation is less stringent. As the United State Supreme Court has stated,

> [w]e have never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibi-

> tions existing against state impairments of pre-existing contracts. Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses [of the Fifth and Fourteenth Amendments].

Pension Benefit Guaranty Corp. v. Gray & Co., 467 U.S. 717, 733, 81 L. Ed. 2d 601, 613 (1984).

Accordingly, the due process standard of review is as follows:

> [L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and [] the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-17, 49 L. Ed. 2d 752, 766-67 (1976). Nonetheless,

> [t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Id. Further, constitutional scholars have suggested that under circumstances where a legislative body attempts to modify the government's *own* obligation of contract through retroactive legislation, a heightened scrutiny of proffered justifications may be required. *See* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.9, at 427 (5th ed. 1995).

Therefore, in the case *sub judice*, it must be decided whether it was "arbitrary and irrational" for the State to apply the earnings cap of G.S. § 128-24(5)(c) to plaintiff, an individual who retired *prior to* the effective date of the statute. *See Pineman v. Fallon*, 662 F. Supp. 1311, 1313 (D. Conn. 1987), *aff'd*, 842 F.2d 598 (2d Cir. 1988), *cert. denied*, 488 U.S. 824, 102 L. Ed. 2d 48 (1988) (while no due process violation found, court emphasized that "the legislature did not undertake to modify the retirement benefits of those who had already left state service by [effective date of the statute]").

As with the "reasonable and necessary" issue regarding the Contract Clause in *Simpson*, 88 N.C. App. at 225-26, 363 S.E.2d at 94-95, and in the case *sub judice*, the record before us concerning the "arbitrary and irrational" question has not been sufficiently devel-

oped to the extent that this Court might hold defendants were properly entitled to judgment as a matter of law. Indeed, the instant record is comprised in the main of counsels' vigorous disputation of plaintiff's recusal motion, discussed below, and contains only minimal reference touching upon the issue of whether "the [State] has acted in an arbitrary and irrational way," *Usery*, 428 U.S. at 15, 49 L. Ed. 2d at 766, through its retroactive application of G.S. § 128-24(5)(c) to plaintiff. The trial court's grant of summary judgment on plaintiff's federal due process claim is therefore reversed.

[3] Regarding plaintiff's state constitutional claim, although the "law of the land" clause and the Due Process Clause are similar, our Supreme Court has reserved to the courts of this state

> the right to grant relief against unreasonable and arbitrary state statutes under Article I, section 19 of the Constitution of North Carolina in circumstances under which no relief might be granted by the due process clause of the fourteenth amendment . . . . Whether a state statute violates the law of the land clause "is a question of degree and reasonableness in relation to the public good likely to result from it."

Lowe v. Tarble, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985) (quoting *In re Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973)). The test under our state "law of the land" clause thus involves a weighing of the "degree and reasonableness" of the deprivation rendered by G.S. 128-24(5)(c) "in relation to the public good likely to result from it." *Id.* For reasons indicated earlier, we again do not believe the record herein was developed sufficiently to allow the trial court to resolve as a matter of law in defendants' favor their motion for summary judgment as to these matters, *see Simpson*, 88 N.C. App. at 225-26, 363 S.E.2d at 94-95, and therefore reverse the entry of summary judgment as to plaintiff's claim under the "law of the land" clause.

III.

Concerning plaintiff's third claim, based upon the doctrine of equitable estoppel, however, we summarily reject his contention that the trial court's allowance of defendants' summary judgment motion was error.

> "The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are

> otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation 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."

Meachan v. Board of Education, 47 N.C. App. 271, 277-78, 267 S.E.2d 349, 353 (1980) (quoting *Hawkins v. Finance Corp.*, 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953)). In addition, the elements as to the party claiming estoppel are:

> "(1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially."

Id. at 278, 267 S.E.2d at 353.

[4] Regarding his claim of estoppel, plaintiff's complaint alleged defendants represented that re-employment following retirement would not affect his benefits, but changed the policy subsequent to his retirement by making him subject to G.S. § 128-24(5)(c). In addition, plaintiff's affidavit stated the representation was contained in an employee handbook, and asserted:

> I relied upon the laws that existed at the time that I retired in choosing my future career. Had I known that the law was going to change I would have not retired, but rather would have continued to work. Furthermore, having chosen to work for Onslow County as I did, I had already committed myself to a course of conduct which could not easily be changed, in that it is very difficult to change careers at the age that I was.

The foregoing tender by plaintiff failed to withstand defendants' showing that an essential element of plaintiff's estoppel claim was wanting. *See Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974) (movant meets summary judgment burden by showing essential element of opposing party's claim nonexistent). As defendants point out, the representation upon which plaintiff allegedly relied was indisputably true at the time it was made and in no way constituted "conduct which amount[ed] to false representation or concealment of material facts." *See Fike v. Bd. of Trustees*, 53 N.C. App. 78, 279 S.E.2d 910, *disc. review denied*, 304 N.C. 194, 285

S.E.2d 98 (1981) (system estopped from denying benefits where plaintiff relied on representation in publication of system that employer would forward his benefits application to system, but employer failed to do so). The trial court therefore did not err in granting defendants' summary judgment motion as to plaintiff's equitable estoppel claim.

IV.

Finally, plaintiff assigns as error the trial judge's refusal to grant plaintiff's recusal motion based on

> two improper *ex parte* communications between the court and defense counsel which reasonably created doubts about the court's ability to rule impartially on the defense's motion for summary judgment.

After review of the record, we find this assignment of error unfounded.

In sum, the trial court's grant of defendants' summary judgment motion as to plaintiff's claims under the Contract Clause and the Due Process Clause of the United States Constitution and the "law of the land" clause of the North Carolina Constitution is reversed. As to plaintiff's equitable estoppel claim, the entry of summary judgment is affirmed.

Affirmed in part; reversed in part and remanded.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. MARVIN LESTER WOODY

No. COA95-1358

(Filed 5 November 1996)

1. Jury § 137 (NCI4th)— first-degree sexual offense against child—jury selection—questions regarding interracial marriage—not allowed

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by not allowing an inquiry as to whether a prospective juror

had any prejudice or bias against people of different races being married to each other where defendant was permitted to inquire into the fitness and competency of all prospective jurors and defendant failed to show how he was prejudiced. Regulation of the manner and extent of inquiry of prospective jurors rests largely in the court's discretion and a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of reasoned decision.

Am Jur 2d, Criminal Law § 155; Infants §§ 15, 17.5.

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

2. Evidence and Witnesses § 2517 (NCI4th)— first-degree sexual offense against child—child's testimony as to defendant's age

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by allowing her to testify to defendant's age. Defendant's age was within the victim's personal knowledge and her testimony was not hearsay; moreover, defendant later testified to his age.

Am Jur 2d, Witnesses §§ 75, 76.

Validity, construction, and application of 18 USCS sec. 2251, penalizing sexual exploitation of children. 99 ALR Fed. 643.

3. Evidence and Witnesses § 1932 (NCI4th)— first-degree sexual offense against child—written statement of victim —authentication

The written statement of an eight-year-old victim of first-degree sexual offenses was authenticated by the testimony of the victim and a detective. Although the victim initially noted that her handwriting looked different now, she identified the yellow paper on which she wrote the statement and testified that the handwriting was her handwriting when she was eight years old, and the detective testified that he had given the victim a blank yellow pad and asked her to write down what defendant had done, that he had remained outside the room and that no one else was allowed into the room, that the victim handed her statement,

written on yellow paper, to the detective, that the detective read the statement and had the victim read it, and that he had complete custody and control of the statement from that date until trial.

Am Jur 2d, Evidence §§ 1023, 1024, 1032.

Validity, construction, and application of 18 USCS sec. 2251, penalizing sexual exploitation of children. 99 ALR Fed. 643.

4. Evidence and Witnesses § 3195 (NCI4th)— first-degree sexual offense against child—child's written statement—admissible to corroborate child's testimony

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by allowing the State to combine the victim's trial testimony with a prior written statement. A prior consistent statement of a witness is admissible to strengthen the witness's credibility and it makes no difference whether the evidence appears in a verbal or written statement or whether it is verified. This witness's prior written statement was correctly allowed to corroborate her in-court testimony.

Am Jur 2d, Witnesses §§ 641 et seq.

Validity, construction, and application of 18 USCS sec. 2251, penalizing sexual exploitation of children. 99 ALR Fed. 643.

5. Evidence and Witnesses § 173 (NCI4th)— first-degree sexual offense against child—victim's feelings for defendant—admissible

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by allowing the State to introduce evidence as to whether she loved the defendant. She testified that she loved her father before the alleged abuse but no longer; this change in affection towards defendant is relevant and the determination of whether the probative value is outweighed by the danger of unfair prejudice is within the discretion of the trial judge. N.C.G.S. § 8C-1, Rule 401; N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 556 et seq.

Validity, construction, and application of 18 USCS sec. 2251, penalizing sexual exploitation of children. 99 ALR Fed. 643.

6. Evidence and Witnesses § 2907 (NCI4th)— redirect examination—line of questioning from direct examination

The trial court did not abuse its discretion in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by allowing the State on redirect examination of the daughter to ask about a gun in defendant's possession where the daughter had been asked on direct examination whether she was afraid of defendant and whether he had ever threatened her. Since the State could have continued with this line of questioning on direct, it was within the court's discretion to allow the State to ask about the gun on redirect.

Am Jur 2d, Witnesses § 425.

Validity, construction, and application of 18 USCS sec. 2251, penalizing sexual exploitation of children. 99 ALR Fed. 643.

7. Evidence and Witnesses § 961 (NCI4th)— first-degree sexual offense against child—child's statements to doctor—admissible

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by admitting a doctor's testimony concerning statements made by the victim to the doctor where the victim was seen under a Child Medical Exam program administered by the Stanley County Department of Social Services in which a comprehensive history is taken from the child alone, a complete physical is done with the parent present, and the doctor renders a medical diagnosis based on both the history and the physical. The victim's statements to the doctor fall within the medical exception to the hearsay rule.

Am Jur 2d, Evidence §§ 785 et seq.

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death. 1 ALR2d 365.

8. Rape and Allied Sexual Offenses § 107 (NCI4th)— first-degree sexual offense—victim engaging in fellatio with defendant—sexual act by defendant

There was sufficient evidence of first-degree sexual offense where evidence presented by the State showed that defendant forced the victim to engage in fellatio with him and that he attempted to place his penis in her vagina, and the victim testified that defendant put a little of his finger into her vagina. Defendant's argument that the victim engaged in fellatio with him and that he performed no sexual act with her is meritless.

Am Jur 2d, Rape §§ 53 et seq.

9. Rape and Allied Sexual Offenses § 123 (NCI4th)— first-degree sexual offense—instruction on attempt as lesser included offense—refused

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by denying defendant's motion to instruct the jury on the lesser included offense of attempted first-degree sexual offense where the State tried the case on an all or nothing basis, seeking only a conviction on the greater offense, the defendant did not present evidence of the lesser offense, and the State's evidence was not conflicting.

Am Jur 2d, Rape §§ 108-111.

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

10. Criminal Law § 890 (NCI4th Rev.)— first-degree sexual offense against child—instructions on continued deliberations—no error

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by recharging the jury on its own motion where the jury began its deliberations after the trial court's instructions at 12 noon; at 1:25 they were excused for lunch until 2:30; at 3:00 the jury indicated to the court that they were having difficulty reaching a verdict; the trial court charged the jury using N.C.P.I. Crim. 101.40; the foreman sent a note to the jury at 3:55 p.m. indicating that some jurors were still voting not guilty; the court charged the jury pur-

suant to N.C.G.S. § 15A-1235; and the foreman announced at 4:55 that the jury had reached a verdict. Applying the reasoning of *State v. Patterson*, 332 N.C. 409, the trial court's instructions were not an attempt to coerce the jury, but rather to impress upon the jury the importance of reaching a verdict.

Am Jur 2d, Criminal Law § 155; Infants §§ 15, 17.5.

11. Criminal Law § 448 (NCI4th Rev.)— first-degree sexual offense against child—prosecutor's argument—no gross impropriety

There was no gross impropriety requiring intervention *ex mero motu* during the prosecutor's closing argument in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter where the prosecutor argued that there were only 12 people in the world who could protect the little girl from the 26-year-old bully.

Am Jur 2d, Trial §§ 664 et seq.

Appeal by defendant from judgment entered 25 August 1995 by Judge Sanford L. Steelman, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 22 August 1996.

Attorney General Michael F. Easley, by Associate Attorney General Sondra C. Panico, for the State.

James A. Phillips, Jr. for defendant-appellant.

WALKER, Judge.

Defendant was convicted of first degree statutory sexual offense and was sentenced to a term of life imprisonment. Evidence presented by the State tended to show that during October 1993, the defendant subjected his eight-year-old daughter, N.W., to oral and vaginal intercourse and other sexual touching. In February 1994, N.W., her mother and her three siblings moved out of the residence they were sharing with the defendant and moved in with N.W.'s grandmother. Shortly after the move, N.W. disclosed to her mother and grandmother the acts defendant had done to her while she lived with him. On 23 February 1994, N.W. was examined by Dr. Linda Williamson Lawrence, a pediatrician, who corroborated N.W.'s allegations of sexual abuse.

The defendant testified that he was never alone with N.W. or any of his children and that the acts N.W. testified to never occurred.

[1] Defendant presents eleven assignments of error on appeal. First, the defendant claims the trial court committed reversible error in not allowing an inquiry as to whether a prospective juror had any prejudice or bias against persons of a different race being married to each other. Defendant argues that because he could not explore the bias and prejudice of each prospective juror, his right to fully examine these jurors was violated and constituted prejudicial error. However, the record shows that the defendant was permitted to inquire into the fitness and competency of all prospective jurors.

The regulation of the manner and the extent of the inquiry of prospective jurors on *voir dire* is subject to the trial court's close supervision and rests largely in the court's discretion. *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975), *death penalty vacated*, 428 U.S. 903, 49 L. Ed. 2d. 1208 (1976), *(citing State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972), *cert. denied*, 410 U.S. 987, 36 L. Ed. 2d 184 (1973)). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 547 (1994) (*citing State v. Carson*, 320 N.C. 328, 357 S.E.2d 662 (1987)). Defendant fails to show how he was prejudiced by not being allowed to inquire into the juror's feeling on interracial marriage; therefore, this assignment of error is overruled.

[2] The defendant next argues that the trial court erred in allowing N.W. to testify as to his age without a proper foundation. The defendant contends that N.W.'s testimony was hearsay and therefore inadmissible.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 801, "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Here, the defendant's age was within N.W.'s personal knowledge and was not hearsay. Moreover, the defendant has not shown how he was prejudiced by this evidence, as he later testified to his age. Defendant's second assignment of error is overruled.

[3] In his third and fourth assignments of error, the defendant asserts that the trial court committed reversible error in allowing the State to combine N.W.'s oral trial testimony with a prior written statement made by N.W. which was introduced without a proper foundation. We disagree.

The defendant argues that the State failed to lay a proper foundation showing that the statement was written by N.W. Under N.C. Gen. Stat. § 8C-1, Rule 901(b)(2), authentication or identification may be established through "nonexpert opinion as to the genuineness of the handwriting, based upon familiarity not acquired for purposes of the litigation." Initially, when asked if the written statement was her own statement, N.W. stated that it might be her statement but her handwriting did not look the same now. However, she identified the paper writing as the yellow paper on which she wrote the statement for Detective Tracy Wyrick and testified that the handwriting on the papers was her handwriting when she was eight years old. Detective Wyrick also testified that on 23 February 1994, he gave N.W. a blank yellow legal pad, asked her to write down what the defendant had done to her, and left her alone in an interview room while he remained outside. He testified that no one else was allowed to enter the interview room and that when N.W. left the room, she handed him her written statement on the yellow note paper. Detective Wyrick also stated that he read the statement, asked N.W. to read it, and that he had complete custody and control of the written statement from that date until the trial. We find that the written statement was authenticated by the testimony of both N.W. and Detective Wyrick and was properly admitted into evidence.

[4] The defendant further contends that N.W.'s prior written statement should not have been combined with her oral testimony. However, in this State, a prior consistent statement of the witness is admissible to strengthen his/her credibility. "And it makes no difference, in this State at least, whether such evidence appears in a verbal or written statement, nor whether verified or not." *State v. Sauls*, 291 N.C. 253, 261, 230 S.E.2d 390, 394 (1976), *cert. denied*, 431 U.S. 916, 53 L. Ed. 2d 226 (1977) (*quoting Bowman v. Blankenship*, 165 N.C. 519, 522, 81 S.E. 746, 747 (1914)). Here, the trial court correctly allowed the State to introduce the prior written statement of N.W. to corroborate her in-court testimony and the third and fourth assignments of error are overruled.

[5] In his fifth assignment of error, the defendant argues that the trial court erred in allowing the State to introduce evidence as to whether N.W. loved the defendant. The defendant contends the evidence was improperly admitted because it was not relevant. In the alternative, he argues that even if the testimony was relevant, that the probative value was substantially outweighed by the unfair prejudice created by such testimony.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 401, relevant evidence is defined as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would have been without the evidence." Here, N.W. testified that she loved her father before the alleged sexual abuse but that she no longer loves him. This change in her affection towards the defendant is relevant to show that it is more likely that he committed these acts. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, determining whether the probative value of such evidence is substantially outweighed by danger of unfair prejudice is within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). Again, the defendant has failed to show any prejudice by N.W. being allowed to testify that she no longer loves the defendant. This assignment of error is without merit.

[6] In the defendant's sixth assignment of error, he contends that the trial court erred in allowing the State to proceed into new areas of evidence upon redirect examination of N.W.

Generally, redirect examination cannot be used to repeat direct testimony or to introduce entirely new matter. However, "the trial judge has discretion to permit counsel to introduce relevant evidence which could have been, but was not brought out on direct." *State v. Williams*, 74 N.C. App. 394, 399, 328 S.E.2d 799, 802 (1985) (*quoting State v. Locklear*, 60 N.C. App. 428, 430, 298 S.E.2d 766, 767 (1983)). The testimony at issue here pertained to whether the defendant owned a gun. On direct examination, N.W. was asked whether she was afraid of the defendant and whether he had ever threatened her. She testified that defendant stated that he would kill her and her family if she told anyone what he did to her. Since the State could have continued with this line of questioning on direct to inquire of N.W. in what manner the defendant had threatened her, it was within the court's discretion to allow the State, in its redirect examination, to ask her about the gun in the defendant's possession. We conclude that the trial court did not abuse its discretion in allowing this line of questioning during the State's redirect of N.W.

[7] In his seventh assignment of error, defendant contends that the trial court erred in admitting Dr. Lawrence's testimony concerning statements made by the N.W. during the examination. The defendant argues that this testimony was hearsay and did not fall under N.C. Gen. Stat. § 8C-1, Rule 803(4) (allowing hearsay evidence if the statements are made for the purpose of medical diagnosis or treatment).

The medical exception to the hearsay rule provides the following statements are not excluded by the hearsay rule:

> (4) Statements for the Purposes of Medical Diagnosis or Treatment—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4). This exception applies whether or not the declarant is available as a witness.

Our Supreme Court has affirmed the application of Rule 803(4) to medical testimony of a child's statement given to the physician in child sex abuse and child rape cases. In *State v. Aquallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), a Department of Social Services worker took the child to Dr. Sinal as part of the Child Medical Examination Program. The court held that the statements made by the child to the doctor were made for the purpose of treatment or diagnosis and held them admissible as substantive evidence under Rule 803(4). The court in *Aquallo*, found the victim's statements were pertinent to diagnosis and treatment for the following reasons:

> First, the statements suggested to Dr. Sinal the nature of the problem, which, in turn, dictated the type of examination she performed for diagnostic purposes. Additionally, the victim's identification of the defendant as perpetrator was pertinent to continued treatment of the possible psychological and emotional problems resulting from the rape.

Id. at 597, 350 S.E.2d at 81.

Here, N.W. was seen by Dr. Lawrence's office under a Child Medical Exam program administered by the Stanly County Department of Social Services. Dr. Lawrence testified that as part of the child medical examination, she takes a comprehensive history from the child alone and then does a complete physical examination while the parent is present. Dr. Lawrence further testified that she then renders a medical diagnosis which is based on both the history obtained and the physical examination. Thus, we find that because N.W.'s statements to Dr. Lawrence were made during her medical diagnosis of N.W. they fall within the medical exception to the hearsay rule, and this assignment of error is overruled.

[8] In defendant's eighth assignment of error, he asserts that there was insufficient evidence to establish defendant's guilt of first degree statutory sexual offense.

In reviewing a trial court's denial of a motion to dismiss this Court must consider the evidence in the light most favorable to the State, giving the State the benefit of all permissible favorable inferences. *State v. Everhart*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

> If there is substantial evidence—whether direct, circumstantial or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Moss, 332 N.C. 65, 70, 418 S.E.2d 213, 216 (1992) (*quoting State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citations omitted)).

A person is guilty of first degree statutory sexual offense if he engages in a sexual act with a child under the age of 13 years old and the defendant is at least 12 years old and is at least four years older than the victim. A sexual act is defined by statute as:

> [c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body; provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.1(4) (1986). Under this definition, there are two types of sexual acts. The first type requires penetration by "any object" into two specifically named bodily orifices. The second type has been interpreted by our courts to require a touching. Fellatio is of this second type and "may be accomplished by mere touching of the male sex organ to the lips or mouth of another." *State v. Bailey*, 80 N.C. App. 678, 682, 343 S.E.2d 434, 437, *review improvidently allowed*, 318 N.C. 652, 350 S.E.2d 94 (1986) (*citing State v. Goodson*, 313 N.C. 318, 327 S.E.2d 868 (1985)). Defendant contends that by definition the act of vaginal intercourse is not a sexual act. Further, he argues because it was N.W. who performed fellatio on him, that he did not commit a sexual act with N.W.

Evidence presented by the State showed that the defendant would force N.W. to engage in fellatio with him and that he would

attempt to place his penis in her vagina. Additionally, there was testimony by N.W. that the defendant put "a little of his finger" into her vagina. This Court has previously held that a child victim performing fellatio on a defendant comes within the definition of "sexual act." *See State v. Hewett*, 93 N.C. App. 1, 12, 376 S.E.2d 467, 474 (1989). Defendant's argument that N.W. engaged in fellatio with him and thus he performed no sexual act with her is meritless, as "fellatio is defined to include any touching of the male sex organ by the lips, tongue or mouth of another person." *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *review denied*, 332 N.C. 348, 421 S.E.2d 158 (1992). This evidence, taken in a light most favorable to the State, was sufficient to withstand defendant's motion to dismiss the charge of first degree statutory sexual offense.

[9] In his ninth assignment of error, the defendant contends that the trial court committed reversible error in denying the defendant's motion to instruct the jury on the lesser included offense of attempted first degree sex offense which he requested at the charge conference.

In *State v. Ward*, 118 N.C. App. 389, 455 S.E.2d 666 (1995), this Court held that "a trial court must submit a lesser included offense instruction if the evidence would permit a jury rationally to find defendant guilty of the lesser included offense and acquit him of the greater." *Id.* at 398, 455 S.E.2d at 671 (*quoting State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986)). However, if the State tries the case on an "all or nothing basis," seeking a conviction only on the greater offense, then the trial court needs to present an instruction on the lesser included offense only when the "defendant presents evidence thereof or when the State's evidence is conflicting." *Id.* at 398, 455 S.E.2d at 671 (*quoting State v. Bullard*, 97 N.C. App. 496, 498, 389 S.E.2d 123, 124, *review denied*, 327 N.C. 142, 394 S.E.2d 181 (1990)).

The State proceeded in this case on an "all or nothing" basis. Thus, the trial judge needed only to instruct the jury on a lesser included offense if the defendant presented evidence of the lesser included offense or if the State's evidence was conflicting. Neither of these situations occurred in this case. The defendant testified he was never alone with N.W. and therefore did not sexually assault her. On the other hand, the State's evidence at trial was not conflicting, as the testimony of N.W., Dr. Lawrence and the other corroborating witnesses all tended to show that the defendant forced N.W. to perform

fellatio and that N.W. was also vaginally penetrated. The trial court properly denied defendant's request to charge on the lesser included offense.

[10] In his tenth assignment of error, the defendant asserts that the trial court committed reversible error when it recharged the jury on its own motion.

The jury began its deliberations after the trial court's instructions at 12 noon. At 1:25 p.m., the jury was excused for lunch until 2:30 p.m. The jury then resumed its deliberations. However, at 3:00 p.m. they indicated to the court that they were having difficulty reaching a verdict. The trial court again charged the jury using N.C.P.I., Crim. 101.40 regarding the failure of a jury to reach a verdict. At 3:55 p.m., the foreman sent a note to the court indicating that some of the jurors were still voting "not guilty." The court then charged the jury pursuant to N.C. Gen. Stat. § 15A-1235, which urged the jurors to re-examine their own views without surrendering their convictions. At 4:55 p.m., the foreman announced that the jury had reached a verdict.

In *State v. Patterson*, 332 N.C. 409, 420 S.E.2d 98 (1992), the jury began its deliberations at 3:47 p.m. and continued until the jurors were adjourned at 5:06 p.m. Deliberations resumed the next morning at 9:37 a.m. From 9:56 a.m. until 10:27 a.m. the jurors returned to the courtroom and examined exhibits. At 11:15 a.m., the court was notified by a letter from the jury that the jury was unable to reach a unanimous decision. The court then charged the jury under N.C. Gen. Stat. § 15A-1235, and the jury resumed deliberations at 11:24 a.m. *Id.* at 414, 420 S.E.2d at 100. At 11:55 a.m., the jury sent another note to the court stating it was hopelessly deadlocked. The judge told the jurors he felt they should continue deliberating and declared a lunch recess. After lunch, the judge again charged the jury under N.C. Gen. Stat. § 15A-1235. Fifty-five minutes later, the jury returned with a guilty verdict. *Id.* at 415, 420 S.E.2d at 101.

The defendant in *Patterson* argued that the trial court coerced a verdict by refusing to grant a mistrial when the jury stated they were hopelessly deadlocked. In determining whether a court has coerced the jury into a verdict, we must analyze the totality of the circumstances facing the trial court when it acted. *Id.* at 416, 420 S.E.2d at 101. In *Patterson*, the Supreme Court found that the following circumstances existed: The jury deliberated for less than four hours, the jury was instructed in strict accordance to N.C. Gen. Stat. § 15A-1235, the jurors were reminded not to forsake their honest convictions and

the "trial court never impugned the efforts of the jury or implied in any way that the jury might be held for any unreasonable period of time to reach a unanimous verdict." *Id.* at 416, 420 S.E.2d at 101. The court found, based on the totality of these circumstances, that "its refusal to grant a mistrial nor any of its other actions at trial were coercive of the jury's verdict." *Id.*

The circumstances in the instant case are very similar to the facts in *Patterson*. In both cases, the jury deliberated for approximately four hours with repeated breaks in deliberations. This is not an unreasonable length of time. Additionally, both crimes involved felonies that could result in life imprisonment for the defendants. The trial judge in the instant case, like *Patterson*, charged the jury in accordance with N.C. Gen. Stat. § 15A-1235. Moreover, in this case, the defendant did not object to the court's decision to give the additional instruction to the jury and there is nothing in the record to indicate that the court was attempting to coerce the jury. Thus, applying the reasoning of *Patterson* to these facts, we find the trial court's instructions to the jury were not an attempt to coerce the jury, but rather were given to impress upon the jury the importance of reaching a verdict.

[11] Defendant's final assignment of error charges that the trial court committed reversible error in permitting the prosecutor to argue that N.W. could only be protected by the jury.

In his closing argument, the prosecutor argued that "[t]here are only 12 people in this world who can do something to protect that little girl from that 26-year-old bully." The defendant claims that because there was no evidence introduced which tended to show the defendant constituted a present threat to N.W., the prosecutor improperly made an argument on the basis of matters outside the record in violation of N.C. Gen. Stat. § 15A-1230.

In *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991), the Court stated:

> [t]he conduct of the arguments of counsel is left to the sound discretion of the trial judge. In order for defendant to be granted a new trial, the error must be sufficiently grave that it is prejudicial. Ordinarily, an objection to the arguments by counsel must be made before verdict, since only when the impropriety is gross is the trial court required to correct the abuse ex mero motu.

Id. at 185, 400 S.E.2d at 418 (*citing State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)).

Unless the defendant objects, the trial court is not required to interfere ex mero motu unless the arguments " 'stray so far from the bounds of propriety as to impede the defendant's right to a fair trial.' " *Id.* (*citing State v. Harris*, 308 N.C. 159, 169, 301 S.E.2d 91, 98 (1983)), (*quoting State v. Davis*, 305 N.C. 400, 421, 290 S.E.2d 574, 587 (1982)).

Here, the defendant did not object at the time that the prosecutor was making his closing argument. Thus, the trial court was not required to interfere on its own unless the prosecutor's remarks were so grossly inappropriate as to impede the defendant's right to a fair trial. We find that the prosecutor's statements were within the bounds of propriety and did not impede the defendant's right to a fair trial.

No error.

Judges EAGLES and McGEE concur.

LOUIS BARBER, WADE BARBER, AND FRANK BARBER, PLAINTIFFS v. CONTINENTAL GRAIN COMPANY AND LEBANON CHEMICAL CORPORATION, DEFENDANTS, AND LOUIS BARBER, WADE BARBER, AND FRANK BARBER, PLAINTIFFS v. TRI-PORT TERMINALS, INC., DEFENDANT

No. COA95-36

(Filed 5 November 1996)

1. Agriculture § 24 (NCI4th)— action on diluted fertilizer—sample not from approved source—summary judgment for defendants

The trial court did not err by entering summary judgment for defendants where plaintiffs brought an action for breach of implied warranty of merchantability, fraud, unfair and deceptive trade practices, and negligence arising from plaintiffs' use of fertilizer on a corn crop which had an atypically low yield. A sample from fertilizer tanks on plaintiffs' farm taken and tested unofficially by the North Carolina Department of Agriculture was prop-

erly disqualified as evidence because it did not comply with the provisions of N.C.G.S. § 106-662(b)(4) in that the statute requires samples to be obtained from a source approved by the Commissioner of Agriculture and the "unofficial" sample here was obtained from a storage tank on plaintiffs' farm some time following delivery, which is not an approved source under the Commissioner's rule. There was thus no competent evidence before the trial court that plaintiffs had fulfilled the testing prerequisite for suit set out in N.C.G.S. § 106-662(e)(4).

Am Jur 2d, Agriculture §§ 52, 57.

2. Appeal and Error §§ 367, 147 (NCI4th)— motion to amend record—addition of assignments of error denied—argument not considered

Plaintiffs' argument regarding compliance with the Fertilizer Law in collecting samples as a precondition to claims for fraud, unfair and deceptive trade practices, negligence, and breach of express warranty was not discussed, beyond observing that plaintiffs misinterpret *Potter v. Tyndall*, 22 N.C. App. 129, where plaintiffs motion to amend the record to include assignments of error upon which the argument is based was denied.

Am Jur 2d, Appellate Review § 508.

3. Pleadings § 369 (NCI4th)— futile motion to amend complaint denied—no error

Plaintiffs' motion to amend their complaint to add a claim for breach of express warranty against defendant Lebanon was properly denied where amendment would have been futile in that the claim would have been based on a nitrogen concentration much lower than warranted, but plaintiffs did not meet the requirements of N.C.G.S. § 106-662.

Am Jur 2d, Pleadings § 307.

4. Appeal and Error § 150 (NCI4th)— constitutional argument—not raised at trial—not considered on appeal

Plaintiffs' constitutional arguments regarding testing requirements for instituting suit under the Fertilizer Law were not addressed where no constitutional claim appears in plaintiffs' pleadings or in any other documentation filed with the trial court prior to its ruling.

Am Jur 2d, Appellate Review § 36.

Appeal by plaintiffs from orders entered 20 May 1994 and 6 June 1994 by Judge William C. Griffin, Jr., in Martin County Superior Court. Heard in the Court of Appeals 29 January 1996.

Marvin Schiller and Law Offices of Marvin Blount, Jr., by Marvin K. Blount, Jr., for plaintiff-appellants.

Poyner & Spruill, L.L.P., by George L. Simpson, III, for defendant-appellee Continental Grain Company.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for defendant-appellee Lebanon Chemical Corporation.

Womble Carlyle Sandridge & Rice, PLLC, by Johnny M. Loper, for defendant-appellee Tri-Port Terminals, Inc.

JOHN, Judge.

Plaintiffs appeal the trial court's grant of defendants' motions for summary judgment on plaintiffs' claims of breach of implied warranty of merchantability, fraud, unfair and deceptive trade practices, and negligence. We affirm the trial court.

Pertinent facts and procedural information are as follows: during the summer of 1990, plaintiffs Louis, Frank, and Wade Barber leased land in Hyde County upon which they planted approximately 2200 acres of corn. Between 21 April and 22 June 1990, defendant Lebanon Chemical Corporation (Lebanon) delivered some 340 tons of fertilizer, composed of a liquid urea ammonium nitrate solution (UAN), to plaintiffs' farm for use on the corn crop. UAN was pumped from Lebanon's delivery trucks into storage tanks placed by the company on the farm property.

The UAN delivered by Lebanon was imported from Bulgaria by defendant Continental Grain Company (Continental) and, upon arrival in Norfolk, Virginia, was held in a storage facility operated by defendant Tri-Port Terminals, Inc. (Tri-Port). The UAN was imported at a concentration of 32% nitrogen; however, plaintiffs ordered a 30% nitrogen solution, and Tri-Port diluted the UAN to this level per Lebanon's instructions by adding water. Plaintiffs allege the fields upon which the UAN was applied yielded an atypically low amount of bushels per acre. Tests conducted by the North Carolina Department of Agriculture (NCDA) revealed plaintiffs' corn suffered from insufficient nitrogen.

In late June or early July 1990, Louis Barber telephoned James R. Stevens (Stevens), Fertilizer Administrator for the NCDA from 1974 until his retirement 1 December 1991, and requested sampling and testing of the UAN contained in the various tanks on plaintiffs' farm. Under the North Carolina Fertilizer Law (the Fertilizer Law), N.C.G.S. §§ 106-655 *et seq.*, the Commissioner of Agriculture (the Commissioner) is authorized to test commercial fertilizers sold in North Carolina to ensure their compliance with the provisions of the Fertilizer Law. *See* N.C.G.S. § 106-658 (1995) and N.C.G.S. § 106-662 (1995). Stevens, as Fertilizer Administrator, was the Commissioner's designated agent for test administration purposes.

Stevens agreed to send an inspector to plaintiffs' farm, but cautioned Barber that any samples would be "unofficial," as Stevens had adopted a rule mandating that samples taken for the purpose of enforcing the Fertilizer Law be taken only from:

> (a) containers located on the manufacturer's premises (b) vehicles used to transport the fluid fertilizer from the manufacturer to the distributor (c) containers located on the premises of the distributor and (d) vehicles owned by the distributor en route to the consumer.

By affidavit, Stevens explained his rationale for promulgating the rule:

> It was the policy of the Commissioner not to take official samples of fluid fertilizers sold in bulk from storage tanks or other containers located on the consumer's premises, because of the risk of contamination of the fluid fertilizer after it was delivered into the consumer's custody and control, *i.e.*, there was no way to be certain that fluid fertilizers sold in bulk remained in their original "as manufactured" condition once they were beyond the custody and control of the manufacturer or distributor. If an official sample reveals that a commercial fertilizer is deficient in the guaranteed analysis of any ingredient, the Commissioner is required by the North Carolina Commercial Fertilizer Law to impose a penalty on the manufacturer. Given the risk of contamination, it was neither fair nor reasonable to impose penalties based on bulk fluid fertilizer samples taken "on the farm," and no official samples of fluid fertilizer sold in bulk were taken "on the farm" from the mid-1970's through December 1, 1991.

In a 31 July 1990 letter, Stevens notified plaintiffs that fertilizer in one of the tanks tested contained a nitrogen concentration of only

18.1%. However, Stevens again reiterated that the sample was "unofficial" and for informational purposes only.

Based upon their claim of insufficient nitrogen concentration in the UAN, plaintiffs instituted suit 28 March 1991 against Continental for breach of implied warranty of merchantability, fraud, and unfair and deceptive trade practices. Continental filed answer and plaintiffs filed an amended complaint 2 October 1991, including identical claims against Lebanon. In February 1993, plaintiffs moved to amend their complaint to allege a breach of express warranty claim against Lebanon. Thereafter, plaintiffs instituted a separate action against Tri-Port, containing claims of breach of implied warranty of merchantability, fraud, unfair and deceptive trade practices, and negligence. The cases were consolidated by consent order dated 15 October 1993.

Defendants' subsequent motions for summary judgment and plaintiffs' motion to amend were heard 22 April 1994. On 20 May 1994, the trial court entered an order allowing each defendant's motion for summary judgment. On 6 June 1994, plaintiffs' motion to amend was denied. Plaintiffs filed notice of appeal to this Court 15 June 1994.

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[1] The issue on appeal is whether the trial court properly interpreted N.C.G.S. § 106-662 as precluding each of plaintiffs' claims against defendants. We hold the trial court did not err.

G.S. § 106-662(e)(4) provides:

> No suit for damages claimed to result from the use of any lot of mixed fertilizer or fertilizer material may be brought unless it shall be shown by an analysis of a sample taken and analyzed in accordance with the provisions of this Article, that the said lot of fertilizer as represented by a sample or samples taken in accordance with the provisions of this section does not conform to the provisions of this Article with respect to the composition of the mixed fertilizer or fertilizer material, unless it shall appear to the Commissioner that the manufacturer of the fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are prohibited by the provisions of this Article, or unless it shall appear to the Commissioner that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudu-

> lent goods or unless it shall appear to the Commissioner that the manufacturer of the fertilizer in question, or a representative, agent or employee of the manufacturer, has violated any provisions of G.S. 106-663.

In this context, Stevens' affidavit stated as follows:

> Neither I nor the Commissioner had any information that Continental Grain Company, Lebanon Chemical Company, or Tri-Port Terminals, Inc. employed any ingredients prohibited by the North Carolina Commercial Fertilizer Law in the manufacture of goods offered for sale or distribution in North Carolina during the 1990 season, or that they offered for sale during that season any kind of dishonest or fraudulent goods, or that they or their representatives, agents, or employees had violated any of the provisions of N.C.G.S. 106-663.

These statements of Stevens were uncontradicted. In order to maintain their claims against defendants, therefore, plaintiffs were obligated by the terms of G.S. § 106-662(e)(4) to show

> by an analysis of a sample taken and analyzed in accordance with the provisions of this Article, that [the fertilizer in question] [did] not conform to the provisions of this Article with respect to [its] composition.

Examination of G.S. § 106-662, the section of the Fertilizer Law dealing with sampling, inspection, and testing, reveals two approved methods for collection of fertilizer samples. First, G.S. § 106-662(e) provides that a *consumer* may draw a sample upon notice to the manufacturer or seller and under specified conditions. There is no contention in the case *sub judice* that plaintiffs availed themselves of the sampling provisions set out in G.S. § 106-662(e). Second, under G.S. § 106-662(b), the *Commissioner or his agent* may draw a sample, and may do so without notice to the manufacturer or seller. Plaintiffs insist the standards of G.S. § 106-662(b) were met regarding the testing at issue, and thus we address this section in detail.

G.S. § 106-662(b) mandates certain procedures by which the Commissioner may secure an "official sample" of fertilizer. *See* N.C.G.S. § 106-657(15) (1995). Subsection (1) dictates the amount of fertilizer which must be analyzed and the requisite number of containers to be sampled per lot. Subsection (2) prescribes the methodology to be employed in drawing the sample.

The remainder of G.S. § 106-662(b) states:

> (3) The Board of Agriculture may modify the provisions of this subsection to bring them into conformity with any changes that may hereafter be made in the official methods of and recommendations for sampling commercial fertilizers which shall have been adopted by the Association of Official Analytical Chemists or by the Association of American Plant Food Control Officials. Thereafter, such methods and recommendations shall be used in all sampling done in connection with the administration of this Article in lieu of those prescribed in subdivisions (1) and (2) of this subsection.
>
> (4) All samples taken under the provisions of this section shall be taken from original unbroken bags or containers, the contents of which have not been damaged by exposure, water or otherwise; provided, that any commercial fertilizer offered for sale, sold or distributed in bulk may be sampled in a manner approved by the Commissioner.
>
> (5) The Commissioner shall refuse to analyze all samples except those taken under the provisions of this section and no sample, unless so taken, shall be admitted as evidence in the trial of any suit or action wherein there is called into question the value or composition of any lot of commercial fertilizer distributed under the provisions of this Article.
>
> (6) In the trial of any suit or action wherein there is called in question the value or composition of any lot of commercial fertilizer, a certificate signed by the fertilizer chemist and attested with the seal of the Department of Agriculture, setting forth the analysis made by the chemist of the Department of Agriculture, of any sample of said commercial fertilizer, drawn under the provisions of this section and analyzed by them under the provisions of the same, shall be prima facie proof that the lot of fertilizer represented by the sample was of the value and constituency shown by said analysis. And the said certificate of the chemist shall be admissible in evidence.

Plaintiffs maintain the test results received from Stevens constituted an "official sample" which satisfied the statutory prerequisites for initiation of suit against defendants and admissibility into evidence at subsequent court proceedings. Plaintiffs first point to the affidavit of Danny Alton Turner (Turner), an NCDA fertilizer inspec-

tor, reciting that he took fertilizer samples from storage tanks on plaintiffs' farm

> in accordance with the sampling methods of the Association of Official Analytical Chemists [AOAC], which have been endorsed by the Association of American Plant Food Control Officials.

In addition, plaintiffs reference the affidavit of George Winstead, a fertilizer chemist for the NCDA, stating he analyzed the samples drawn by Turner using the

> official methods of analysis adopted by the Board of Agriculture in conformance with laboratory practices and methods of the [AOAC].

Both affidavits are attested with the seal of the NCDA.

Plaintiffs contend that since the sample reflecting an 18.1% nitrogen concentration was drawn in accordance with procedures adopted by the AOAC, the requirements of 106-662(b)(3) were satisfied. Moreover, plaintiffs continue, since the chemical analysis report concerning the sample was signed by fertilizer chemist Winstead and attested with the seal of the NCDA, the report was admissible in evidence under 106-662(b)(6).

Notwithstanding, in order for the report of a chemical analysis to be admissible into evidence, the sample upon which the report is based must be drawn "under [all] the provisions of this section," G.S. §§ 106-662(b)(5) & (6), and the record does not reflect plaintiffs' compliance with G.S. § 106-662(b)(4).

While G.S. §§ 106-662(b)(1) & (2) & (3) pertain to the *quantity* of sample required to be drawn and to the *methodology* to be employed in taking a sample, G.S. § 106-662(b)(4) addresses the *source* of a sample:

> All samples taken under the provisions of this section shall be taken from original unbroken bags or containers, the contents of which have not been damaged by exposure, water or otherwise; provided, that any commercial fertilizer offered for sale, sold or distributed in bulk may be sampled in a manner approved by the Commissioner.

"Bulk fertilizer" is defined by the Fertilizer Law as "a commercial fertilizer distributed in non-package form." N.C.G.S. § 106-657(2). The 340 tons of the liquid fertilizer UAN at issue in the case *sub judice*

were transported by tanker trucks to storage tanks on plaintiffs' farm and thus qualify as "bulk fertilizer," plaintiffs in any event not contending otherwise.

Under G.S. § 106-662(b)(4), samples of fertilizer distributed in bulk are to be obtained in a "manner," that is, in the context of the subsection, from a *source*, "approved by the Commissioner." At this juncture, the rule promulgated by Stevens, designated agent of the Commissioner, and in effect at the time plaintiffs' samples were taken, bears repetition. It directed that samples of fluid bulk fertilizer were to be drawn from:

> (a) containers located on the manufacturer's premises (b) vehicles used to transport the fluid fertilizer from the manufacturer to the distributor (c) containers located on the premises of the distributor and (d) vehicles owned by the distributor en route to the consumer.

By contrast, the 18.1% nitrogen content sample was obtained from a storage tank on plaintiffs' farm some time following delivery of the UAN, not an approved source under the Commissioner's rule, and therefore did not comply with the "manner approved by the Commissioner." *See* G.S. § 106-662(b)(4).

Plaintiffs insist that compliance with G.S. § 106-662(b) does not require observance of a policy enunciated by an agent, the Fertilizer Administrator, under authority of the Commissioner. We disagree. The express terms of G.S. § 106-662(b)(4) encompass the directive of the Commissioner within its specified requirements; hence plaintiffs failed to satisfy the statutory criteria.

In sum, the 18.1% nitrogen sample did not comply with the provisions of G.S. § 106-662(b) and accordingly was disqualified as evidence "in the trial of [the] suit or action wherein there [was] called into question the value or composition," G.S. § 106-662(b)(5), of the UAN purchased by plaintiffs. There thus being no competent evidence before the trial court that plaintiffs had fulfilled the testing prerequisite for suit set out in G.S. § 106-662(e)(4), defendants met their summary judgment burden of demonstrating "that an essential element of the opposing party's claim is nonexistent," *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974), and the trial court did not err by allowing defendants' motions.

[2] Plaintiffs alternatively contend that in the event we hold, as we have, that they failed to comply with the Fertilizer Law in collection

of the nitrogen deficient sample, such compliance was not a precondition to their claims of fraud, unfair and deceptive trade practices, negligence, and breach of express warranty, and only precluded their claim for breach of implied warranty of merchantability. We note plaintiffs' motion to amend the record to include assignments of error upon which this argument is based was denied 15 May 1995 by order of this Court. We therefore decline to discuss further plaintiffs' alternative argument, *see* N.C.R. App. P. 10(a) (scope of appellate review limited to consideration of assignments of error set out in the record on appeal), save to observe plaintiffs misinterpret this Court's holding in *Potter v. Tyndall*, 22 N.C. App. 129, 205 S.E.2d 808, *cert. denied*, 285 N.C. 661, 207 S.E.2d 762 (1974), upon which they rely. *See Potter*, 22 N.C. App. at 133, 205 S.E.2d at 811 ("When a litigant alleges that he has been damaged by the use of inherently defective fertilizer, he must comply with [statutory prerequisites]").

[3] As for plaintiffs' contention that their motion to amend the complaint to add a claim for breach of express warranty against Lebanon was erroneously denied, we note a motion to amend is properly denied where the amendment would be futile. *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). Plaintiffs' motion indicated the express warranty claim was to be based on the theory that Lebanon expressly warranted the fertilizer it delivered was of a 30% nitrogen concentration, when in reality the concentration was much lower. As we have held plaintiffs failed to meet the requirements of G.S. § 106-662, amendment of their complaint to add an express warranty claim against Lebanon would have been futile. The trial court therefore did not err by denying plaintiffs' motion to amend.

[4] Finally, plaintiffs assert that the sampling and testing requirements for instituting suit under the Fertilizer Law violated their equal protection and due process rights under the federal and state constitutions. However,

> because it does not affirmatively appear in the record that the constitutional issue was both raised and passed upon in the trial court, we will not address it for the first time on appeal.

Nelson v. Battle Forest Friends Meeting, 108 N.C. App. 641, 646, 425 S.E.2d 4, 7, *rev'd on other grounds*, 335 N.C. 133, 436 S.E.2d 122 (1993).

No constitutional claim, state or federal, appears in plaintiffs' pleadings or in any other documentation filed with the trial court prior to its ruling. While the argument of plaintiffs' counsel at pages

81 and 82 of the transcript of the summary judgment hearing does mention the phrase "unconstitutional," neither the trial court's "Order Granting Defendants' Motions for Summary Judgment" nor "the record . . . indicate that the trial court considered the issue in granting summary judgment." *Nelson,* 108 N.C. App. at 646, 425 S.E.2d at 7. Accordingly, we do not address plaintiffs' constitutional arguments.

To summarize, the trial court did not err by entering summary judgment in favor of defendants. Plaintiffs' assignment of error to denial of their motion to amend the complaint is rejected. Plaintiffs' remaining contentions are not properly before us.

Affirmed.

Judges Johnson and Greene concur.

GERALD ALLEN BROWN, PLAINTIFF/APPELLANT v. S & N COMMUNICATIONS, INC., EMPLOYER, HOME INSURANCE COMPANY, CARRIER, APPELLEES

No. COA95-1283

(Filed 5 November 1996)

1. Workers' Compensation § 230 (NCI4th)— disability compensation—impairment of earning capacity

In order to receive disability compensation under the Workers' Compensation Act, the mere fact of an on-the-job injury is not sufficient; rather, the injury must have impaired the worker's earning capacity.

Am Jur 2d, Workers' Compensation §§ 395-399.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

2. Workers' Compensation § 228 (NCI4th)— disability—requisite findings

In order to find a worker disabled under the Workers' Compensation Act, the Industrial Commission must find (1) that plaintiff was incapable of earning the same wages he had earned before his injury in the same employment; (2) that plaintiff was

incapable of earning the same wages he had earned before his injury in any other employment; and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Am Jur 2d, Workers' Compensation § 380.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

3. Workers' Compensation § 234 (NCI4th)— burden of proving disability—effect of approval of Form 21 agreement

Initially, the employee must prove both the extent and degree of his disability, but once the 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. However, the approval of a Form 21 agreement by the Industrial Commission relieves the employee of his initial burden of proving a disability, and the employee receives the benefit of a presumption that he is totally disabled.

Am Jur 2d, Workers' Compensation §§ 395-399.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

4. Workers' Compensation § 254 (NCI4th)— approval of Form 21 agreement—presumption of disability—burden of rebutting presumption

Where the parties executed a Form 21 agreement which was approved by the Industrial Commission, plaintiff met his initial burden of proving a disability, and the presumption of disability continued until defendant employer offered evidence to rebut the presumption.

Am Jur 2d, Workers' Compensation § 453.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

5. Workers' Compensation § 254 (NCI4th)— presumption of continuing disability—rebuttal by employer

An employer may rebut the presumption of continuing total disability arising from a Form 21 agreement either by showing

the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to earn lesser wages than before the injury.

Am Jur 2d, Workers' Compensation § 431.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

6. Workers' Compensation § 254 (NCI4th)— presumption of continuing disability—rebuttal by employer

To rebut the presumption of continuing disability arising from a Form 21 agreement, the employer must produce evidence that (1) suitable jobs are available for the employee; (2) the employee is capable of getting said job taking into account the employee's physical and vocational limitations; and (3) the job would enable the employee to earn some wages. The employer may also rebut the presumption of disability by showing that the employee has unjustifiably refused suitable employment.

Am Jur 2d, Workers' Compensation § 431.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

7. Workers' Compensation § 254 (NCI4th)— presumption of continuing disability—maximum medical improvement not rebuttal

A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the employer's burden of rebutting the presumption of a continuing disability accruing from a Form 21 agreement.

Am Jur 2d, Workers' Compensation § 431.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

8. Workers' Compensation § 254 (NCI4th)— continued disability—maximum medical improvement—burden not shifted

The Industrial Commission erred by placing on plaintiff employee the burden of proving continued disability following a

finding that plaintiff had reached maximum medical improvement. After a finding of maximum medical improvement, the burden remains with the employer to produce sufficient evidence to rebut the presumption of continuing disability and does not shift to the employee.

Am Jur 2d, Workers' Compensation § 431.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

9. Workers' Compensation § 254 (NCI4th)— presumption of disability—rebuttal by employer—burden on employee

If an employer offers sufficient evidence to rebut the presumption of continuing disability, the burden then switches back to the employee to offer evidence in support of a continuing disability or evidence to prove a permanent partial disability under N.C.G.S. § 97-30. The employee may prove a continuing total disability by showing that no jobs are available, that no suitable jobs are available, or that he has unsuccessfully sought employment with the employer.

Am Jur 2d, Workers' Compensation § 431.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

10. Workers' Compensation § 259 (NCI4th)— presumption of total disability—rebuttal by employer—failure of proof by employee—partial disability

If an employee fails to meet the burden of proving a continuing total disability following the employer's rebuttal of the presumption of disability, the disability changes from a total disability to a partial disability under N.C.G.S. § 97-30. When an employee's power to earn is diminished but not obliterated, the employee is entitled to benefits under N.C.G.S. § 97-30 for permanent partial disability.

Am Jur 2d, Workers' Compensation § 381.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

11. Workers' Compensation §§ 252, 259 (NCI4th)— total or partial disability—mutually exclusive—selection of remedy

The remedies for total disability under N.C.G.S. §§ 97-29 or 97-31 and for partial disability under N.C.G.S. § 97-30 are mutually exclusive. However, when an employee cannot be fully compensated under § 97-29 or § 97-31 for total disability, he may still be entitled to compensation for permanent partial disability. The employee may select the remedy which offers the more generous benefits less the amount he or she has already received.

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

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

12. Workers' Compensation § 259 (NCI4th)— presumption of total disability—maximum medical improvement—erroneous shift of burden of proof to employee—opportunity to show permanent partial disability

Where a presumption of continuing total disability was established by an approved Form 21 agreement, the Industrial Commission's erroneous shifting of the burden of proving a temporary total disability to plaintiff employee after a finding of maximum medical improvement, without more, foreclosed plaintiff's opportunity to select the more generous remedy and deprived plaintiff of an opportunity to offer evidence to establish a permanent partial disability and receive additional benefits under N.C.G.S. § 97-30.

Am Jur 2d, Workers' Compensation § 381.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 13 July 1995. Heard in the Court of Appeals 28 August 1996.

Plaintiff Gerald Allen Brown appeals from the 13 July 1995 Opinion and Award of the North Carolina Industrial Commission which awarded plaintiff temporary total disability compensation pur-

suant to N.C.G.S. 97-31(16), past and future medical expenses, and a reasonable attorney's fee and directed defendant to pay the costs of the initial hearing before the Deputy Commissioner.

Plaintiff Gerald Allen Brown is forty three years old, holds a degree in mechanical engineering, and worked for seventeen years before joining defendant S & N Communications as a line foreman in 1989. On 15 May 1991, while working for defendant, plaintiff suffered a compensable injury by accident. Plaintiff was using a hoist for cable wire when the handle on the jack cable turned rapidly and hit him in his right brow and right eye. Following the accident, plaintiff required several surgeries on his right eye. Despite those procedures, plaintiff lost complete functional use of his right eye. As a result of the accident, he suffers a loss of all depth perception, some peripheral and binocular vision, and a loss of 25% of his total visual field.

On 25 June 1991, the parties executed a Form 21 Agreement for Compensation and Disability, which stipulated that plaintiff suffered an "injury by accident arising out of and in the course of said employment" to his right eye and further agreed that plaintiff sustained a disability from the injury and provided weekly compensation "beginning May 15, 1991 and continuing for necessary weeks." The North Carolina Industrial Commission approved the Form 21 Disability Agreement on 30 July 1991. The defendant filed a Form 24, Application to Stop Payment of Compensation, on 7 April 1993. The Industrial Commission approved the Form 24 on 26 July 1993 without a hearing. Plaintiff filed Form 33, Request that Claim be Assigned for Hearing, on 9 February 1993. Deputy Commissioner Neill Fuleihan heard the case on 18 October 1993 in Bryson City, North Carolina and entered an Opinion and Award on 26 October 1994 awarding Plaintiff weekly compensation for total loss of use of his right eye beginning 4 March 1992 and continuing for 120 weeks. The plaintiff appealed to the Full Commission on 4 November 1994 and the Full Commission heard the appeal on 7 June 1995. On 13 July 1995 the Full Commission rendered the following Opinion and Award:

FINDINGS OF FACT

1. Plaintiff is 43 years of age and has a Bachelor of Science degree in mechanical engineering. Plaintiff's employment history consists of four years of military service where he worked in refueling and accounting, seven and one-half years of farming, five years as a technician installing TV antennas and receivers for Lowe's Building Supplies, and two years as a line foreman with

defendant employer, where his job duties consisted of supervising and coordinating the installation of aerial and underground open wire and cable communications equipment. These duties required plaintiff to read blueprints with color coding, supervise crew members, operate digger and bucket trucks, climb and work at heights and underground, and work around moving equipment.

2. On 15 May 1991, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer, resulting in an injury to his right eye.

3. For his 15 May 1991 injury by accident, plaintiff has been seen and treated by Drs. Campbell, Henry, Wood, Isernhagen, Brown, Laborde and Crawford and has been seen and evaluated by Drs. Weidman, III and Ugland.

4. As a result of his 15 May 1991 injury by accident, plaintiff has traumatic aphakia from loss of the crystalline lens in his right eye, traumatic iridectomy from a loss of a portion of the iris in his right eye, irregular astigmatism in his right eye, photoreceptor damage or optic nerve dysfunction in his right eye, a scleral buckle and retinal tears in his right eye, stabismus or non-alignment of both eyes, double vision in his right eye, a loss of binocular vision, a loss of depth perception, a loss of peripheral vision and light sensitivity in his right eye, which have resulted in a complete loss of functional use of his right eye and a 25 percent loss of his total visual field.

5. Although use of a patch over plaintiff's right eye eliminates the double vision in his right eye, a patch causes plaintiff some discomfort inasmuch as his right eye and the area surrounding it is still tender from the 15 May 1991 injury by accident.

6. Plaintiff reached maximum medical improvement from his 15 May 1991 injury by accident on 4 March 1992, at which time he was released to return to work without restriction other than the limitation present from complete loss of functional use of his right eye.

7. Although no further medical treatment is necessary at this time to effect a cure, give relief or lessen plaintiff's disability, the overall health of plaintiff's right eye has been compromised as a result of his 15 May 1991 injury by accident, for which plaintiff may require future medical treatment.

8. As a result of his 15 May 1991 injury by accident and the residuals thereof, plaintiff is unable to return to work in his former employment with defendant employer or in any job which requires fine visual acuity. Defendant employer has not offered plaintiff a job within his limitations.

9. Plaintiff underwent a vocational assessment by Melissa Sue Garland on 4 June 1993.

10. Plaintiff has neither sought employment, nor engaged in any employment, since reaching maximum medical improvement on 4 March 1992, from his 15 May 1991 injury by accident.

11. There is insufficient evidence of record from which to determine by its greater weight that plaintiff is physically or mentally incapable of working in any employment, that he unsuccessfully sought work within his capability for work, that it would be futile to look for work due to preexisting conditions, or that he has obtained employment at a wage less than he earned prior to injury. This finding does not preclude Plaintiff from offering such evidence in the future, and, if he desires to do so, he can file a Form 33 and proceed to hearing.

12. Plaintiff received temporary total disability compensation benefits at a rate of $406.00 per week pursuant to an approved Form 21, from the date of his injury by accident on 15 May 1991, until the Form 24 was approved on 26 July 1993.

The foregoing findings of fact engender the following:

CONCLUSIONS OF LAW

1. Plaintiff can meet his burden of establishing the existence of a disability to earn wages in one of four ways: 1) The production of medical evidence that he is physically or mentally, as a consequence of a work related injury, incapable of any work in any employment; 2) The production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his efforts to obtain employment; 3) The production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e. age, inexperience, lack of education, to seek other employment; or 4) The production of evidence that he has obtained employment at a wage less than earned prior to injury. *Russell v. Lowe's*

> *Products Distribution*, 108 N.C. App. 762, 462 S.E.2d 454 (1993). There is no presumption of disability from the mere fact that wages have not been earned. As the Supreme Court stated in *Hendrix v. Lynn-Corriher Corp.*, 317 N.C. 197, 345 S.E.2d 374 (1986), it is an employee's earning capacity, rather than his earnings, which is the determining factor on the issue of disability, or as the Supreme Court earlier stated in *Hill v. Dubois*, 234 N.C. 446, 67 S.E. 2d 371 (1951), "compensation must be based upon loss of wage earning power rather than the amount actually received."
>
> 2. On 15 May, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer and as a result thereof was temporary totally disabled from 15 May 1991 to 4 March 1992, for which he is entitled to compensation at a rate of $406.00 for the aforementioned period subject to a credit to defendant for temporary total disability compensation paid heretofore. Plaintiff reached maximum medical improvement from his 15 May 1991 injury by accident on 4 March 1992, at which time he was no longer temporarily totally disabled inasmuch as he was able to return to work without restriction other than the limitation present from complete loss of use of his right eye and failed to undertake a reasonable effort to obtain employment, as a further result thereof, sustained a total loss of use of his right eye for which he is entitled to 120 weeks of compensation at a rate of $406.00 per week subject to a credit to defendants for temporary total disability compensation paid beyond 4 March 1992. G.S. §97-2(6); G.S. §97-29; G.S. §97-31(16); G.S. §97-42.
>
> 3. Plaintiff is entitled to all medical treatment incurred, or to be incurred, as a result of his 15 May 1991 injury by accident. G.S. §97-25.

The Commission awarded plaintiff temporary total disability compensation for 120 weeks beginning 4 March 1992, future medical expenses and reasonable attorney's fees. Plaintiff now appeals the Commission's 13 July 1995 Order.

Zeyland G. McKinney, Jr., for plaintiff-appellant.

Wishart, Norris, Henninger & Pittman, P.A., by W. Timothy Moreau, for defendant-appellees.

EAGLES, Judge.

Plaintiff contends that the Industrial Commission erred by failing to apply the continuing presumption of disability in favor of the plaintiff. We agree.

[1] The Worker's Compensation Act compensates an employee for work related injuries which prevent him from making the equivalent amount of wages he made before the injury. *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988). In order to receive disability compensation under the Act, the mere fact of an on the job injury is not sufficient. The injury must have impaired the worker's earning capacity. *Id.; Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E.2d 755 (1967).

[2, 3] N.C.G.S. 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." In order to find a worker disabled under the Act, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
>
> (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
>
> (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Initially, the claimant must prove both the extent and the degree of his disability. *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988). However, once the 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." *Watson*, 92 N.C. App. at 476, 374 S.E.2d at 485 (*quoting Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)). The approval of a Form 21 by the Commission relieves the employee of his initial burden of proving a disability. In fact, once the Commission approves a Form 21 agreement between the parties, the employee receives the benefit of the presumption that he is totally disabled. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 208, 472 S.E.2d 382, 386 (1996).

[4] The parties here executed a Form 21 agreement on 25 June 1991 and the Commission approved that agreement on 30 July 1991. Accordingly, plaintiff met his initial burden of proving a disability at that time. That presumption of disability continues until the defendant offers evidence to rebut the presumption. At that point, the burden shifts to the employer to show that the worker is employable. *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994).

[5, 6] An employer may rebut the continuing presumption of total disability either by showing the employee's capacity to earn the same wages as before the injury or by showing the employee's capacity to earn lesser wages than before the injury. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 209, 472 S.E.2d 382, 388 (1996) (Walker, J., concurring). To rebut the presumption of continuing disability, the employer must produce evidence that:

1. suitable jobs are available for the employee;

2. that the employee is capable of getting said job taking into account the employee's physical and vocational limitations;

3. and that the job would enable the employee to earn some wages.

Franklin v. Broyhill Furniture Industries, 123 N.C. App. 200, 209, 472 S.E. 2d 382, 388 (1996) (Walker, J., concurring). At any time, the employer may rebut the presumption of disability by showing that the employee has unjustifiably refused suitable employment. N.C.G.S. 97-32 (1991); *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 210, 472 S.E.2d 382, 388 (1996) (Walker, J., concurring).

[7] A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the defendant's burden. "The maximum medical improvement finding is solely the prerequisite to determination of the amount of any permanent disability for purposes of G.S. 97-31." *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 476, 374 S.E.2d 483, 485 (1988); *see also Radica v. Carolina Mills*, 113 N.C. App. 440, 439 S.E.2d 185, (1994).

[8] The Commission erred here by mistaking a finding of maximum medical improvement for evidence sufficient to rebut the continuing presumption of disability. The Commission erroneously placed the

burden of proving the disability on the plaintiff following a finding that the plaintiff had reached maximum medical improvement on 4 March 1992. In its findings of fact, the Commission found that the "[P]laintiff has neither sought employment, nor engaged in any employment, since reaching maximum medical improvement on 4 March 1992" and that the evidence was insufficient to determine that the "plaintiff is physically or mentally incapable of working in any employment, that he unsuccessfully sought work within his capability for work, that it would be futile to look for work due to preexisting conditions, or that he has obtained employment at a wage less than he earned prior to injury." The Commission made no findings as to the sufficiency of the defendant's evidence. This formula for reviewing the plaintiff's claim is incorrect. After a finding of maximum medical improvement, the burden remains with the employer to produce sufficient evidence to rebut the continuing presumption of disability; the burden does not shift to the employee.

[9] If the employer offers sufficient evidence to rebut the continuing presumption of disability, the process is not concluded. The burden then switches back to the employee to offer evidence in support of a continuing disability or evidence to prove a permanent partial disability under G.S. 97-30. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 209, 472 S.E.2d 382, 388 (1996) (Walker, J., concurring). The employee can prove a continuing total disability by showing either that no jobs are available, no suitable jobs are available, or that he has unsuccessfully sought employment with the employer. *Id.* If the employee meets this burden, he is entitled to continuing total disability benefits.

[10, 11] If the employee fails to meet this burden, he continues to be disabled but the disability changes from a total disability to a partial disability under N.C.G.S. 97-30. *Id.*; *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 398 S.E.2d 677 (1990). When an employee's power to earn is diminished but not obliterated, he is entitled to benefits under N.C.G.S. 97-30 for a permanent partial disability. *Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987). An injured employee cannot be simultaneously totally and partially disabled. *Carothers v. Ti-Caro*, 83 N.C. App. 301, 306, 350 S.E.2d 95, 98 (1986). The remedies for a total disability under G.S. 97-29 or G.S. 97-31 and a partial disability under G.S. 97-30 are mutually exclusive. *Id.* However, when an employee cannot be fully compensated under G.S. 97-31 or G.S. 97-29 for total disability, he may still be entitled to compensation for a permanent partial disability under G.S. 97-30.

Kendrick v. City of Greensboro, 80 N.C. App. 183, 189, 341 S.E.2d 122, 125 (1986). The employee may select the remedy which offers the more generous benefits, "*less* the amount he or she has already received." *Gupton*, 320 N.C. at 43, 357 S.E.2d at 678.

[12] The Commission's error here foreclosed plaintiff's opportunity to select the more generous remedy. Shifting the burden of proving a temporary total disability to the plaintiff-employee after a finding of maximum medical improvement, without more, deprives the plaintiff of an opportunity to offer evidence to establish a permanent partial disability and receive additional benefits under G.S. 97-30.

Accordingly, we vacate the award of the Industrial Commission and remand for further proceedings to determine the extent of the plaintiff's disability on 4 March 1992. In that proceeding, defendants may offer evidence to rebut the presumption of disability arising from the approved Form 21. Plaintiff may then offer evidence to establish either a continuing total disability or a permanent partial disability under G.S. 97-30.

Our holding here makes it unnecessary to address plaintiff's remaining assignment of error. For the foregoing reasons, we vacate and remand.

Vacated and remanded.

Judges WALKER and McGEE concur.

STARCO, INC., PLAINTIFF v. AMG BONDING AND INSURANCE SERVICES, INC., DALE CLARK, DALE CLARK BONDING, INC., DEFENDANTS

COA95-1315

(Filed 5 November 1996)

1. **Appeal and Error § 486 (NCI4th)— finding misstating date of service—finding incorporating documents—no prejudice to defendant**

Defendant failed to show that any prejudice resulted in the trial court's finding which misstated the date of service of plaintiff's summons and complaint or in the trial court's finding which incorporated documents by reference.

Am Jur 2d, Appellate Review §§ 735, 742.

2. Courts § 16 (NCI4th)— foreign corporation—minimum contacts with N.C.—exercise of personal jurisdiction proper

Defendant Arizona bonding company's activities clearly fell within N.C.G.S. § 1-75.4(5), and it had sufficient minimum contacts with this state to permit the exercise of in personam jurisdiction over it, where defendant directly solicited business in this state and issued bid bonds in connection with contracts for clients of a North Carolina businessman; at least one of these contracts was to be performed in North Carolina; and defendant thus engaged in the requisite "minimum contacts" so that the exercise of personal jurisdiction over it did not offend traditional notions of fair play and substantial justice.

Am Jur 2d, Courts § 80.

Retrospective operation of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated acts or transactions. 19 ALR3d 138.

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.

Appeal by defendant AMG Bonding and Insurance Services, Inc. from order entered 11 September 1995 and signed 14 September 1995 by Judge D. B. Herring in Lenoir County Superior Court. Heard in the Court of Appeals 9 September 1996.

Wallace, Morris, Barwick & Rochelle, P.A., by Edwin M. Braswell, Jr., for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender, for defendant-appellee Dale Clark.

White & Allen, P.A., by John C. Archie, for defendant-appellant AMG Bonding Insurance Services, Inc.

JOHNSON, Judge.

On 24 February 1995, plaintiff Starco, Inc. filed this action alleging claims for breach of contract and negligence against defendants AMG Bonding and Insurance Services, Inc. (AMG) and Dale Clark. Defendant Clark filed an answer generally denying any liability to

plaintiff. AMG filed a motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, contending that the court lacked personal jurisdiction in the action. This motion came on for hearing before Judge D. B. Herring during the 11 September 1995 civil session of Lenoir County Superior Court.

The evidence presented tended to show the following. AMG is a corporation organized under and existing by virtue of the laws of Arizona. AMG's only business office is located in Scottsdale, Arizona. AMG is in the business of procuring bonds for various purposes. AMG locates and provides potential corporate or individual sureties with information concerning the contractor or the project, or both. Most of AMG's business comes from referrals, rather than active solicitation. AMG does not own, lease or maintain real or personal property in North Carolina; does not have bank accounts in North Carolina; does not have employees or agents in North Carolina; does not have mailing addresses or maintain phone numbers in North Carolina; does not conduct its internal corporate affairs in North Carolina; has never borrowed money in North Carolina; does not collect debts in North Carolina; does not advertise in North Carolina; and does not manufacture, process, or service goods which are used or consumed in North Carolina. Further, AMG has never filed any documents to be registered as a foreign corporation with the office of the North Carolina Secretary of State. There is, however, evidence in the record which tends to show that an agent of defendant AMG had solicited defendant Clark's business, Clark Bonding Company, Inc., d/b/a The Bond Exchange, for assistance in bonding some of their clients some five years previously. Moreover, in July or August of 1994, an AMG agent telephoned defendant Clark soliciting business for defendant AMG; and followed up this telephone conversation with mailing defendant Clark a business card, information regarding AMG's individual surety program, a copy of AMG's bond request form, and several pages of federal regulations in reference to the federal acquisition regulation system. As a result, defendant Clark submitted underwriting packages for plaintiff, Superior Industrial Maintenance, Whitehurst Fence and Science and Technology. Consequently, defendant AMG issued bid bonds for plaintiff, Superior Industrial Maintenance and Science and Technology.

After hearing all of the evidence and the arguments of all of the parties, Judge Herring entered an order denying defendant AMG's motion to dismiss plaintiff's claim for lack of personal jurisdiction. Defendant AMG appeals. On appeal, defendant AMG brings forth

some fourteen (14) assignments of error and arguments on appeal. For purposes of thorough, but concise discussion, these arguments will be grouped herein.

A. Errors in the Trial Court's Findings of Fact

[1] Defendant AMG, in assignments of error 1 and 2, takes issue with the trial court's finding of fact 2—"That on the 27th day of February 1995, the defendant AMG Bonding and Insurance Services, Inc. was served with said Summons and a copy of said Complaint by certified mail"; and finding of fact 10—"That said affidavit is incorporated herein by reference and the statements in said affidavit are accepted by the [c]ourt as findings of fact." Defendant contends that these findings of fact are unsupported by competent evidence and are, therefore, error.

1. Finding of Fact 2

It is well-settled that appellate review of findings of fact and conclusions of law made by a trial judge, without a jury, is limited to a determination of whether there is competent evidence to support his findings of fact and whether, in light of such findings, his conclusions of law were proper. *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Moreover, findings of fact by a trial judge in a non-jury trial have the force and effect of a jury verdict; and if the evidence tends to support the trial court's findings, these findings are binding on appeal, even though there may be some evidence to support findings to the contrary. *Id.*

In the instant case, defendant AMG is quite correct in its contention that the trial court, in finding of fact 2, misstated the date of service of plaintiff's summons and complaint as 27 February 1995, instead of the correct date of 28 February 1995 as noted in plaintiff's affidavit. However, to obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action. *Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 346 S.E.2d 168 (1986), *disc. review denied*, 318 N.C. 692, 351 S.E.2d 741 (1987). This, defendant AMG has failed to do.

2. Finding of Fact 10

The purpose of requiring a trial judge in a non-jury trial to make appropriate findings of fact and conclusions of law is to assist the

appellate courts in its review of said findings and conclusions. *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 402 S.E.2d 860 (1991). While defendant AMG militates to the contrary, there is no prohibition against incorporating documents by reference and utilizing the contents of such documents as the trial court's findings of fact. *See Sealey v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994) (incorporating an exhibit showing costs of court in the trial court's order); *Rogers v. Rogers*, 111 N.C. App. 606, 432 S.E.2d 907 (1993) (incorporating a separation agreement into a divorce judgment); *Cohen v. Cohen*, 100 N.C. App. 334, 396 S.E.2d 344 (1990) (incorporating an affidavit into the trial court's child support order), *disc. review denied*, 328 N.C. 270, 400 S.E.2d 451 (1991)). Defendant AMG's reliance on *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982), for support of this argument is misplaced. In *Quick*, our Supreme Court was presented with an order, awarding permanent alimony, that was clearly without sufficient findings of facts to support the conclusions of law therein. *Id.* Herein, the trial court's order is supported by sufficient findings of fact, which are supported by adequate evidence on the record.

As defendant AMG fails to show that any prejudice has resulted in either of the trial court's findings discussed herein, we find no prejudicial error in regards to these assignments of error.

B. Errors in the Trial Court's Conclusions of Law

While a trial court's findings of fact are binding if supported by sufficient evidence, its conclusions of law are reviewable *de novo* on appeal. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845. Defendant assigns error (assignments of error 3-12) to the following conclusions of law made by the trial court:

> 2. That the defendant AMG Bonding and Insurance Services, Inc. is engaged in substantial business activity within this State and has a substantial connection with this State.
>
> 3. That the plaintiff's suit does not offend traditional notions of fair play and substantial justice.
>
> 4. That by soliciting bond business in the State of North Carolina, the defendant AMG Bonding and Insurance Services, Inc. has purposefully availed itself of the laws and protection of the State of North Carolina, and the contact of the defendant AMG Bonding and Insurance Services, Inc. with the State of North Carolina is not random, fortuitous or attenuated.

5. That the defendant is being sued in North Carolina for alleged injuries allegedly arising from activities which he purposefully directed toward a North Carolina resident.

6. That the plaintiff's Complaint alleges that the bid bond in question was to be used in connection with a construction project to be performed in North Carolina and therefore there is significant connection and interest in North Carolina with the subject matter of this action.

7. That North Carolina is the most convenient forum for the plaintiff to seek redress of its alleged injuries.

8. That the defendant AMG Bonding and Insurance Services waived its right to challenge personal jurisdiction by seeking affirmative relief from the Court when it obtained an extension of time to answer the plaintiff's discovery request and thereby invoked the adjudicatory powers of the Court in a matter not directly related to a question of jurisdiction.

9. That the defendant Dale Clark argued for, and concurred with, the entry of this Order.

10. That this Court has jurisdiction over the person of defendant AMG Bonding and Insurance Services, Inc.

11. That the motion of the defendant AMG Bonding and Insurance Services, Inc. to dismiss should be denied.

As all of these conclusions of law address the court's ability to exercise personal jurisdiction over defendant AMG, we will address these assignments of error in tandem.

[2] In order to properly exercise in personam jurisdiction over a nonresident defendant, a two-prong determination must be made. First, we must determine if the General Statutes of North Carolina permit the courts of this state to consider this action against defendant. Second, if so, it must be determined whether the exercise of this power by North Carolina courts violate the requirements of constitutional due process. *Chapman v. Janko, U.S.A.*, 120 N.C. App. 371, 373, 462 S.E.2d 534, 536 (1995) (quoting *Dataflow Companies v. Hutto*, 114 N.C. App. 209, 211, 441 S.E.2d 580, 581 (1994)).

Jurisdictional authority over a foreign corporation is provided by North Carolina's long-arm statute, North Carolina General Statutes section 1-75.4, which provides in pertinent part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . .
>
> (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; . . . .

N.C. Gen. Stat. § 1-75.4(5) (1983). Our courts have reminded us on numerous occasions that section 1-75.4 should receive liberal construction, favoring the finding of jurisdiction. *Dataflow*, 114 N.C. App. 209, 441 S.E.2d 580; *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986); *Marion v. Long*, 72 N.C. App. 585, 325 S.E.2d 300, *disc. review denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). It is the plaintiff who bears the burden of establishing prima facie evidence that at least one of the statutory grounds for jurisdiction set out in the long-arm statute is met. *Centura Bank v. Pee Dee Express, Inc.*, 119 N.C. App. 210, 212, 458 S.E.2d 15, 18 (1995).

In the instant case, the evidence tends to show that defendant AMG, an Arizona corporation, solicited the services of a North Carolina corporation, Clark Bonding, d/b/a The Bond Exchange, through its president, defendant Dale Clark, a North Carolina resident; that a relationship between the two companies was developed; that over the last several years, defendant AMG sent several of their accounts to The Bond Exchange for review, but The Bond Exchange was unable to assist defendant AMG's clients; that in July or August 1994, an agent of defendant AMG telephoned defendant Dale Clark, once again soliciting bond business for defendant AMG; that in response to this conversation, the agent sent defendant Clark a packet of information—including the agent's business card, informa-

tion regarding defendant AMG's individual surety program, a copy of federal regulations, and an AMG bond request form; that defendant Clark subsequently submitted an underwriting file to defendant AMG for plaintiff after receiving and reviewing the information sent to him by defendant AMG; that thereafter, defendant AMG issued a bid bond for $8,000,000.00 from an individual surety; and that defendant Clark submitted other clients of The Bond Exchange to defendant AMG for their individual surety program, which resulted in defendant AMG issuing bid bonds for those companies also.

As such, defendant AMG's activities clearly fall within section 1-75.4(5) of the General Statutes. Specifically, North Carolina General Statutes section 1-75.4(5)a confers personal jurisdiction upon North Carolina courts in any action which "[a]rises 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 . . .[.]" N.C.G.S. § 1-75.4(5)a. Moreover, section 1-75.4(5)b is applicable to "services actually performed for the plaintiff by the defendant within this State . . . ." N.C.G.S. § 1-75.4(5)b. Unquestionably, defendant AMG made promises to defendant Clark to, and did, issue bid bonds to various businesses, including plaintiff corporation. Thus, bringing defendant within the personal jurisdiction of our courts. That is, however, not the end of our inquiry herein.

We must now inquire as to whether the exercise of jurisdiction comports with the Fourteenth Amendment to the United States due process requirements. These due process requirements require that "certain minimum contacts [exist]. . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 2d 95, 102 (1945)) (quotations omitted). It must be noted, however, that a determination of whether minimum contacts exist cannot be effected by utilization of a mechanical formula or rule of thumb, but instead by ascertaining what is fair and reasonable and just under the facts and circumstances of each case. *Chapman*, 120 N.C. App. at 375, 462 S.E.2d at 537. There are a number of criteria that may be used in analyzing whether minimum contacts exist, including: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state and convenience to the parties, and (5) whether the defendant invoked benefits and protections of the law of the

forum state. *See Federal Deposit Ins. Corp. v. Kerr*, 637 F.Supp. 828 (W.D.N.C. 1986). In light of modern business practices, the quantity, or even the absence, of actual physical contacts with the forum state merely constitutes a factor to be considered and is not controlling in determining whether minimum contacts exists. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985). Additionally, minimum contacts do not arise ipso facto from actions of a defendant having some incidental effect in the forum state. There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business in the forum state, such that he or she should reasonably anticipate being haled into court there. *Id.*

In the case *sub judice*, the evidence shows not only did defendant AMG directly solicit business in this state, but also issued bid bonds in connection with contract(s) for clients of defendant Clark. At least one of these contracts (plaintiff's) was to be performed in North Carolina. "North Carolina has a ' "manifest interest" in providing its residents with a convenient forum for addressing injuries inflicted by out-of-state actions.' " *Kath v. H.D.A. Entertainment*, 120 N.C. App. 264, 266, 461 S.E.2d 778, 780 (1995) (quoting *ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 669, 386 S.E.2d 766, 768 (1990)). While defendant may contend otherwise, when its agent contacted defendant Clark, a North Carolina businessman, to solicit his assistance in bonding some of their clients and later to solicit bond business, and thereafter engaged in business transactions with defendant Clark and his clients, at least one of which was a North Carolina corporation, defendant AMG purposefully availed itself to the benefits and laws of our fair state. Accordingly, defendant AMG engaged in the requisite "minimum contacts" so as not to "offend traditional notions of fair play and substantial justice." *See Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 287, 350 S.E.2d 111, 115 (1986) (stating that a significant factor in determining the proper forum is who initiated the relationship between the parties).

As the trial court made adequate findings of fact, and those findings were supported by sufficient evidence, the trial court's conclusions of law 2-7, and 9-11 are proper. We do, however, find error in the trial court's conclusion that defendant had "waived its right to challenge personal jurisdiction by seeking affirmative relief from the [c]ourt when it obtained an extension of time to answer the plaintiff's discovery request . . . ." This Court has previously held that if a general appearance is made in conjunction with or after a 12(b)(2)

motion challenging personal jurisdiction is filed, the right to challenge personal jurisdiction is still preserved. *Hall v. Hall*, 65 N.C. App. 797, 310 S.E.2d 378 (1984). This error, however, was harmless, as defendant can show no prejudicial error resulting therefrom.

C. Errors in Denying Defendant AMG's Motion to Dismiss

In light of all of the foregoing, the trial court correctly denied defendant AMG's 12(b)(2) motion to dismiss for lack of personal jurisdiction. Thus, the decision of the trial court is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

PATSY ALLMON, EMPLOYEE, PLAINTIFF V. ALCATEL, INC., EMPLOYER; CIGNA INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA94-1244

(Filed 5 November 1996)

1. Workers' Compensation § 292 (NCI4th)— federal discrimination claim—settlement proceeds not wages—termination of workers' compensation benefits error

The Industrial Commission erred in holding that the settlement proceeds from plaintiff's federal handicap discrimination claim against defendant employer constituted "wages" and she therefore was not entitled to temporary total disability benefits, since the federal discrimination claim and the worker's compensation claim were based on two separate and distinct injuries, and recovery for both would not give plaintiff double recovery for a single action.

Am Jur 2d, Americans with Disabilities Act: Analysis and Implications §§ 1, 257; Job Discrimination § 174; Workers' Compensation §§ 381-384.

2. Workers' Compensation § 301 (NCI4th)— refusal to pay benefits—assessment of penalty—appropriate time period

The Industrial Commission erred in assessing a penalty against defendant under N.C.G.S. § 97-18(e) only for the period

running from the date of the Commission's first order to reinstate benefits to the date of the Commission's approval of defendant's Form 24 request, rather than from the date defendant unilaterally terminated plaintiff's benefits until the date of plaintiff's reinstatement, since the statute requires payment of the penalty from the date the benefits are due but not paid, and the Form 24 was effectively vacated by the Claims Examiner two months after its initial approval.

Am Jur 2d, Workers' Compensation § 477.

Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments due. 8 ALR4th 902.

On appeal from the opinion and award entered on 11 July 1994 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 August 1995.

Monroe, Wyne & Lennon, P.A., by George W. Lennon, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan, for defendant appellees.

COZORT, Judge.

In this case, plaintiff suffered a back injury compensable under the North Carolina Workers' Compensation Act. Defendant resisted payment of workers' compensation benefits due plaintiff, by cutting off benefits despite contrary direction by the Industrial Commission. During the pendency of this workers' compensation dispute, plaintiff filed a separate federal claim alleging handicap discrimination. The federal discrimination claim was settled out of court in 1990, for a monetary remedy and reinstatement of plaintiff to her former position. The settlement reserved plaintiff's rights to her workers' compensation claims. Plaintiff requested a hearing with the Industrial Commission alleging she was due additional compensation because of defendant's cessation of benefits; plaintiff also alleged that a penalty should be assessed against defendant for untimely payment of benefits. The Commission held that the settlement of the federal discrimination claim constituted "wages." The Commission denied plaintiff's claim for benefits. We find the Commission erred in classifying the settlement proceeds as "wages," and we reverse. The facts and procedural history follow.

The plaintiff, Patsy Allmon, suffered an injury on 26 July 1980 and an injury on 10 November 1980. The first injury occurred when plaintiff was hit by boxes falling from a forklift. The second injury, and the source of the present compensation controversy, resulted when a coworker tripped and hit plaintiff, knocking her down against a pallet. The second accident caused plaintiff severe injury, forcing her to undergo multiple surgical operations, including several spinal fusions.

On 11 March 1987, plaintiff was released by her orthopedic surgeon, with a twenty-percent permanent impairment rating of the back. Due to plaintiff's impaired condition, she was medically restricted from jobs involving certain kinds of lifting. Plaintiff sought to return to work; however, she was told by defendant-employer, on or about 29 May 1987, that no jobs were available meeting her medical requirements.

On 28 September 1987, defendant terminated plaintiff's temporary total disability benefits without the necessary Form 24 approval by the Industrial Commission (Commission). On 10 November 1987, the Commission ordered defendant to reinstate benefits, retroactive to the 28 September 1987 date of defendant's unilateral suspension of benefits. On 18 November 1987, the Commission repeated its order. Defendant complied with neither order. Defendant submitted a Form 24 to the Commission on or about 11 April 1988, which was approved, and which operated to terminate defendant's obligation to pay plaintiff temporary total disability.

On 20 June 1988, the Commission's Chief Claims Examiner ("Examiner") ordered defendant to reinstate benefits withheld from plaintiff for the period during which defendant had no Form 24 Commission approval. The Examiner also vacated approval of the Form 24, nullifying its effect and reinstating plaintiff's temporary total disability payments. The effective retroactive date for benefit reinstatement was not explicitly set forth in the Examiner's order. However, the order directed defendant to pay benefits prospectively from the date of the order, until otherwise notified by the Commission. The record indicates no retroactive or prospective benefits were ever paid by defendant pursuant to the Examiner's 20 June 1988 order.

Plaintiff filed charges of federal handicap discrimination with the United States Department of Labor in September 1989. On 2 May 1990, plaintiff and defendant settled the federal claims through an

agreement entitled "General Release and Settlement Agreement" (Agreement). This Agreement provided plaintiff with $51,235.20 in settlement proceeds and reinstatement to her former position with defendant. Plaintiff was reinstated on 4 May 1990. In the Agreement's recitals, defendant states it "has agreed to this settlement solely to avoid future expense and inconvenience." As well, defendant promised to pay plaintiff $51,235.20, "representing back pay from September 28, 1987 until May 4, 1990 . . . ." Section two of the recitals, entitled "Reservation of Workers' Compensation Claim," states that the Agreement "does not constitute a waiver of any rights . . . which are compensable under applicable workers' compensation laws." Plaintiff, in recital section four, agreed specifically to withdraw her federal claim and to request termination of the Department of Labor's discrimination investigation.

On 17 March 1992, plaintiff filed a "Request That [a workers' compensation] Claim Be Assigned For Hearing" (Request). Subsequently, a hearing was held before Industrial Commission Deputy Commissioner Charles Markham on 27 March 1992. Plaintiff's claim before the Deputy Commissioner included, *inter alia*, a renewed request for temporary total disability running from defendant's unilateral cessation of benefits on 28 September 1987 to 4 May 1990 (the date of plaintiff's reinstatement pursuant to the settlement agreement); and, a penalty of ten percent for untimely payment of the aforementioned temporary total disability benefits per N.C. Gen. Stat. § 97-18(e) (1991). Deputy Commissioner Markham entered an opinion and award denying plaintiff's claim for additional disability compensation.

On appeal, the Full Commission denied plaintiff's claim for additional benefits. As part of its opinion and award filed 11 July 1994, the Full Commission reached two conclusions of law relevant to this appeal. First, the Full Commission declared that settlement proceeds from the discrimination claim were "wages" as a matter of law. The Full Commission then denied plaintiff's request for temporary total disability benefits, holding that the

> effect of the May 4, 1990 agreement is that plaintiff was not disabled during [the 28 September 1984 to 4 May 1990 period] cited [in the Agreement] within the meaning of the Workers' Compensation Act, because the lump sum payment replaced "wages" she would have been earning . . . .

The Commission determined that a ten-percent penalty was due plaintiff, pursuant to N.C. Gen. Stat. § 97-18(e), but only for the period between 10 November 1987 (the date of the Commission's first directive to defendant to pay benefits) until the date of the Form 24 approval on 26 April 1988.

[1] We disagree with the Commission's conclusion that the settlement proceeds are "wages" as a matter of law. We also disagree with the period set by the Commission for assessment of the § 97-18(e) penalty. While the scope of this Court's review of Commission findings is limited to a competent evidence standard, conclusions of law are entirely reviewable for error. *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985).

Defendant characterizes plaintiff's discrimination claim as arising out of the same injury and set of facts as the claim for workers' compensation. Allowing both, defendant claims, is tantamount to handing plaintiff a "double recovery" for a single injury, an action expressly prohibited by the workers' compensation statute and case law. In *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), our Supreme Court stated that the Workers' Compensation Act "disfavors duplicative payments for the same disability." *Id.* at 117, 357 S.E.2d at 673. For reasons which follow, we find *Foster* does not control the instant situation.

As opposed to the plaintiff in *Foster*, the instant plaintiff has alleged two distinct, separately remedial injuries. Plaintiff's first claim is based on the physical injury which led to the workers' compensation claim. The second injury claimed by plaintiff arose from defendant's alleged handicap discrimination. The *Foster* plaintiff sought two recoveries from a single injury: money from private disability income insurance paid for by the employer, and workers' compensation. *Foster*, 320 N.C. at 114, 117 n.1, 357 S.E.2d at 671, 673 n.1. The *Foster* Court found that the private disability payout "function[ed] as a wage replacement program tantamount to workers' compensation." *Id.* at 117, 357 S.E.2d at 673. Since the private plan operated "in lieu" of workers' compensation, payment under both was a double recovery and was barred by statute. *Id.*; and *see* N.C. Gen. Stat. § 97-31 (1991) (workers' compensation "shall be paid for disability . . . and shall be in lieu of all other compensation.") In *Estes* v. *N.C. State University*, 102 N.C. App. 52, 58, 401 S.E.2d 384, 387-88 (1991), an employer-defendant argued it was entitled to a credit against an award of temporary total disability benefits paid to

its employee because the employer had also paid its disabled employee sick leave and vacation benefits. *See also* N.C. Gen. Stat. § 97-42 (1991) (credits allowed only when payments to employee were not due and payable under the Act when made by employer). The *Estes* Court determined that sick leave was often utilized for noninjury related purposes, such as a "family illness or death in the family." *Estes*, 102 N.C. App. at 58, 401 S.E.2d at 387. The varying objectives of workers' compensation and sick leave led the *Estes* Court to determine that "using sick leave is not tantamount . . . to receiving workers' compensation benefits." *Id.* at 59, 401 S.E.2d at 387-88. Since the sick leave benefits had "nothing to do" with the Workers' Compensation Act, they were "not analogous to payments under a disability and sickness plan." *Id.* at 59, 401 S.E.2d at 388. Thus, the benefits were not duplicative, and no set-off was due. *Id.*

The analysis of the *Estes* Court is instructive here, in that we do not find plaintiff's recovery for discrimination "analogous to payments under a disability and sickness plan." *Id.* The concepts of "workplace disability" and "handicap discrimination" are innately different, and the remedies for either necessarily distinct. The nature of the injuries are different: one is essentially physical, the other primarily based on prejudice or bias. *See, e.g., Barber v. Minges*, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943) (purpose of the Act is to compel industry to take care of its injured workers); *Teamsters v. United States*, 431 U.S. 324, 358, 52 L.Ed.2d 396, 429 (1977) (Title VII addresses employment decisions based on illegal discriminatory criteria).

The Workers' Compensation Act and the federal civil rights laws address different ills and make up entirely separate bodies of law. The purpose of workers' compensation is to provide an employee with "swift and sure compensation" for harm resulting from workplace injury. *Rorie v. Holly Farms*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982). On the other hand, civil rights laws have a more global goal: "to abolish the smallness of mind that clings to pernicious stereotypes founded not on fact but upon historical misconceptions and fear." *Freeman v. Kevinator, Inc.*, 469 F.Supp. 999, 1000 (E.D. Mich. 1979).

Thus, federal laws against discrimination remedy injuries that often carry far-reaching social, political and economic implications. *See, e.g., Memphis Community School District v. Stachura*, 477 U.S. 299, 91 L.Ed.2d 249 (1986). Because Congress considers policy

against discrimination to be of the highest priority, it has given the courts broad remedial power in the area of federal civil rights. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44-46, 39 L.Ed.2d 147, 156-57 (1974). It appears manifest that Congress did not intend to force a worker to choose between remedies under workers' compensation and those available under federal civil rights laws. *Id.* at 48, 39 L.Ed.2d at 158 (legislative history of the civil rights acts evinces "a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.")

Another critical distinction between plaintiff's workplace injury and the discrimination-based injury is the distinct causal origin of both. Plaintiff's back was injured first. Later, plaintiff filed a claim alleging defendant had made a discriminatorily based employment decision not to rehire her. Thus, the timing of the injuries was not concurrent. It is uncontradicted that defendant's alleged discrimination was based on, and arose after, plaintiff's back-related injury. Simply put, the two injuries are not the same. The settlement of a claim for federal civil rights violations is not, nor was it intended to be, a substitute for workers' compensation benefits. The Agreement clearly reserved all rights to remedies available to plaintiff under the Workers' Compensation Act. No set-off or credit is due defendant.

[2] The separate but connected issue of the late payment fee is resolvable by a plain reading of the applicable statute, N.C. Gen. Stat. § 97-18(e). In pertinent part, the statute reads:

> If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission is not paid within 14 days after it becomes due . . . there *shall* be added to such unpaid installment an amount equal to ten per centum (10%) thereof . . . unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had *no control* such installment could not be paid within the period prescribed for the payment.

(Emphasis added.)

As we have already concluded that plaintiff's right to temporary total disability was not foreclosed by settlement of her discrimination claim, defendant's exposure to the ten-percent § 97-18(e) penalty is evident. Defendant unilaterally suspended payment of temporary total disability to plaintiff on 28 September 1987, without Commission approval or submission of a Form 24. On 10 November

1987, the Commission ordered defendant to reinstate benefits, and to pay such benefits retroactively to the date of their initial suspension on 28 September 1987. Despite repeated orders by the Commission, defendant did not reinstate the benefits due plaintiff. In fact, the record indicates that no reinstated benefits have ever been paid plaintiff. Moreover, defendant did not comply with the Commission's administrative rules which require submission and approval of a Form 24 prior to benefit termination. Industrial Commission Rule 404 (1996); and *see Kisiah v. W. R. Kisiah Plumbing*, 124 N.C. App. 72, 476 S.E.2d 434 (1996).

The Full Commission, in its opinion and award, assessed a § 97-18(e) penalty against defendant, but only for the period running from 10 November 1987 (the date of the Commission's first order to reinstate benefits), to 26 April 1988 (the date of the Commission's approval of defendant's Form 24 request). Establishment of this time frame for imposition of the penalty is error for two reasons. First, the Full Commission has failed to provide for a penalty from the date it became due, which was 28 September 1987 (the date defendant unilaterally terminated plaintiff's benefits). This failure violates § 97-18(e)'s mandate to pay the penalty from the date the benefits were due, but not paid. Second, the Full Commission erred by using the approval date of the Form 24 as the termination date for the penalty, as that Form 24 was effectively vacated by the Claims Examiner on 20 June 1988.

Failure to award the penalty for the full time period would run afoul of the long-settled policy of interpreting the Workers' Compensation Act liberally, and in favor of the employee. *Dayal v. Provident Life and Accident Ins. Co.*, 71 N.C. App. 131, 132, 321 S.E.2d 452, 453 (1984). By the mandate of § 97-18(e), defendant is responsible for the penalty from 28 September 1987 through plaintiff's reinstatement date at Alcatel of 4 May 1990.

In summary the Full Commission's decision as to temporary total disability benefits due is reversed. The case is remanded to the Commission for entry of benefits and penalty consistent with this opinion.

Reversed and remanded.

Judge McGEE concurs.

Judge WALKER concurs in the result.

COMMISSIONER OF LABOR OF NORTH CAROLINA, PLAINTIFF-APPELLANT v. HOUSE OF RAEFORD FARMS, INC., DEFENDANT-APPELLEE

No. COA95-1401

(Filed 5 November 1996)

1. Labor and Employment § 75 (NCI4th)— employee's REDA complaint forwarded to employer—compliance with statute

The trial court erred in its determination that the Commissioner of Labor failed to forward a copy of a dismissed employee's Retaliatory Employment Discrimination Act (REDA) complaint to defendant employer within 20 days following receipt in accordance with N.C.G.S. § 95-242(a) where the evidence tended to show that, five days after the Department of Labor's Right to Know Division received necessary information from the dismissed employee about the name and address of the employer, a person at defendant's place of business signed the receipt for the letter sent by the director of plaintiff's Right to Know Division informing defendant of the dismissed employee's REDA complaint.

Am Jur 2d, Wrongful Discharge § 10.

2. Labor and Employment § 75 (NCI4th)— REDA complaint—statutory time periods directory

The trial court erred in dismissing plaintiff Commissioner of Labor's REDA complaint on the ground that the Commissioner had exceeded the 90-day time period in N.C.G.S. § 95-242(a) for the Commissioner to make a determination as to the merit of a complaint, since the complaint processing time periods of the statute are directory and not jurisdictional, as the statute fails to provide a consequence for the Commissioner's failure to comply with the 90-day period, and the statute is intended to spur the Commissioner to action, not limit the scope of his authority.

Am Jur 2d, Wrongful Discharge § 10.

Appeal by plaintiff from order entered 11 September 1995 by Judge E. Lynn Johnson in Hoke County Superior Court. Heard in the Court of Appeals 18 September 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hilda Burnett-Baker and Associate Attorney General Daniel D. Addison, for plaintiff-appellant.

Jordan, Price, Wall, Gray & Jones, L.L.P., by Henry W. Jones, Jr. and A. Hope Derby, for defendant-appellee.

JOHNSON, Judge.

On 9 October 1992, Betty Jo Locklear (now Betty Jo Barton) was injured when she accidentally slipped and fell while working at a poultry plant owned and operated by defendant House of Raeford Farms, Inc. in Lumber Bridge, North Carolina. After being absent from work as a result of the 9 October incident, defendant terminated Ms. Barton's employment on 26 October 1992.

Thereafter, Ms. Barton wrote a letter to the North Carolina Department of Labor complaining that she was unfairly terminated and had not received workers' compensation. However, Ms. Barton failed to indicate the name and address of her employer in this letter.

Ms. Barton's letter was received by the Department of Labor's Right to Know Division on 11 November 1992. At that time, the Right to Know Division was responsible for investigating complaints alleging workplace retaliation in violation of North Carolina's Retaliatory Employment Discrimination Act (REDA), N.C. Gen. Stat. § 95-240, *et seq.* However, as Ms. Barton's letter did not contain the name and address of her employer, the Right to Know Division could not proceed with its investigation and, therefore, contacted Ms. Barton to request that she provide that information.

Consequently, Ms. Barton responded by letter, received by the Right to Know Division on 16 December 1992, which noted the name and address of defendant as being her employer. Therein, she also noted that defendant's personnel director had said that he would file a workers' compensation claim for her, but that she had never received any information in reference to such a claim.

On 18 December 1992, the Director of the Right to Know Division, Ann Wall, wrote a letter to defendant informing defendant corporation of Ms. Barton's REDA complaint. Enclosed were copies of both of Ms. Barton's complaint letters. Ms. Wall's letter was sent by certified mail, return receipt requested, on that same date. On 21 December 1992, someone at defendant's place of business signed the

receipt for the letter. Notably, defendant's personnel director, Erick Wowra, maintains that neither he nor anyone else at defendant's place of business received Ms. Wall's letter on that date.

For a period of time, during which the Department of Labor's Right to Know Division was being realigned and reorganized, Ms. Barton's claim remained open, but uninvestigated. Finally, on 11 April 1994, after the General Assembly provided permanent funding to a new division for the processing of REDA complaints, the Workplace Retaliatory Discrimination Division (WORD), Ms. Barton's complaint was assigned to REDA investigator Joseph D. Turnham.

As a consequence, on 12 April 1994, WORD sent a letter to defendant informing the corporation of Mr. Turnham's assignment to the case. On 26 April 1994, Mr. Turnham visited defendant's place of business and interviewed several of the personnel as a part of his investigation of Ms. Barton's complaint. During this visit, defendant's personnel director, Mr. Wowra, asked Mr. Turnham to supply him with a copy of the complaint. As a result, Mr. Turnham faxed a copy of the complaint to Mr. Wowra on 27 April 1994.

Mr. Turnham completed his investigation of Ms. Barton's complaint on 25 May 1994. On that date, Ms. Wall, on behalf of the Commissioner of Labor, determined that the allegations of Ms. Barton's complaint were true and that the complaint was meritorious.

Following this determination, efforts to conciliate the complaint were made, but were unsuccessful. Thus, on 6 February 1995, Ms. Wall, on behalf of the Commissioner of Labor, informed Ms. Barton and defendant that the Commissioner would file a civil action; and subsequently, on 27 April 1995, plaintiff instituted this action in Hoke County Superior Court, alleging that defendant had violated North Carolina REDA.

Thereafter, on 30 June 1995, defendant filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. This motion came on for hearing before Judge E. Lynn Johnson at the 11 September 1995 civil session of Hoke County Superior Court.

The evidence presented tended to show the following: Defendant's personnel director, Mr. Wowra, questioned the authenticity of a doctor's note that Ms. Barton had submitted to excuse her absence from work after her injury in October 1992. Mr. Wowra stated that he had spoken with Ms. Barton's doctor, Dr. Peter

Perryman, in October 1992, and that Dr. Perryman had indicated that he had given Ms. Barton a note to excuse her absence, but that the date on the note, on which Ms. Barton was to return to work had been altered by someone in the doctor's office without his consent. During his investigation, Mr. Turnham had opportunity to speak with Dr. Perryman, and at that time, the doctor indicated that he had altered the date on the note himself. Significantly, Dr. Perryman died on 15 May 1995.

After reviewing the evidence presented by both parties, Judge Johnson ruled upon defendant's motion as one for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, as both parties presented affidavits and other matters outside of the pleadings, concluding that defendant's motion should be granted and dismissing plaintiff's complaint. Plaintiff appeals.

On appeal, plaintiff presents but one assignment of error: The court's entry of summary judgment in favor of defendant was in error because plaintiff met the statutory investigatory prerequisites for bringing this action. We agree.

Summary judgment is appropriately granted pursuant to North Carolina General Statutes section 1A-1, Rule 56(c) when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party 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). It is the moving party who bears the burden of showing that lack of a triable issue. Once the moving party meets its burden, section (e) of Rule 56 provides that the burden then shifts to the non-moving party to present a forecast of evidence showing that the non-moving party will be able to make out at least a prima facie case at trial. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). For the reasons discussed herein, we find that defendant failed to show a lack of a genuine issue of material fact in this case, and therefore, we conclude that the trial court erroneously granted its motion for summary judgment.

[1] First, plaintiff argues that the trial court erred in its determination that it failed to forward a copy of Ms. Barton's complaint to defendant within twenty (20) days following receipt, in accordance with section 95-242(a) of the General Statutes. Section 95-242(a) of

North Carolina's REDA provides that within twenty (20) days following receipt of a complaint, a copy of that complaint shall be forwarded to the employer who is alleged to have violated the law. N.C. Gen. Stat. § 95-242(a) (1993).

In the instant action, Ms. Betty Jo Barton penned a letter to the Department of Labor's Right to Know Division complaining of defendant's alleged violations of REDA. However, the letter failed to indicate defendant's name and address. Without this information, the Right to Know Division was unable to commence an investigation of Ms. Barton's allegations. Moreover, the statutory period in which to begin an investigation of these allegations could not begin without the requisite information as to an employer's name and address.

Subsequently, the Right to Know Division contacted Ms. Barton and requested this information. Ms. Barton responded to this request by letter, which was received by the Right to Know Division on 16 December 1992. Consequently, on 18 December 1992, Ms. Wall, the Director of the Right to Know Division, wrote a letter to defendant informing it of Ms. Barton's REDA complaint and enclosing copies of Ms. Barton's letters. Although defendant's personnel director, Mr. Worwa, contends otherwise, the evidence in the light most favorable to plaintiff, tends to show that a person at defendant's place of business signed the receipt for Ms. Wall's letter on 21 December 1992. Accordingly, we find that a copy of Ms. Barton's complaint was forwarded to defendant and an investigation was commenced within twenty (20) days of receipt of the necessary information from Ms. Barton. Defendant's arguments to the contrary fail.

[2] Plaintiff next argues that the complaint processing time periods in section 95-242(a) are directory, not jurisdictional in nature, and thus, the court erred in dismissing this action on the basis that plaintiff exceeded these time periods. We agree.

Whether the time provisions of section 95-242(a) are jurisdictional in nature is dependent upon legislative intent—i.e., whether the legislature intended the language of section 95-242(a) to be mandatory or directory. *State ex rel. Utilities Comm. v. Empire Power Co.*, 112 N.C. App. 265, 277, 435 S.E.2d 553, 559 (1993) (citing *Art Society v. Bridges, State Auditor*, 235 N.C. 125, 130, 69 S.E.2d 1, 5 (1952)), *disc. review denied*, 335 N.C. 564, 441 S.E.2d 125 (1994). Generally, "statutory time periods are . . . considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period." *Id.*(citing

Meliezer v. Resolution Trust Co., 952 F.2d 879, 883 (5th Cir. 1992); *Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984)). Mandatory provisions are jurisdictional, while directory provisions are not.

Section 95-242(a) provides:

> An employee allegedly aggrieved by a violation of G.S. 95-241 may file a written complaint with the Commissioner of Labor alleging the violation. The complaint shall be filed within 180 days of the alleged violation. Within 20 days following receipt of the complaint, the Commissioner shall forward a copy of the complaint to the person alleged to have committed the violation and shall initiate an investigation. If the Commissioner determines after the investigation that there is not reasonable cause to believe that the allegation is true, the Commissioner shall dismiss the complaint, promptly notify the employee and the respondent, and issue a right-to-sue letter to the employee that will enable the employee to bring a civil action pursuant to G.S. 95-243. If the Commissioner determines after investigation that there is reasonable cause to believe that the allegation is true, the Commissioner shall attempt to eliminate the alleged violation by informal methods which may consist of conference, conciliation, and persuasion. *The Commissioner shall make a determination as soon as possible and, in any event, not later than 90 days after the filing of the complaint.*

N.C.G.S. § 95-242(a) (emphasis added). Significantly, the statute fails to provide a consequence for the Commissioner's failure to comply with the 90-day period given to make a determination about a complaint.

Plaintiff references our decision in *Empire Power*, 112 N.C. App. 265, 435 S.E.2d 553, in support of this argument. In *Empire Power*, our Court was called upon to interpret a statute much like the one in this case—section 62-82(a) of the General Statutes. Section 62-82(a) required the Utilities Commission to commence a hearing into an application for a certificate of public convenience and necessity not later than three months after the filing of the application. N.C. Gen. Stat. § 62-82(a) (1989). The Court, utilizing the canons of statutory construction, interpreted the statutory time period in that instance to be directory, rather than mandatory since the statute did not contain any consequences for the Utilities Commission's failure to commence a hearing within the specified time period and did not divest the Commission of jurisdiction to do so. *Empire Power*, 112 N.C. App.

265, 435 S.E.2d 553. Accordingly, the Court held that the time period contained therein was directory and not jurisdictional, giving the Commission authority to commence the subject hearing after the three month period was past. *Id.*

Defendant, however, references *Spiers v. Davenport*, 263 N.C. 56, 138 S.E.2d 762 (1964), and *HCA Crossroads Residential Ctrs. v. N. C. Dept. of Human Res.*, 327 N.C. 573, 398 S.E.2d 466 (1990), in support of its position to the contrary. In *Spiers*, the North Carolina Supreme Court was called upon to interpret The Machinery Act, N.C. Gen. Stat. § 105-271 *et seq.*, which required a county tax board to complete county property valuations " 'not later than the third Monday following its first meeting.' " 263 N.C. at 59, 138 S.E.2d at 763 (quoting N.C. Gen. Stat. § 105-327(e)). The Supreme Court held that the statute was mandatory, and therefore, the tax board lacked jurisdiction to revalue the plaintiff's property after the statutory time period had passed. The Court, however, particularly noted that "[t]he reason why the [board] is required to act within a fixed time is apparent." *Id.* at 59, 138 S.E.2d at 764. It was paramount that property be valued within the statutory time period, so that the other time limits provided in the Act would also be met. Otherwise, the entire taxation process would be disrupted. *Id.*

In *HCA Crossroads*, our Supreme Court interpreted section 131E-185 of the North Carolina General Statutes. Together, subsections 131E-185(a1) and (c) provided a 150-day statutory time period within which the Department of Human Resources could review applications for certificates of need. N.C. Gen. Stat. § 131E-185 (a1), (c) (1988). As this time period was jurisdictional in nature, the Supreme Court found that failure to act on an application within this time period, rendered any decision by the Department, other than an approval of the application, a nullity. *HCA Crossroads*, 327 N.C. 573, 398 S.E.2d 466. This Court, however, distinguished *HCA Crossroads* in *Empire Power* stating that the case was inapplicable to *Empire Power* because the statute in *Empire Power* (N.C.G.S. § 62-82(a)) did not contain the explicit language addressed in *HCA Crossroads* (N.C.G.S. § 131E-185). *Empire Power*, 112 N.C. App. at 278, 398 S.E.2d at 560.

In the case *sub judice*, we find a statute similar to that of the one in *Empire Power*. North Carolina General Statutes section 95-242(a) requires that the Commissioner of Labor make a determination as to the merit of a complaint within 90 days, but fails to provide a result

in the event that the Commissioner fails to do so. As this Court found in *Empire Power*, we find today that this statutory time period is of a directory, not jurisdictional nature.

While defendant's arguments of prejudice do not fall upon deaf ears, we are particularly persuaded in this case by the legislative history and circumstances surrounding the adoption of North Carolina's REDA. The North Carolina General Assembly enacted REDA in response to the disastrous fire which occurred in September 1991 at Imperial Food Products in Hamlet, North Carolina. By enacting REDA, the General Assembly sought to remedy unsafe and unlawful workplace conditions, by providing employees with a mechanism to report these violations without being punished for doing so. It is doubtful, therefore, that the General Assembly wished to place such stringent restrictions on the investigatory time periods found in section 95-242(a), so as to deny an injured employee the right to seek redress through REDA. As did the United States Supreme Court in *Brock v. Pierce County*, we balance the equities in this case, and find that the statutory language in section 95-242(a) was intended to spur the Commissioner to action, not limit the scope of his authority. *See Brock v. Pierce County*, 476 U.S. 253, 90 L. Ed. 2d 248 (1986) (interpreting 29 U.S.C. § 816(b) (now repealed) and recognizing the importance of allowing agencies to go forward after procedural deadlines, when divesting the agency of jurisdiction would prejudice a private citizen seeking redress). Hence, we cannot say that as a matter of law the Commissioner was without jurisdiction to bring this matter to the court's attention, and as such, we find that the trial court erred in dismissing this action on the basis that plaintiff had exceeded this statutory time period.

As the trial court incorrectly interpreted the nature of the provisions of section 95-242(a), we find that there is indeed genuine issue of material fact in the instant case and that the trial court erred in granting defendant's motion for summary judgment. Therefore, the trial court's decision is reversed and the case is remanded.

Reversed and remanded.

Chief Judge ARNOLD and GREENE concur.

JANE & DENNIS SHARP, PETITIONERS v. TAMULA-JEAN SHARP, RESPONDENT. IN RE: SAMANTHA E. FERRELL AND AMANDA LYNN SHARP

COA95-1388

(Filed 5 November 1996)

Divorce and Separation § 357 (NCI4th)— grandparents' right to bring initial custody action—allegation of unfit parent required

The Supreme Court's decision of *McIntyre v. McIntyre*, 341 N.C. 629, prohibits grandparents from initiating suits for visitation when no custody proceeding is ongoing and the minor child's family is intact, but it does not prohibit grandparents from initiating a custody action pursuant to N.C.G.S. § 50-131.1(a) when no custody proceeding is ongoing; however, the grandparents must still overcome the constitutionally protected paramount right of parents to the custody, care, and control of their children, and in a dispute between a parent and grandparents, there must be allegations that the parent is unfit.

Am Jur 2d, Divorce and Separation §§ 980, 1002.

Award of custody of child where contest is between child's father and grandparent. 25 ALR3d 7.

Award of custody of child where contest is between child's mother and grandparent. 29 ALR3d 366.

Award of custody of child where contest is between child's parents and grandparent. 31 ALR3d 1187.

Appeal by plaintiffs from order entered 19 October 1995 by Judge William Y. Manson in Durham County District Court. Heard in the Court of Appeals 18 September 1996.

Plaintiffs are the maternal grandparents of defendant's two minor children. On 31 July 1995 plaintiffs filed a Complaint and Motion for Temporary Custody in Durham County District Court seeking custody of the minor children. At the time of the complaint, Samantha E. Ferrell was three years old, and Amanda Lynn Sharp was eighteen months old. The children were born out of wedlock and had different fathers.

In this initial custody action, plaintiffs alleged that defendant had executed a notarized temporary custody authorization to plaintiffs

effective 23 June 1995 until 1 August 1995, pending defendant's finding suitable housing. Plaintiffs alleged further, *inter alia*, that defendant had not yet found suitable housing; that she had not provided a safe or stable home for the children; that she had relationships with several men and had moved around in both North Carolina and Pennsylvania; that since the children resided with plaintiffs, she had not contributed to the support of the children; that "there is a substantial risk of harm to the minor children if in the physical custody of the defendant-mother"; and that she was not emotionally stable enough to care for the children. Plaintiffs asserted that they were fit and proper people to have custody of the minor children, and that it was in the best interest of the minor children to be in their custody.

After an *ex parte* hearing on 1 August 1995, Judge William Y. Manson found that "there is a risk of emotional and/or physical harm to the minor children should they be returned to the physical custody of the defendant-mother," and granted plaintiffs temporary custody pending a hearing in the matter. On 12 October 1995 defendant filed a Motion to Dismiss plaintiffs' complaint, arguing that it failed to state a claim upon which relief may be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990).

At a hearing on the motion on 19 October 1995, Judge Manson dismissed the complaint for lack of subject matter jurisdiction, based upon the court's reading of *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995). In *McIntyre*, the Supreme Court held that under N.C. Gen. Stat. § 50-13.1(a) (1995), grandparents may not initiate a visitation action when no custody proceeding is ongoing, and the children's family is intact. *Id.* at 635, 461 S.E.2d at 750. Judge Manson ordered that the minor children be returned to the custody of defendant mother.

Pursuant to G.S. § 1A-1, Rule 60, plaintiffs filed a Motion for Relief from the court's 19 October 1995 order, based upon an argument that *McIntyre*, a case addressing only visitation, does not apply in the context of this custody action. At a 7 November 1995 hearing, Judge Manson denied plaintiffs' Rule 60 motion, finding that custody and visitation are synonymous; that there was no pending custody action; and that the children's family was intact. Plaintiffs gave notice of appeal to this Court of the 19 October 1995 order.

Subsequently, this Court granted plaintiffs' petition for a temporary stay of the 19 October 1995 order, as well a writ of supersedeas, pending the outcome of this appeal (COAP95-486).

Levine & Stewart, by Michael D. Levine and Elizabeth R. Harrison, for plaintiff appellants.

John M. Bourlon, Ann M. Credle, and Frances P. Solari for defendant appellee.

ARNOLD, Chief Judge.

This case presents the question of whether the recent Supreme Court's decision in *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995) prohibits grandparents from initiating a custody action pursuant to N.C. Gen. Stat. § 50-13.1(a) (1995) when no custody proceeding is ongoing.

G.S. § 50-13.1(a) provides:

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

In *McIntyre*, the Supreme Court held that G.S. § 50-13.1(a) does not give grandparents "the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact." 341 N.C. at 635, 461 S.E. 2d at 750. The *McIntyre* Court reviewed several subsections of Chapter 50 that more specifically addressed visitation rights of grandparents and determined that they "control our interpretation of N.C.G.S. § 50-13.1(a)." 341 N.C. at 634, 461 S.E.2d at 749. The Court found that G.S. § 50-13.2(b1) allows a trial court to grant visitation rights to grandparents in a custody order; G.S. § 50-13.5(j) allows grandparents to make a motion in the cause for visitation after the custody of a minor child has been determined; and G.S. § 50-13.2A allows grandparents of a minor child who has been adopted by a stepparent or a relative of the child to institute an action for visitation. *McIntyre*, 341 N.C. at 632-34, 461 S.E.2d at 748-49.

The *McIntyre* Court concluded that "it appears that the legislature intended to grant grandparents a right to visitation only in those situations specified in these three statutes." *Id.* at 634, 461 S.E.2d at 749. Under these "more minute and definite" statutes, the Court held, "a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative." *Id.*

Defendant argues that *McIntyre* applies equally to custody cases initiated by grandparents and requires that such suits be dismissed for lack of subject matter jurisdiction. We disagree.

The *McIntyre* holding was narrowly limited to suits initiated by grandparents for *visitation* and does not apply to suits for *custody*. The *McIntyre* Court specifically addressed the language of the 1989 amendment to G.S. § 50-13.1(a) providing that "[u]nless a contrary intent is clear, the word 'custody' shall be deemed to include custody or visitation or both." The *McIntyre* Court interpreted the legislature's intent in amending the statute as follows:

> The amendment probably was added to provide that in certain contexts "custody" and "visitation" are synonymous; however, here it is clear that in the context of grandparents' rights to visitation, the two words do not mean the same thing. . . . [T]he legislature did not intend "custody" and "visitation" to be interpreted as synonymous in the context of grandparent's rights.

McIntyre, 341 N.C. at 634-35, 461 S.E.2d at 749.

We do not believe, therefore, that the Supreme Court intended its narrow holding regarding grandparent's visitation suits to apply broadly to situations where grandparents bring initial suits for custody where there are allegations that the parents are unfit, or have abandoned or neglected their children.

"So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate." *Petersen v. Rogers*, 337 N.C. 397, 403, 445 S.E.2d 901, 905 (1994) (quoting *Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716, *disc. review denied*, 293 N.C. 360, 238 S.E.2d 149 (1977)). But, this paramount right of parents to custody must yield where there is a finding of unfitness. *Id.* at 403, 445 S.E.2d at 904. The law presumes that parents "will perform their obligations to their children" and therefore presumes their right to custody. *Id.* at 403, 445 S.E.2d at 904 (quoting *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961)). A parent's right to custody, however, is not an absolute right. *Id.* "*When a parent neglects the welfare and interest of his child, he waives his usual right to custody.*" *Id.* at 403, 445 S.E.2d at 904 (emphasis in original) (quoting *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191).

In this case, the grandparents filed suit for custody pursuant to G.S. 50-13.1, which is usually invoked in the context of divorce and

separation. However, this provision is intended to cover "a myriad of situations in which custody disputes are involved" and its application is not "restricted to custody disputes involved in separation or divorce." *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 706-07, 281 S.E.2d 370, 374-75 (1981).

Although grandparents have the right to bring an initial suit for custody, they must still overcome the "constitutionally-protected paramount right of parents to custody, care, and control of their children." *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905. While the best interest of the child standard would apply in custody disputes between two parents, in a dispute between parents and grandparents there must first be a finding that the parent is unfit. *Cf. Petersen*, 337 N.C. at 401-02, 445 S.E.2d at 903-04.

The complaint and motion for temporary custody filed by the grandparents in this case allege that the mother has not provided safe and suitable housing for her children, that she has not contributed to the support of her children, that the children's father has not been involved with the children, and that the children are at substantial risk of harm. Because the district court dismissed the case for lack of subject matter jurisdiction, there was never a hearing to determine whether the allegations were true, or whether the mother was a fit parent.

Defendant argues that her parents should be restricted to making allegations of potential harm to their grandchildren only through the procedures provided by the Juvenile Code of Chapter 7A of the General Statutes. N.C. Gen. Stat. §§ 7A-516 *et. seq.* (1995). Pursuant to these statutes, any individual who suspects child abuse or neglect must report such allegations to the Department of Social Services. G.S. § 7A-543. The Department of Social Services is required to investigate the allegations, and if they are substantiated, file a complaint invoking the jurisdiction of the district court for the protection of the juvenile. G.S. § 7A-544.

Without question, social service workers who investigate allegations of abuse or neglect are concerned, dedicated, hardworking people who care deeply about the safety of children. But these individuals are "strangers" to the family unit under investigation. Moreover, all too often, Social Services lacks adequate resources to protect every child who is at risk of potential harm, and the results are sometimes tragic. Close family members, especially grandparents, are

often in the best position to discover and substantiate abuse or neglect, and immediately intervene to protect the children.

We do not believe the legislature intended to provide access to our courts, where serious allegations exist, only through the protracted process of a social service investigation, while closing the courthouse door to those who may be the most concerned, members of the child's extended family. Where the safety of a child is at issue, the doors of our courts must swing wide open.

The legislature has spoken to the issue of child custody in three separate chapters, Chapter 50 (addressing primarily divorce and separation proceedings), Chapter 7A of the Juvenile Code (focusing on juvenile delinquency, neglect and abuse), and Chapter 50A (the Uniform Child Custody Jurisdiction Act). N.C. Gen. Stat. §§ 50 *et. seq.*; §§ 7A-516 *et. seq.* (1995); §§ 50A *et. seq.* (1995 Supp.). A constant theme sounded throughout each of these chapters is the overriding importance of protecting the welfare of children.

The principle that our courts should be readily accessible to hear custody issues when the welfare of a child is at issue is clearly expressed in the Uniform Child Custody Jurisdiction Act. G.S. § 50A *et. seq.* One of the stated purposes of the Act is to "[d]iscourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child." G.S. § 50A-1(4). Keeping this purpose in mind, the district court is authorized to decide child custody matters and has jurisdiction to make a child custody determination by *initial decree if it is in the best interest of the child* because

> (i) the child and the child's parents, or the child and at least one *contestant*, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or
>
> The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.

N.C. Gen. Stat. § 50A-3(a)(2)(3) (1989) (emphasis added). A *contestant* in a custody dispute is defined as "a person, including a parent,

who claims a right to custody or visitation rights with respect to a child." N.C. Gen. Stat. § 50A-2(1) (1989).

The grandparents in this case claim they have a right to custody of their grandchildren because they are fit to provide for their care while the children's parents are unable or unwilling to do so. Given the allegations of this case it is clearly in the best interest of the children that the district court assume jurisdiction, hold a hearing, and make findings of fact with regard to the fitness of the parents to retain custody.

The district court is also vested with *exclusive* and original jurisdiction over any case involving a juvenile who is alleged to be abused or neglected. N.C. Gen. Stat. § 7A-523 (1995). Our laws make clear that protecting the welfare of children is of such overriding importance that our courts must be readily accessible when the potential for harm exists. *See Oxendine*, 303 N.C. at 707-08, 281 S.E. 2d. at 375-76 (rejecting the argument that foster parents should be barred from seeking an adoption determination on the theory they lacked standing).

Defendant contends that grandparents may bring a suit for custody only when there is an ongoing custody proceeding as provided by G.S. § 50-13.5(j). This procedural provision simply makes clear that grandparents have the right to file suit for custody or visitation during an ongoing proceeding, but it does not restrict their right to bring an initial custody suit pursuant to G.S. § 50-13.1 when there are allegations that the parent is unfit. In *Kerns v. Southern*, 100 N.C. App. 664, 397 S.E.2d 651 (1990), this Court rejected the argument that grandparents lack standing to sue for custody of their grandchildren pursuant to G.S. § 50-13.1.

We hold accordingly that G.S. § 50-13.1(a) grants grandparents the right to bring an initial suit for custody when there are allegations that the child's parents are unfit. The trial court's order dismissing plaintiffs' complaint for lack of subject matter jurisdiction is

Reversed and remanded.

Judges JOHNSON and GREENE concur.

STATE v. ROGERS

[124 N.C. App. 364 (1996)]

STATE OF NORTH CAROLINA v. JOHN MICHAEL ROGERS, DEFENDANT-APPELLANT

No. COA96-8

(Filed 5 November 1996)

1. Searches and Seizures § 77 (NCI4th)— detaining defendant for Alco-sensor test—reasonable, articulable suspicion of crime

An officer had a reasonable, articulable suspicion that defendant was committing the crime of driving while impaired in his presence and thus properly detained defendant for an Alco-sensor test where defendant stopped his vehicle in an intersection after being directed to turn by the officer; the officer approached defendant's vehicle and engaged in a short conversation with defendant; and the officer detected a strong odor of alcohol on defendant's breath.

Am Jur 2d, Searches and Seizures § 75.

2. Automobiles and Other Vehicles § 834 (NCI4th)— driving while impaired—probable cause for arrest

An officer had probable cause to arrest defendant for driving while impaired where defendant stopped his vehicle in an intersection after being directed to turn by the officer; the officer approached defendant's vehicle, engaged in a short conversation with defendant, and detected a strong odor of alcohol on defendant's breath; the officer administered an Alco-sensor test to defendant which revealed an alcohol concentration of .13; the officer arrested defendant; and a subsequent Intoxilyzer test indicated that defendant's alcohol concentration was .11.

Am Jur 2d, Automobiles and Highway Driving §§ 296 et seq.

3. Automobiles and Other Vehicles § 813 (NCI4th)— Alco-sensor test—results inadmissible—basis for probable cause

Though the arresting officer's failure to administer a second Alco-sensor test, in violation of N.C.G.S. § 20-16.3(b), may have rendered the evidence inadmissible at trial, there was no prohibition against the results of this test being used by the officer to form probable cause.

Am Jur 2d, Automobiles and Highway Driving §§ 296 et seq.

Driving while intoxicated: duty of law enforcement officer to offer suspect chemical sobriety test under implied consent law. 95 ALR3d 710.

4. **Automobiles and Other Vehicles § 115 (NCI4th); Constitutional Law § 172 (NCI4th)— driver's license revoked—DWI conviction—no double jeopardy**

Revocation of defendant's driver's license under N.C.G.S. § 20-16.5 and subsequent conviction of DWI under N.C.G.S. § 20-138.1 did not violate the prohibition against double jeopardy.

Am Jur 2d, Automobiles and Highway Driving §§ 137 et seq.

Appeal by defendant from judgment entered 13 September 1995 by Judge Peter M. McHugh in Iredell County Superior Court. Heard in the Court of Appeals 9 September 1996.

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

Knox, Knox, Freeman & Brotherton, by Allen C. Brotherton, for defendant-appellant.

JOHNSON, Judge.

On 25 August 1994, defendant was arrested and charged with driving while impaired (DWI) in violation of section 20-138.1 of the North Carolina General Statutes. On 9 November 1994, defendant pled guilty to DWI in Iredell County District Court. Thereafter, on 18 November 1994, defendant gave notice of appeal to superior court for trial *de novo*. On 16 January 1995, defendant filed and served a motion to suppress all of the evidence obtained subsequent to his allegedly illegal seizure and arrest. This motion came on for hearing at the 11 September 1995 criminal session of Iredell County Superior Court before Judge Peter McHugh.

The evidence presented at the hearing on defendant's motion to suppress was as follows: On 25 August 1994, Trooper J. S. Fox of the North Carolina Highway Patrol was directing traffic at the intersection of Brawley School Road and Stutts Road in Iredell County. Trooper Fox and other officers were diverting traffic from the area of a hostage situation. Using hand signals, the trooper was directing

traffic to turn left onto Stutts Road from Brawley School Road. During this time, several drivers stopped their vehicles to speak to the officers as they did not know the direction in which they needed to travel.

At approximately 10:10 p.m., Trooper Fox observed defendant's 1993 Buick vehicle approaching the intersection where the trooper was stationed. Instead of turning left as directed by Trooper Fox, defendant stopped his vehicle in the intersection. Consequently, the trooper approached defendant's vehicle and noticed that defendant was its sole occupant. Notably, defendant contends that he stopped in the intersection to speak with Trooper Fox about the direction in which he needed to travel. Trooper Fox approached defendant's vehicle, and engaged in short conversation with defendant, during which he noted a strong odor of alcohol on defendant's breath. As a result, the trooper directed defendant to drive to the shoulder of the roadway and defendant complied. Subsequently, the trooper administered an Alco-sensor test, arrested defendant, and transported him to the Iredell County Jail, where an Intoxilyzer test indicated that defendant's alcohol concentration was .11. After hearing the evidence and arguments of counsel, the trial court found that Trooper Fox had lawfully detained and searched defendant, and denied defendant's motion to suppress.

Immediately thereafter, this case came on for trial before a duly empaneled jury. At the close of all of the evidence, defendant made a motion to dismiss the charge, contending that the criminal prosecution was a violation of the constitutional prohibitions against double jeopardy. This motion was also denied. The trial court, in giving its instruction to the jury, instructed the jury on the issue of whether defendant had an alcohol concentration over the legal limit, since the trial court found that evidence was insufficient as a matter of law to find him mentally or physically impaired. The jury found defendant guilty and the trial court imposed a Level 5 impaired driving sentence with a twelve month sentence of probation. Defendant appeals.

On appeal, defendant assigns as error the trial court's denial of his motion to suppress on two grounds: (1) the evidence was the product of an illegal seizure made without reasonable, articulable suspicion; and (2) the evidence was a product of an illegal arrest made without probable cause. We cannot agree.

[1] The Fourth Amendment to the United States Constitution guarantees citizens the right to be secure from unreasonable searches and

seizures. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). The protections of the Fourth and Fourteenth Amendments extend to investigatory detentions of vehicles. *Id.* at 441, 446 S.E.2d at 69-70. A law enforcement officer may, however, make a brief, investigative stop of a vehicle if he is led to do so by specific, articulable facts giving rise to a reasonable suspicion of illegal activity. *Id.* at 441, 446 S.E.2d at 70; *United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L. Ed. 2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)). The United States Supreme Court explained the "reasonable suspicion" standard in *Alabama v. White*:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. . . . Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," that must be taken into account when evaluating whether there is reasonable suspicion.

496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990) (citations omitted).

North Carolina General Statutes section 15A-977(f) requires that the trial court make findings of fact and conclusions of law when ruling upon a motion to suppress. N.C. Gen. Stat. § 15A-977(f) (1988). These findings of fact are conclusive and binding upon appellate courts if supported by competent evidence. *State v. Jordan*, 120 N.C. App. 364, 462 S.E.2d 234, *disc. review denied*, 342 N.C. 416, 465 S.E.2d 546 (1995).

In the instant case, the trial court made the following pertinent findings of fact:

> (1) That defendant was seized "at the time that Trooper Fox requested him to pull off of the shoulder of the road after the initial confrontation between the two of them." Until that point the trooper was engaged in a public safety function. "He had no intention and no purpose to stop [defendant's] vehicle, no purpose to confront [him]."

(2) That at the point that the trooper requested defendant to pull onto the shoulder of the road, the trooper had both an articulable suspicion and probable cause to believe that a misdemeanor offense was being committed in his presence.

(3) That defendant was the sole occupant of a vehicle that was in operation on a public highway in this State.

(4) That the evidence is "uncontroverted of a strong odor of alcohol, and . . . in and of itself, under these circumstances, is grounds for probable cause."

Looking at the totality of the circumstances, we find adequate evidence to support the trial court's findings of fact that Trooper Fox had a reasonable, articulable suspicion to believe that defendant was committing a crime in his presence—driving while impaired.

[2] We must now address defendant's contention that Trooper Fox did not possess probable cause to arrest him. "To be lawful, a warrantless arrest must be supported by probable cause." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984). " 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . .' " *Id.*(citations omitted) (quoting *State v. Shore*, 285 N.C. 328, 335, 204 S.E.2d 682, 687 (1974). This standard requires " 'less than evidence which would justify . . .' conviction." *Id.* at 261, 322 S.E.2d at 146 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949)). In making the determination as to whether probable cause exists, one must examine the attenuating facts and circumstances of each case. *Id.* This Court explained a trial court's function in making this determination in *In re Gardner*,

> In determining whether probable cause exists in any particular case, it is the function of the trial court, if there be conflicting evidence, to find the relevant facts. Such factual findings, if supported by competent evidence, are binding on appeal. However, whether the facts so found by the trial court or shown by uncontradicted evidence are such as to establish probable cause in a particular case, is a question of law as to which the trial court's ruling may be reviewed on appeal.

39 N.C. App. 567, 571, 251 S.E.2d 723, 726 (1979), *quoted in Moore v. Hodges*, 116 N.C. App. 727, 730, 449 S.E.2d 218, 220 (1994).

In the instant case, the facts were uncontroverted that defendant was operating a motor vehicle on a public highway in North Carolina on 25 August 1994, when he encountered a traffic diversion at the intersection of Brawley School Road and Stutts Road; that he stopped his vehicle in the middle of that intersection to speak with Trooper Fox as he was uncertain as to which direction he needed to go; that he held a brief conversation with the trooper, during which the trooper detected a strong odor of alcohol about defendant's person; that the trooper directed defendant to pull over to the shoulder of the roadway; that the trooper administered but one Alco-sensor test before arresting defendant; and that defendant was subsequently administered an Intoxilyzer test which indicated that his alcohol concentration was .11, in excess of the .08 legal limit.

After hearing the evidence and arguments of all of the parties involved, the trial court found and concluded that not only did the trooper have a reasonable, articulable suspicion to detain defendant, but that the trooper also had probable cause to arrest defendant. The trial court found that under the circumstances presented herein, the strong odor of alcohol alone was sufficient to furnish the trooper with probable cause. The trial court particularly noted, "it is a rare case where that sole manifestation of impairment is presented as purported grounds to support probable cause," but stated that the reason for his finding in this case hinged upon the fact that defendant initiated the contact with the trooper while driving while impaired in the instant case. Significantly, the trial court declined to include any findings as to the Alco-sensor test given to defendant before defendant's arrest, as such was rendered invalid under section 20-16.3 of the General Statutes which requires that two sequential screening tests be administered, and Trooper Fox only administered the Alco-sensor test once at the scene.

[3] We find that the trial court properly denied defendant's motion to suppress as there was adequate evidence to support the trial court's finding that the trooper had probable cause to believe that defendant was driving while impaired. While defendant references *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970), and *State v. Gurley*, 257 N.C. 270, 125 S.E.2d 445 (1962), in support of his argument to the contrary, these cases are distinguishable as herein there is evidence from which a reasonable, cautious police officer could find that defendant had been or was committing a crime in his presence. The facts indicate that the trooper, in this case, did not rely solely on the odor of alcohol in finding probable cause to arrest defendant. The trooper,

who had been trained and was experienced in methods of detecting signs of intoxication, had an opportunity to observe defendant stop in the intersection, spoke with him, and smelled a strong odor of alcohol about his person. At this time, the trooper administered an Alco-sensor test which revealed an alcohol concentration of .13. That the trooper failed to administer a second Alco-sensor test, in violation of section 20-16.3(b) of the General Statutes, may not rob him of the probable cause that these facts and circumstances furnished him. There is no prohibition against the results of this test being used by the officer to form probable cause, although this evidence may not have been admissible at trial. As the trooper possessed both a reasonable, articulable suspicion and probable cause to believe that a crime was being committed in his presence, defendant's seizure and consequent arrest were lawful and the trial court properly denied defendant's motion to suppress.

[4] Finally, defendant assigns as error the trial court's denial of his motion to dismiss because his prosecution violated the prohibition against double jeopardy. Notably, defendant failed to include the order revoking his driver's license entered by the magistrate in the Record on Appeal, but asks that we exercise our discretion and allow this order to be appended to the record. However, assuming *arguendo* we do as defendant requests, defendant is still without relief, as our Supreme Court found in *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996), that revocation of one's driver's license under North Carolina General Statutes section 20-16.5 and subsequent conviction of DWI under section 20-138.1 does not violate the prohibition against double jeopardy. *Id.* Accordingly, this assignment of error is overruled.

In light of the foregoing, we find that defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WYNN concur.

DARRELL REID WILSON, v. DOROTHY REID WILSON, IN THE MATTER OF WILLIAM C. CREWS, III, PROPOSED DEPONENT

No. COA95-1364

(Filed 5 November 1996)

1. **Appeal and Error § 94 (NCI4th)— order requiring appearance for deposition—order immediately appealable**

Though an order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling were not reviewed before final judgment, the order finding the proposed deponent in contempt for failure to appear for a deposition and the underlying order upon which the contempt order was based were immediately appealable in this case since the proposed deponent could purge himself only by complying with the order to appear for the deposition, of which he complained.

Am Jur 2d, Appellate Review §§ 135, 137, 139, 140.

2. **Discovery and Depositions § 21 (NCI4th)— order requiring appearance for deposition—no jurisdiction of trial court—failure to obey not contempt**

The Davidson County District Court lacked jurisdiction to enter an order requiring the proposed deponent to appear for a deposition, and therefore the contempt order based on his failure to obey that underlying order was void, since the proposed deponent resided, lived, was employed, and transacted his business in Guilford County; he could be compelled to appear at a deposition only in Guilford County; the Davidson County District Court could not subpoena the deponent to appear in Forsyth County; and it was not contempt for the deponent to disobey the improper order. N.C.G.S. § 1A-1, Rules 30(b)(1) and 45(d)(1).

Am Jur 2d, Depositions and Discovery §§ 130 et seq.

Appeal by proposed deponent from orders entered 22 August 1995, 6 September 1995, and 8 September 1995 by Judge George T. Fuller in Davidson County District Court. Heard in the Court of Appeals 18 September 1996.

This case arises out of an underlying action by Darrell Reid Wilson against his former wife, Dorothy Reid Wilson, alleging mali-

cious prosecution and requesting punitive damages. Plaintiff specifically claims that defendant maliciously and without probable cause had criminal summonses issued against him for abandonment and non-support of defendant, and non-support of their minor child.

As a part of discovery in the case, plaintiff attempted to depose a non-party, William C. Crews III, who was dating defendant at the time. In his first attempt to depose Crews, plaintiff sent Crews a notice of deposition requesting that he appear at the offices of plaintiff's attorney, Gatto Law Offices, in Forsyth County, North Carolina on 10 February 1995. The uncontradicted evidence shows that Crews resided, was employed, and conducted his business in Guilford County, North Carolina. Plaintiff also caused a subpoena to issue from the Davidson County District Court, commanding Crews to appear at the 10 February 1995 deposition. Crews did not appear at the deposition, and a motion to compel filed by plaintiff was dismissed by the Davidson County District Court on 3 April 1995.

Plaintiff sent Crews a second notice of deposition, filed on 3 April 1995, requesting that he appear at a newly scheduled deposition on 27 April 1995, also at Gatto Law Offices in Forsyth County. Again, a subpoena for deposition was issued by the Davidson County District Court. In response, Crews sent to plaintiff a Motion for a Protective Order, Motion to Quash Subpoena, Notice, and Motion for Costs, dated 24 April 1995. The motions were not filed, however, until 14 July 1995. In his motions, Crews indicated that he would not appear at the 27 April 1995 deposition in Forsyth County, alleging, *inter alia*, that he did not reside, was not employed, and did not conduct business in Forsyth County.

On or about 30 May 1995, plaintiff filed a Motion to Show Cause in the Davidson County District Court, requesting that Crews be held in civil and criminal contempt for failing to appear at the 27 April 1995 deposition, and requesting that Crews be ordered to appear and show cause why he should not be held in contempt. Plaintiff also sent a notice of show cause hearing to Crews, indicating the Crews "may appear" at the 19 July 1995 hearing, but no judicial order or notice was issued directing Crews to appear. *See* N.C. Gen. Stat. § 5A-23 (1986).

After the show cause hearing on 19 July 1995, at which Crews did not appear, the Davidson County District Court filed an order on 22 August 1995, signed and served on 15 August 1995. The court found, *inter alia*, that it had jurisdiction over Crews and the subject matter

in this action, that Crews had been properly served with a subpoena to appear at the 27 April 1995 deposition, and that pursuant to N.C. Gen. Stat. § 1A-1, Rule 45(f), Crews was in willful contempt of court for failure to appear at the 27 April 1995 deposition. The court ordered Crews to appear at a newly scheduled deposition, again at Gatto Law Offices in Forsyth County, on 28 August 1995.

The court also ordered Crews to appear in Davidson County District Court on 6 September 1995 to show cause for his failure to appear at the 19 July 1995 show cause hearing. Finally, the court ordered Crews to pay Gatto Law Offices "the amount of $516.35, representing costs of deposition preparation and $350 representing a reasonable attorney's fee in the prosecution of this matter on or before August 28, 1995."

On 15 August 1995, plaintiff sent Crews a notice of deposition scheduled for 28 August 1995 in Forsyth County, and caused a subpoena for deposition to be issued from the Davidson County District Court. On 1 September 1995, Crews filed a notice of appeal of the order entered 22 August 1995, along with a document entitled "NOTICE" in the Davidson County District Court, which stated his reasons for not appearing at the 28 August 1995 deposition. His reasons included, *inter alia*, the contention that the Davidson County District Court was without jurisdiction to enter the 22 August 1995 order, and the assertion that the order was currently on appeal to this Court.

Crews and his attorney appeared before the Davidson County District Court for the show cause hearing on 6 September 1996. The court found that Crews failed to appear at the 28 August 1995 deposition in Forsyth County and held him in civil and criminal contempt for his failure to abide by the 22 August 1995 order. The court noted the fact that Crews had filed an appeal of the 22 August 1995 order, but it "specifically decline[d] to stay execution of the terms and conditions of the order . . . ."

The court concluded that it had subject matter jurisdiction in this action and ordered Crews to be incarcerated in the Davidson County Jail until his attendance on 8 September 1995 at deposition at Gatto Law Offices in Forsyth County. The court further ordered that Crews remain in custody of the Davidson County Sheriff's Department "until he complies with the terms and conditions" of the 22 August 1995 order by paying the sum of $516.35 to Gatto Law Offices. Finally, by separate and duplicative order signed 6 September 1996, the

Davidson County District Court ordered that Crews be found in contempt of court for failure to appear at the 28 August 1996 deposition, and that Crews be held in jail "until he purges himself of contempt by giving his deposition" on 8 September 1995.

Upon a motion filed by Crews on 6 September 1995, the Davidson County Superior Court granted Crews a Writ of Habeas Corpus the next day, releasing him from incarceration pending a hearing on the writ. The superior court also found that the district court's orders entered with reference to the hearings on 19 July 1995 and 6 September 1995 "are overreaching and should be stayed pending hearing on this Writ of Habeas Corpus," and that Crews "is entitled to not be deposed in either Davidson or Forsyth County or otherwise but by good and proper subpoena and notice, duly issued and duly served."

Crews now appeals all orders of the Davidson County District Court with reference to the 19 July 1995 and 6 September 1995 hearings.

Max D. Ballinger for proposed non-party deponent appellant.

No brief filed for plaintiff appellee.

ARNOLD, Chief Judge.

[1] We must first determine whether Crews appeals interlocutory orders that are not immediately appealable. "As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment." *Benfield v. Benfield*, 89 N.C. App. 415, 418, 366 S.E.2d 500, 502 (1988); *see generally* N.C. Gen. Stat. § 5A-24 (1986); G.S. § 7A-27 (1995). Nevertheless,

> when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity both of the original discovery order and the contempt order itself where, as here, the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains.

Willis v. Power Co., 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976).

In this case, Crews may purge himself only by complying with the order to appear at deposition in Forsyth County, of which he complains. The contempt order, and the underlying order upon which the contempt order is based, are therefore immediately appealable.

[2] Crews asserts multiple assignments of error, but we find merit in his appeal by addressing only two determinative jurisdictional issues. First, we find that the Davidson County District Court lacked jurisdiction to enter the 22 August 1995 order, and therefore the contempt order based on Crews's failure to obey that underlying order is void.

Under Rule 30 of the North Carolina Rules of Civil Procedure, a deponent who resides in North Carolina "may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person." N.C. Gen. Stat. § 1A-1, Rule 30(b)(1) (Supp. 1995). Moreover, Rule 45 provides:

> Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the superior court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein.

G.S. § 1A-1, Rule 45(d)(1) (1990); *id.*, Comment ("[I]n section (d) the idea is that the subpoena shall issue from the court of the county where the deposition is to be taken."); *see also Cochran v. Cochran*, 93 N.C. App. 574, 578, 378 S.E.2d 580, 583 (1989) ("[I]n order to compel the deposition testimony of a nonparty, a subpoena must be issued from the county in which the deposition is to be taken.").

The uncontradicted evidence in the record shows that at all relevant times Crews resided, lived, was employed, and transacted his business in Guilford County. Under Rule 30(b)(1), Crews may be compelled to appear at a deposition only in Guilford County. Moreover, under Rule 45(d)(1), the Forsyth County Superior Court is the only court with jurisdiction to issue a subpoena for Crews to appear at a deposition in Forsyth County. The subpoena directing Crews to appear at the 27 April 1995 deposition in Forsyth County, however, was issued by the Davidson County District Court. The Davidson County District Court, therefore, lacked jurisdiction to find Crews in contempt of its erroneous subpoena to appear for a deposition in Forsyth County on 27 April 1995, and it likewise lacked jurisdiction to compel Crews, by order of 22 August 1995, to appear at a newly scheduled deposition on 28 August 1995 in Forsyth County.

In *Harding v. Harding*, 46 N.C. App. 62, 64, 264 S.E.2d 131, 132 (1980), this Court held that "it is not contempt to disobey an order entered by a court without jurisdiction . . . ." *See also In re Smith*, 301 N.C. 621, 633, 272 S.E.2d 834, 842 (1981) ("Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt."). As we found above, the Davidson County District Court lacked jurisdiction to enter the 22 August 1995 order, and consequently, it was not contempt for Crews to disobey that order. The contempt order, therefore, is void.

[3] Second, we conclude that after Crews filed notice of appeal to this Court for the 22 August 1995 order, the Davidson County District Court lacked jurisdiction to enter the 8 September 1995 contempt order based upon Crews's failure to comply with the appealed order. On 1 September 1995, Crews filed a notice of appeal to this Court from the 22 August 1995 order. He also filed a document entitled "NOTICE" indicating his reasons for not complying with the 22 August 1995 order, including the fact that he had filed a notice of appeal from that order.

N.C. Gen. Stat. § 1-294 (1983) provides:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

This statute operates to stay the 22 August 1995 order against Crews, who is a non-party deponent in this action. Accordingly, we hold that the Davidson County District Court was without jurisdiction, pending the appeal, to find Crews in contempt of the order appealed from, and its findings and order to that effect are void.

For the several reasons stated above, we find that the Davidson County District Court lacked jurisdiction to enter the orders with reference to the 19 August 1995 and 6 September 1995 hearings. These orders are

Vacated.

Judges JOHNSON and GREENE concur.

CHARLES ALLEN BROWN, PLAINTIFF-APPELLEE v. MICHAEL ALTON HURLEY, DEFENDANT-APPELLANT

No. COA95-1253

(Filed 5 November 1996)

Husband and Wife § 50 (NCI4th); Pleadings § 63 (NCI4th)—pleadings well-grounded in law and fact—pleadings not interposed for improper purpose—sanctions properly denied

The trial court properly found that plaintiff's pleadings were well-grounded in law, well-grounded in fact, and not interposed for an improper purpose, and the court therefore properly denied defendant's Rule 11 motion for sanctions where: (1) plaintiff's claim for criminal conversation was facially plausible, as there was an actual marriage between plaintiff and his wife, and he alleged sexual intercourse between his wife and defendant after separation but during marriage; (2) plaintiff's claim for alienation of affections was facially plausible, as the evidence tended to show that plaintiff and his wife continued to have an amorous relationship after their separation, but it began to deteriorate shortly after the wife became involved with defendant; (3) a factual basis existed for both claims, as the evidence showed that plaintiff personally observed defendant staying overnight at the wife's apartment, kissing her, and going out of town with her; plaintiff hired a private investigator who documented the facts; and plaintiff thus made a reasonable inquiry into the facts; and (4) plaintiff's pleadings were not interposed for an improper purpose where he deposed defendant and his wife, served subpoenas on them requesting production of receipts and other documents, served defendant with a request for admissions, and otherwise took reasonable steps in an attempt to develop evidence in support of his cause of action.

Am Jur 2d, Husband and Wife §§ 269-289; Pleading §§ 26, 339.

Element of causation in alienation of affections action. 19 ALR2d 471.

Condonation or forgiveness of spouse as affecting liability for alienation of affections. 38 ALR2d 1234.

What statute of limitations governs an action for alienation of affections. 46 ALR2d 1086.

Appeal by Defendant from Order entered 10 May 1995 by Judge Donald R. Huffman in Guilford County Superior Court. Heard in the Court of Appeals 26 August 1996.

Edward P. Hausle, P.A., by Edward P. Hausle, for Defendant-Appellant.

Stephen E. Lawing for Plaintiff-Appellee.

WYNN, Judge.

Defendant Michael Alton Hurley appeals from an order entered 10 May 1995 denying his motion for sanctions under N.C. Gen. Stat. § 1A-1, Rule 11 (1990) against plaintiff Charles Allen Brown.

The trial court made the following findings of fact: Plaintiff married Deborah T. Brown on 28 December 1985. In June 1992, Mrs. Brown left the marital residence, stating that she needed time to herself to think but that she would be back. In the three months following their separation, the Browns continued to engage in activities which plaintiff believed were aimed at a reconciliation of the marriage. For example, Mrs. Brown continued to provide plaintiff with "anniversary" cards (the couple had celebrated the 28th day of each month as the anniversary of their marriage), go out to dinner with him, and take vacations with him at the beach. However, on 8 October 1992, Mrs. Brown presented plaintiff with a separation agreement. Plaintiff asserts that this was the first time that she made it known to him that she was not returning to the marriage. Thereafter, plaintiff began making some investigations, and on the morning of 23 October 1992, he discovered an automobile in front of Mrs. Brown's apartment that he later identified as belonging to defendant, a co-worker of Mrs. Brown.

On 28 January 1993, plaintiff and Mrs. Brown executed a separation and property settlement agreement, which stated that it was to be effective 27 June 1992, the agreed date upon which they separated. Subsequently, plaintiff sued defendant seeking damages for alienation of affections and for criminal conversation. He alleged that he was unable to save his marriage because of defendant's interference.

In April 1993, defendant admitted at his deposition to having a sexual relationship with Mrs. Brown, but that it only began in October of 1992 after her separation from plaintiff. In May 1993, defendant moved to dismiss the action for failure to state a claim and for summary judgment, both on the ground that there was no evi-

dence of a relationship between defendant and Mrs. Brown until after she separated from plaintiff. The trial court denied both motions.

This action came on for trial on 21 February 1994. Prior to the empaneling of a jury, defendant moved *in limine* to prohibit evidence of a post-separation relationship between defendant and plaintiff's wife. The trial court granted that motion, ordering:

> "[plaintiff] . . . not to offer any evidence concerning alienation of affections for anything that occurs after June 27, 1992, the date that irreconcilable differences separated the parties. And as far as the criminal conversation is concerned it would seem that would go up through and to January 28, 1983 (sic). I sustain any objection to evidence offered after that date, which is the date of the agreement, . . ."

The judge later changed his ruling to make 27 June 1992 the cut-off date for both claims. Plaintiff then conceded that he had no evidence of any pre-separation conduct and judgment was directed in defendant's favor. Plaintiff gave notice of appeal from the order granting the motion *in limine* and the directed verdict. However, the appeal was not perfected and was subsequently dismissed.

Defendant moved for Rule 11 sanctions against plaintiff and his counsel on 6 March 1995; thereafter, plaintiff filed his own Rule 11 motion. Both motions were denied and the parties appealed. However, plaintiff subsequently withdrew his appeal.

The issues on appeal are whether the trial court erred in finding that plaintiff's pleadings were (I) well-grounded in law; (II) well-grounded in fact; and (III) not interposed for an improper purpose.

We note at the outset that our Supreme Court has adopted the following standard for appellate review of the granting or denial of motions to impose sanctions under Rule 11(a):

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

I.

We first look at whether the trial court erred in finding that plaintiff's pleadings were well-grounded in law. To satisfy the legal sufficiency prong of Rule 11, the pleading must be "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, . . ." N.C.G.S. § 1A-1, Rule 11(a) (1990). There is a two-part analysis to determine whether a pleading satisfies the legal sufficiency requirement of Rule 11. First, the court must determine whether the pleading is facially plausible. *Bryson v. Sullivan*, 330 N.C. 644, 661, 412 S.E.2d 327, 336 (1992). If the paper is facially plausible, then the inquiry is complete and sanctions are inappropriate. If the paper is not facially plausible, then the second inquiry is whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by existing law. *Id.* Defendant contends that to substantiate his claims for alienation of affections and criminal conversation, existing law required plaintiff to establish that defendant and Mrs. Brown engaged in a pre-separation relationship. He further contends that Rule 11 sanctions were appropriate in this case because plaintiff was aware that such evidence did not exist. We disagree.

The elements of criminal conversation are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture. *Gray v. Hoover*, 94 N.C. App. 724, 381 S.E.2d 472, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 498 (1989). The mere fact of separation will not bar an action for criminal conversation occurring during the separation. *Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938). Thus, under *Bryant*, the court's ruling with respect to criminal conversation was clearly correct.

In an action for alienation of affections, the plaintiff must show that (1) the parties to the marriage were happily married and that genuine love and affection existed between them; (2) that such love and affection was alienated and destroyed; and (3) that the wrongful and malicious acts of the defendant brought about the loss and alienation of such love and affection. *Gray v. Hoover*, 94 N.C. App. at 727, 381 S.E.2d at 473. The plaintiff does not have to prove that his spouse had no affection for anyone else or that their marriage was previously one of "untroubled bliss"; he only has to prove that his spouse had

some genuine love and affection for him and that love and affection was lost as a result of defendant's wrongdoing. *Shaw v. Stringer*, 101 N.C. App. 513, 516, 400 S.E.2d 101, 103 (1991). Furthermore, while a husband and wife separating appears to contradict any assertions of a "happy marriage," this Court has held that the mere fact of separation does not establish a lack of "genuine love and affection" as a matter of law. *See Canon v. Miller*, 71 N.C. App. 460, 468-69, 322 S.E.2d 780, 787 (1984), *vacated on other grounds*, 313 N.C. 324, 327 S.E.2d 888 (1985).

In the instant case, plaintiff's claim for alienation of affections was also facially plausible. The trial court found and the record establishes that plaintiff and Mrs. Brown continued to have an amorous relationship after their separation, and that Mrs. Brown's feelings for plaintiff began to deteriorate shortly after she became involved with defendant.

Defendant argues that plaintiff was aware that he could only present pre-separation evidence to support his claim for alienation of affections because he and Mrs. Brown specifically contracted that the separation agreement would be effective as of the date of their separation, rather than as of the date of the document's execution. However, we find that there was sufficient evidence to support the trial court's ruling that there was no "meeting of the minds" between plaintiff and Mrs. Brown as to whether the date of separation was to be the effective date for *all* purposes. The Court noted that (1) plaintiff insisted on the addition of a paragraph in the separation agreement preserving his claims for alienation of affections and criminal conversation and (2) there was no evidence that either party in any way abided by the terms of the agreement prior to the date it was actually signed. Thus, we affirm the trial court's determination that sanctions were inappropriate under the legal sufficiency prong of Rule 11.

II.

We look next at whether plaintiff's pleadings were factually sufficient. Under Rule 11, the signer certifies that the pleading is well-grounded in fact. N.C.G.S. § 1A-1, Rule 11(a). "In analyzing whether a complaint meets the factual certification requirement, the court must make the following determinations: (1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact." *McClerin v. R-M*

Industries, Inc., 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995) (citation omitted).

In the instant case, we affirm the trial court's ruling that a factual basis existed for both of plaintiff's claims. The trial court found and the record establishes that before he filed his complaint, plaintiff personally observed the defendant staying over night at Mrs. Brown's apartment, kissing Mrs. Brown on several occasions, and going out of town with her. In addition, plaintiff hired a private investigator in December of 1992 who documented many instances of defendant spending the night with plaintiff's wife and photographed defendant kissing Mrs. Brown. We conclude that the evidence in this case supports the trial court's ruling that sanctions were not appropriate under this prong of Rule 11 because plaintiff made a reasonable inquiry into the facts.

III.

Finally, we look at whether the trial court erred in finding that plaintiff's pleadings were not interposed for an improper purpose. Even if a complaint is well-grounded in fact and in law, it may nonetheless violate the improper purpose prong of Rule 11. *Bryson v. Sullivan*, 330 N.C. at 663, 412 S.E.2d at 337. An improper purpose is "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 13(C) (Supp. 1992)). In other words, a party "will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay." *Bryson v. Sullivan*, 330 N.C. at 663, 412 S.E.2d at 337. An objective standard is used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose. *Id.*

In the instant case, the record on appeal indicates that there was sufficient evidence to support the trial court's determination that plaintiff's actions, looked at in their entirety, did not indicate that he maintained his suit for an improper purpose. For example, plaintiff: (1) deposed defendant and Mrs. Brown; (2) served subpoenas upon defendant and Mrs. Brown requesting production of telephone records, gasoline card records, credit card statements, hotel records, and other documents; (3) served defendant with a request for admissions; (4) moved the court to compel defendant to comply with his discovery requests (which was granted); and (5) hired a private inves-

tigator. The court concluded that these were all reasonable steps in plaintiff's attempt to develop evidence in support of his cause of action. Therefore, we must uphold the trial court's decision to not impose sanctions under this last prong of Rule 11.

For the foregoing reasons, the order of the trial court is,

Affirmed.

Judges JOHNSON and LEWIS concur.

COMPUTER DECISIONS, INC., PLAINTIFF v. ROUSE OFFICE MANAGEMENT OF NORTH CAROLINA, INC., AND ROUSE-TEACHERS GATEWAY II LIMITED PARTNERSHIP, DEFENDANTS

95-1155

(Filed 5 November 1996)

1. Frauds, Statute of § 32 (NCI4th)— sufficiency of pleading

Defendants adequately pled the statute of frauds as a defense to a claim for breach of a lease where they pled that no written agreement to enter the lease was ever executed by the parties.

Am Jur 2d, Landlord and Tenant §§ 13, 28, 29; Statute of Frauds §§ 98, 100, 101.

2. Frauds, Statute of § 5 (NCI4th)— admissions in answers and deposition—no writing under statute of frauds

Defendants' admissions in their answer and in their vice president's deposition did not substitute for a writing under the statute of frauds.

Am Jur 2d, Contracts § 181; Statute of Frauds §§ 100, 178, 311, 312.

3. Frauds, Statue of § 3 (NCI4th)— statute of frauds—no equitable estoppel to assert

Defendants were not equitably estopped from asserting the statute of frauds, since defendants did not have a duty to disclose their intentions regarding plaintiff's proposed lease or their negotiations with another prospective tenant, and, assuming that

defendant's vice president's statement that the parties "had a deal" was a promise that defendants thereafter breached, breach of promise alone is insufficient to establish estoppel.

Am Jur 2d, Estoppel and Waiver § 48; Statute of Frauds §§ 100, 565, 566.

4. Frauds, Statute of § 3 (NCI4th)— statute of frauds defense—quasi-estoppel no bar

Quasi-estoppel did not bar defendants' statute of frauds defense since there was no evidence that defendant accepted benefits of the alleged lease agreement with plaintiff, and since detrimental reliance is irrelevant under the doctrine of quasi-estoppel.

Am Jur 2d, Estoppel and Waiver § 48; Statute of Frauds §§ 100, 569.

5. Frauds, Statute of § 5 (NCI4th)— internal form and draft lease—failure to show contract formation—statute of frauds not satisfied

An internal form and a draft lease were insufficient to satisfy the statute of frauds because those writings failed to show contract formation.

Am Jur 2d, Commercial Code §§ 113, 115; Contracts § 181; Statute of Frauds §§ 100, 366.

Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds. 12 ALR2d 508.

Sufficiency of memorandum of lease agreement to satisfy the statue of frauds as regards terms and conditions of lease. 16 ALR2d 621.

6. Fraud, Deceit, and Misrepresentation § 15 (NCI4th)— negotiations between commercial parties—no duty to disclose—no fraud

The trial court did not err in granting summary judgment for defendants on plaintiff's fraud claim, since both plaintiff and defendants were commercial parties negotiating a commercial lease, and defendants had no duty to inform plaintiff that they were negotiating with another party.

Am Jur 2d, Statute of Frauds §§ 366, 513.

7. Unfair Competition or Trade Practices § 12 (NCI4th)— lease negotiations—no unfair and deceptive practices

The trial court did not err in granting summary judgment for defendants on plaintiff's unfair and deceptive practices claim since there was no enforceable contract between the parties; by deciding not to pursue lease negotiations with plaintiff, defendants were simply exercising their right to contract freely with whomever they chose; and even if defendants did breach an oral lease agreement, substantial aggravating circumstances attendant to the breach must be shown in order to sustain an action under N.C.G.S. § 75-1.1.

Am Jur 2d, Contracts § 238; Fraud and Deceit § 41.

Appeal by plaintiff from order signed 11 August 1995 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 5 June 1996.

Howard, From, Stallings & Hutson, P.A., by John N. Hutson, Jr. and Scott A. Miskimon, for plaintiff-appellant.

Moore & Van Allen, PLLC, by Denise Smith Cline, for defendant-appellee.

LEWIS, Judge.

Plaintiff appeals the trial court's grant of summary judgment for defendants on all of its claims.

Evidence presented at summary judgment shows the following undisputed facts: Computer Decisions, Inc. ("Computer Decisions") operates a computer training business in Morrisville, North Carolina. In 1992, Computer Decisions began negotiations with Rouse-Teachers Gateway II Limited Partnership, and its property manager, Rouse Office Management of North Carolina, Inc. (hereinafter jointly "Rouse"), to explore the possibility of leasing office space from Rouse on the first floor of 2300 Gateway Centre ("the premises") in Morrisville.

On 14 December 1992, representatives of Computer Decisions and Rouse met and reached verbal agreement regarding the proposed initial lease term, premises to be leased initially, allocation of various upfitting charges, and rent. Certain other terms remained undecided. It was then plaintiff's president Jon Beard asked Rouse vice-president Jody Clark if they had a deal. She said: "We have a deal." Defendants

were aware that plaintiff had a deadline for moving. On 15 December 1992, Rouse created a written internal request form ("internal form") to serve as the basis for a draft lease. The internal form was signed by two Rouse vice presidents and contained the name of the tenant, description of the premises, rent, lease term, and additional provisions.

During December 1992 and January 1993, the parties continued to negotiate over terms and exchanged drafts of proposed lease agreements. On 28 January 1993, Computer Decisions learned that Rouse had been negotiating with Nello Teer. Jon Beard confronted Jody Clark who declared that Rouse no longer intended to rent the premises to Computer Decisions. Rouse then leased the premises to Nello Teer. As its existing lease expired on 28 February 1993, Computer Decisions had to locate, lease, remodel and move into new office space in 30 days.

On 2 December 1993, Computer Decisions filed a complaint, amended 7 April 1995, against Rouse alleging claims for breach of lease, fraud, negligent misrepresentation, and unfair and deceptive trade practices. Defendants filed an answer in which they asserted that there was no written lease agreement to bind the parties. Defendants then moved for summary judgment which motion was granted by order signed 11 August 1995 by Judge Stafford G. Bullock. Plaintiff appeals.

Plaintiff contends that the court erred by granting summary judgment for defendants on its breach of lease claim. Defendants counter that, as a matter of law, any alleged lease agreement is unenforceable for failure to comply with the statute of frauds.

We first address plaintiff's assertions (1) that defendants have not sufficiently pled the statute of frauds, (2) that defendants' admissions of the lease agreement substitute for the statute of frauds, and (3) that defendants are estopped to plead the statute of frauds.

[1] First, defendants pled the statute of frauds as a defense because they pled that no written agreement to enter the lease was ever executed by the parties. *See Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 597, 173 S.E.2d 496, 501, *cert. denied*, 276 N.C. 728 (1970).

[2] Second, plaintiff cites *Sandlin v. Kearney*, 154 N.C. 596, 70 S.E. 942 (1911), in support of its assertion that defendants' admissions in their answer and in Jody Clark's deposition substitute for a writing under the statute of frauds. *Sandlin* does not support this contention.

In *Sandlin*, the statute of frauds defense was waived because it was not asserted. *Id.* at 600, 601-602, 70 S.E.2d at 944, 945. Consequently, the court relied on the parties' admissions. *See id.*

In fact, except for cases decided under the Uniform Commercial Code Statute of Frauds, N.C. Gen. Stat. section 25-2-201, inapplicable here, our courts have consistently held that a party's admission of the contract in a deposition or answer does *not* bar that party from pleading the statute of frauds as a defense. *E.g.*, *Weant v. McCanless*, 235 N.C. 384, 386, 70 S.E.2d 196, 198 (1952); *Barnes v. Teague*, 54 N.C. 277, 280 (1854); *Pierce v. Gaddy*, 42 N.C. App. 622, 626, 257 S.E.2d 459, 462, *disc. review denied*, 298 N.C. 569, 261 S.E.2d 124 (1979).

[3] Third, plaintiff asserts that defendants are estopped under the doctrines of equitable estoppel and quasi-estoppel from asserting the statute of frauds. In a proper case, equitable estoppel based on fraud may override the statute of frauds. *Dunn v. Dunn*, 24 N.C. App. 713, 716, 212 S.E.2d 407, 409, *cert. denied*, 287 N.C. 258, 214 S.E.2d 430 (1975).

Plaintiff contends that there is a genuine issue of material fact as to whether defendants' failure to disclose its simultaneous negotiations with plaintiff and Nello Teer was fraudulent or in bad faith so as to warrant application of equitable estoppel.

However, as discussed below in regard to plaintiff's fraud and negligent misrepresentation claims, defendants did not have a duty to disclose their intentions regarding plaintiff's proposed lease or their negotiations with Nello Teer. Furthermore, assuming that Jody Clark's statement that the parties "had a deal" was a promise that defendants thereafter breached, breach of promise alone is insufficient to establish estoppel. *Vick v. Vick*, 126 N.C. 123, 128, 35 S.E. 257, 258 (1900). We hold that there is no genuine dispute of material fact, and that, as a matter of law, defendants are not equitably estopped from asserting the statute of frauds.

[4] In the alternative, plaintiff asserts, based on its detrimental reliance, that quasi-estoppel bars defendants' statute of frauds defense. We disagree.

In *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991), the Court stressed that the party asserting the statute of frauds defense accepted the benefits of the contract for eight years before first asserting that the contract was not binding. *Id.* at 173, 172-74 n.3, 404 S.E.2d at 858-59. Here, there is no evidence that defendants accepted

the benefits of the alleged lease agreement with plaintiff. In addition, we have held that detrimental reliance is irrelevant under the doctrine of quasi-estoppel. *Carolina Medicorp v. Bd. of Trustees of the State Medical Plan*, 118 N.C. App. 485, 493, 456 S.E.2d 116, 121 (1995). We hold that defendants are not precluded under the doctrines of equitable estoppel or quasi-estoppel from asserting the statute of frauds defense.

[5] Plaintiff asserts that the 15 December 1992 internal form and a draft lease dated 18 December 1992 ("draft lease") are sufficient to satisfy the statute of frauds. We disagree because these writings fail to show contract formation.

North Carolina's Statute of Frauds, N.C. Gen. Stat. section 22-2 (1986), provides, *inter alia*, that "leases and contracts for leasing land exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith." Here, since the alleged lease was for a term greater than three years, G.S. section 22-2 applies.

The writing or writings must "show the essential elements of a valid contract," *Smith v. Joyce*, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939), and " 'the *intent* and *obligation* of the parties.' " *Rape v. Lyerly*, 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975) (quoting *Mayer v. Adrian*, 77 N.C. 83, 88 (1877)).

We find the internal request form relied upon by plaintiff insufficient to satisfy the statute of frauds. This form is titled "Office and Industrial Document Request." It requests creation of a draft lease and sets out the terms to be included. It is signed by two Rouse vice presidents, and includes the name of the tenant, description of the premises, rent, lease term, and additional provisions. However, there is no indication, from the face of the document, that the parties made an agreement to be bound. This writing fails to show the essential elements of a contract. *See McGraw v. Llewellyn*, 256 N.C. 213, 216-17, 123 S.E.2d 575, 578 (1962).

We also hold that the 18 December 1992 draft lease, either alone or combined with the internal form, is insufficient under the statute of frauds as it too fails to contain evidence of contract formation. Since the alleged oral lease agreement, even if proven to exist, is unenforceable under the statute of frauds, the trial court did not err in granting summary judgment on plaintiff's claim for breach of lease.

We only address the failure to disclose component of the plaintiff's fraud claims since the other fraud allegations have been abandoned. *See* N.C.R. App. P. 28(a) (1996).

[6] Plaintiff has not cited any North Carolina cases which show, under the facts presented, that defendants had a duty to disclose their intentions regarding their leasing plans for the premises. Such a duty must be shown for fraud claims based on an alleged failure to disclose. *See Harton v. Harton*, 81 N.C. App. 295, 297-98, 344 S.E.2d 117, 119-20, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986).

In addition, we have held, in the context of a fraud claim, that there is no duty of disclosure in a commercial real estate transaction between commercial parties. *C.F.R. Foods, Inc. v. Randolph Development Co.*, 107 N.C. App. 584, 589, 421 S.E.2d 386, 389, *disc. review denied*, 333 N.C. 166, 424 S.E.2d 906 (1992). Both plaintiff and defendants were commercial parties negotiating a commercial lease. Under the facts presented, defendants did not have a duty to inform plaintiff that they were negotiating with another party. The trial court did not err by granting summary judgment on plaintiff's fraud claim.

Plaintiff also asserts a claim for negligent misrepresentation but cites no North Carolina cases in support of its contention that defendants had a duty of disclosure. Summary judgment was properly given.

[7] Plaintiff also asserts that the trial court erred by granting summary judgment to defendants on its unfair and deceptive trade practices claim under N.C. Gen. Stat. section 75-1.1 *et. seq.* (1994).

To prevail on an unfair and deceptive trade practices claim, a plaintiff must show (1) that the defendant committed an unfair or deceptive act or practice, (2) in or affecting commerce, (3) and that it was injured thereby. *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992), *disc. review denied as improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993).

Plaintiff relies on *Mosley & Mosley Builders v. Landin Ltd.*, 97 N.C. App. 511, 389 S.E.2d 576, *disc. review denied*, 326 N.C. 801, 393 S.E.2d 898 (1990) in an attempt to show that defendants' actions were deceptive. We do not find *Mosley* applicable.

In *Mosley*, a landlord forcibly entered the tenant's premises and removed his personal property from the rented premises while there

was an outstanding dispute between the parties as to whether the landlord could relocate the tenant to a new location. *Id.* at 519, 389 S.E.2d at 580-81. The court held that, under these circumstances, a letter from the landlord, sent shortly prior to the dispute and wishing the tenant a profitable year, had the tendency to mislead and deceive. *See id.* In contrast, here, there was no enforceable contract between plaintiff and defendants, and no wrongful entry or removal of property as there was in *Mosley.*

Defendants rely on *Tar Heel Industries v. E.I. duPont de Nemours,* 91 N.C. App. 51, 370 S.E.2d 449 (1988). There, the plaintiff, a provider of shuttle service, claimed that the defendant violated Chapter 75 by failing to inform plaintiff that it was looking for an alternative shuttle service provider prior to the sixty days notice required under the service contract. *Id.* at 56-57, 370 S.E.2d at 452. Stating that the defendant was only exercising its rights under the contract, we held, as a matter of law, that there was no violation of Chapter 75. *Id.* Similarly here, by deciding not to pursue lease negotiations with plaintiff, defendants were simply exercising their right to contract freely with whomever they choose.

Plaintiff's Chapter 75 claim is based on defendants' alleged breach of an oral lease agreement. It is well established that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under G.S. section 75-1.1. *Branch Banking and Trust Co. v. Thompson,* 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied,* 332 N.C. 482, 421 S.E.2d 350 (1992). Rather, substantial aggravating circumstances attendant to the breach must be shown. *Id.* This the plaintiff has not done. Under the undisputed facts, we hold that defendants' actions, as a matter of law, do not violate Chapter 75.

There is no genuine issue of material fact, and defendants are entitled to judgment as a matter of law. Accordingly, we affirm the trial court's grant of summary judgment for defendants on all of plaintiff's claims.

Judges JOHNSON and MARTIN, Mark D. concur.

FREDERICK TINCH, PLAINTIFF v. VIDEO INDUSTRIAL SERVICES, INC., WESTERN TEMPORARY SERVICES, INC., HENDON ENGINEERING ASSOCIATES, INC., METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, AND CARYLON CORPORATION, DEFENDANT

No. COA96-155

(Filed 5 November 1996)

1. Appeal and Error § 118 (NCI4th)— partial denial of summary judgment—nonappealable interlocutory order

Defendant engineering company's appeal from the trial court's partial denial of summary judgment as to plaintiff worker's claim that defendant breached a statutory duty to plaintiff was dismissed as interlocutory where this claim was not certified for immediate appeal by the trial court, and defendant has not shown that it will be deprived of any substantial right without review before final judgment on this claim.

Am Jur 2d, Appellate Review §§ 169, 170.

2. Appeal and Error § 121 (NCI4th)— partial summary judgment—nonappealable interlocutory order

Plaintiff worker's appeal from the trial court's order granting summary judgment in favor of defendant video company as to plaintiff's *Woodson* claim based on alleged intentional, willful and wanton misconduct was dismissed as interlocutory where the only claim left for trial is plaintiff's claim that defendant engineering company's breach of a statutory duty caused plaintiff's injuries; the resolutions of plaintiff's claims against defendant video company and defendant engineering company are not dependent upon the same facts; and dismissal of this appeal will not prejudice a substantial right of plaintiff or result in inconsistent verdicts as to the liability of defendant video company and defendant engineering company.

Am Jur 2d, Appellate Review §§ 169, 170.

Appeal by plaintiff and defendant Hendon Engineering Associates, Inc., from order entered 5 October 1995 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 1996.

Mraz & Dungan, by John A. Mraz and Carl Spencer Alridge, II, for plaintiff appellant-appellee.

Ball, Barden, Contrivo & Bell, P.A., by Ervin L. Ball, Jr., for defendant appellant-appellee Video Industrial Services, Inc.

Hunton & Williams, by Frank A. Hirsch, Jr., and Talcott J. Franklin, for defendant appellant-appellee Hendon Engineering Associates, Inc.

SMITH, Judge.

On 20 June 1994 plaintiff Frederick Tinch brought this action in tort to recover damages for injuries received while working on a job site in Asheville, North Carolina. Plaintiff Tinch named Hendon Engineering Associates, Inc., the Metropolitan Sewerage District of Buncombe County and Western Temporary Services as defendants. Plaintiff also named Video Industrial Services, Inc., and Carylon Corporation, as defendants.

On 23 August 1994, defendant Hendon moved for summary judgment as to all claims asserted by plaintiff Tinch. On 5 October 1995 the trial court granted summary judgment in favor of Hendon as to all claims, except the trial court denied Hendon's motion for summary judgment as to plaintiff's claim that defendant Hendon owed a duty to plaintiff pursuant to Chapter 89C of the North Carolina General Statutes.

On 1 November 1994 defendants Video and Carylon moved for summary judgment as to all claims asserted by plaintiff Tinch. On 5 October 1995 the trial court granted Video's motion for summary judgment.

Plaintiff Tinch gave notice of appeal from the 5 October 1995 order granting summary judgment in favor of defendant Video. Defendant Hendon gave notice of appeal from paragraph 2(c) of the 5 October 1995 order, partially denying summary judgment to Hendon. On 29 February 1996 plaintiff appellant Tinch filed a motion to dismiss defendant appellant Hendon's appeal as being interlocutory. We hold that both defendant Hendon's and plaintiff Tinch's appeals are interlocutory and dismiss. We first address the interlocutory nature of defendant appellant Hendon's appeal and then address the interlocutory nature of plaintiff appellant Tinch's appeal.

An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy. *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801,

803 (1993). Generally, no right of appeal lies from an interlocutory order. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). The purpose of this rule is " 'to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.' " *Id.* (quoting *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985). However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal may lie. *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. *Id.* An appeal of an order denying a motion for partial summary judgment is interlocutory as long as a substantial right is not affected. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 661, 403 S.E.2d 593, 594 (1991), *aff'd and remanded*, 332 N.C. 288, 420 S.E.2d 426 (1992).

[1] Hendon appeals from the 5 October 1995 order denying partial summary judgment as to plaintiff's claim that Hendon breached a duty to plaintiff pursuant to Chapter 89C of the North Carolina General Statutes. The trial court's partial denial of summary judgment is interlocutory because it leaves further action for the trial court and does not dispose of the case in its entirety. Furthermore, the trial court certified all claims in the 5 October 1995 order for immediate appeal except the one from which Hendon appeals. Therefore, Hendon must show that a substantial right will be lost or prejudiced without review before final judgment is rendered. Hendon has not shown that it will be deprived of any substantial right if we decline review and plaintiff proceeds to trial on the theory of liability pursuant to Chapter 89C. Because Hendon's claim was not certified for immediate appeal and because no substantial right will be lost or prejudiced, we grant plaintiff appellant's motion to dismiss Hendon's appeal.

[2] On our own motion, we dismiss plaintiff appellant Tinch's appeal of the trial court's order granting summary judgment in favor of defendant appellee Video Industrial Services, Inc. "If an appealing party has no right of appeal, an appellate court on its own mo-

tion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Waters v. Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978) (footnote omitted).

The trial court granted summary judgment in favor of defendant Video as to all of plaintiff's claims. Plaintiff assigns error to the trial court's granting summary judgment in favor of defendant Video, and the only claim addressed in plaintiff's brief is the *Woodson* claim. Pursuant to Rule 54(b), the trial court certified the order of summary judgment in Video's favor, finding there was no just reason for delay and entering final judgment, thereby releasing it for immediate appeal. "Rule 54(b) modifies the traditional notion that a case could not be appealed until the trial court had finally and entirely disposed of it all." *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 490, 251 S.E.2d 443, 446 (1979). "[A] trial judge cannot 'by denominating his decree a "final judgment" make it immediately appealable under Rule 54(b) if it is not such a judgment.' " *Pelican Watch v. U.S. Fire Ins. Co.*, 90 N.C. App. 140, 141, 367 S.E.2d 351, 352 (1988) (quoting *Tridyn*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979)), *rev'd*, 323 N.C. 700, 375 S.E.2d 161 (1989). A finding that "there is no just reason for delay" under Rule 54(b) is not enough. The judgment must also be final. *Cook v. Tobacco Co.*, 47 N.C. App. 187, 188-89, 266 S.E.2d 754, 755-56 (1980). A determination by the trial court in its appeal entries that there is no just reason to delay the appeal must be construed in light of N.C. Gen. Stat. § 7A-27 and our well-settled case law concerning interlocutory appeals. *Fraser*, 75 N.C. App. at 655, 331 S.E.2d at 218. "In multiple claim or multiple party cases the trial court may enter a judgment which is final and which fully terminates fewer than all the claims or claims as to fewer than all the parties." *Tridyn*, 296 N.C. at 490, 251 S.E.2d at 446-47. "Whether a case involves multiple parties is not difficult to determine . . . however, it is important in applying Rule 54(b) to distinguish the true *multiple claim case* from the case in which only a *single claim based on a single factual occurrence* is asserted but in which various kinds of remedies may be sought." *Id.* at 490, 251 S.E.2d at 447 (emphasis added).

Our Supreme Court has said that " '[t]he right to avoid one trial on . . . disputed [fact] issues is not normally a substantial right that would allow an interlocutory appeal while the right to avoid the possibility of two trials on the same issues can be such a substantial right.' " *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772

(1989) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)). "[I]f the final disposition of multiple claims depends upon the determination of any common fact issues, then the parties ordinarily have a substantial right that those issues be determined by the same jury." *Id.* at 26, 376 S.E.2d at 491-92.

In this case, plaintiff alleged that defendant Video's intentional, willful and wanton misconduct was the direct and proximate cause of the injuries and damages suffered by plaintiff. Plaintiff also alleged that defendant Hendon was negligent in failing to investigate the safety record of defendant Video before contracting with Video, in failing to investigate the nature and origin of the equipment that Video used to perform its work, in failing to require Video to use safe equipment which conformed to accepted standards, in failing to require people using Video's winch to be properly trained and in failing to warn plaintiff of the dangers of winch operation. The only remaining claim left for trial is plaintiff's claim that defendant Hendon owed a duty to plaintiff pursuant to Chapter 89C of the North Carolina General Statutes, and that Hendon's breach of that duty caused the injuries and damages suffered by plaintiff. Video's alleged intentional, willful and wanton misconduct with respect to plaintiff's injuries does not affect plaintiff's claim that defendant Hendon's ordinary negligence caused plaintiff's injuries. There are no common fact issues between these defendants. The resolutions of plaintiff's legal claims against Video and Hendon are not dependent upon the same set of facts. Thus, dismissing the appeal against Video will not result in plaintiff having to undergo duplicate trials on the same issues of fact, nor will our dismissal result in inconsistent verdicts. This is a true multiple claim case involving different facts to support the claims alleged. Thus, dismissal of this appeal will not prejudice a substantial right of plaintiff in this case and will not result in inconsistent verdicts as to the liability of defendants Video and Hendon. This appeal is dismissed as interlocutory.

Appeals dismissed.

Judges EAGLES and MARTIN, John C., concur.

LATTIE C. KING v. YEARGIN CONSTRUCTION CO., INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA95-412

(Filed 5 November 1996)

Workers' Compensation § 254 (NCI4th)— temporary total disability—Form 21 agreement—employer's burden of showing disability ended

Where the parties' Form 21 agreement for the payment of temporary total disability was approved by the Industrial Commission, the employee enjoys a presumption of disability, and in order to terminate the employee's benefits absent a waiver, the employer must request a hearing at which it bears the burden of showing that the employee is no longer disabled. Therefore, the Industrial Commission erred by placing on plaintiff employee the burden of proving continued disability even though plaintiff had been released to return to work with no restrictions.

Am Jur 2d, Workers' Compensation § 431.

Insurance: "total disability" or the like as referring to inability to work in usual occupation or in other occupations. 21 ALR3d 1155.

Appeal by plaintiff from Opinion and Award entered 16 February 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 January 1996.

Grimes and Teich, Attorneys, by Henry E. Teich, for plaintiff-appellee.

Roberts & Stevens, P.A., by Steven W. Sizemore, for defendant-appellees.

JOHN, Judge.

Plaintiff appeals an Opinion and Award of the North Carolina Industrial Commission (the Commission) ruling he was not entitled to Workers' Compensation benefits under N.C.G.S. § 97-29 (1991) or N.C.G.S. § 97-30 (1991), and confining his award to benefits under N.C.G.S. § 97-31 (1991). We reverse the Commission's order and remand for further proceedings.

Pertinent facts and procedural information are as follows: plaintiff sustained an injury 11 July 1989 in the course of his employment

as a sheet metal mechanic with defendant Yeargin Construction Co., Inc. (Yeargin). Pursuant to a Form 21 agreement, approved by the Commission 18 August 1989, plaintiff was paid temporary total disability benefits from 23 July 1989 until 28 August 1989, when he returned to work with labor restrictions. By July 1990, his condition had worsened, and he ceased working for Yeargin save for a 10-day period in September 1990. Plaintiff again began receiving temporary total benefits on 12 July 1990, this time pursuant to a Form 26 agreement, denominated "Supplemental Memorandum of Agreement as to Payment of Compensation," approved by the Commission 15 August 1990.

Although plaintiff manifested continuing symptoms, his orthopaedic surgeon, Dr. Montgomery, released him to return to work without restrictions 29 January 1991. Plaintiff did not seek work and was not offered suitable work by Yeargin. His temporary total benefits were terminated by defendants 28 January 1991, which termination was approved by the Commission 27 February 1991.

In September 1991, plaintiff was referred to Dr. Sean Maloney (Dr. Maloney), a specialist in physical medicine and rehabilitation. Plaintiff eventually reached maximum medical improvement 7 February 1992, and was rated by Dr. Maloney as having a 10% permanent partial impairment of the back.

In response to the January 1991 termination of benefits, plaintiff requested a hearing to determine his right to further compensation. In an Opinion and Award filed 30 June 1992, Deputy Commissioner Morgan Chapman ordered defendants to pay plaintiff temporary total disability benefits for the period from 28 January 1991 through 7 February 1992. The Deputy Commissioner determined plaintiff appeared to retain some earning capacity subsequent to attaining maximum medical improvement. However, plaintiff had not reached the end of his healing period prior to the hearing, and no evidence regarding plaintiff's earning capacity was presented. The Deputy Commissioner concluded an additional hearing was required to determine plaintiff's earning capacity should he elect the receipt of benefits under G.S. § 97-30, dependent upon loss of earning capacity, rather than under G.S. § 97-31, payable regardless of earning capacity.

Following a 23 August 1993 hearing conducted for the foregoing purpose, Deputy Commissioner Lorrie L. Dollar ruled plaintiff was limited to benefits under G.S. § 97-31. On appeal, her decision was

affirmed by the Full Commission in an Opinion and Award filed 16 February 1995. The Commission's order provided, *inter alia*, as follows:

> 8. The plaintiff began working at the World of Wood on June 13, 1993, working 13-20 hours per week for $4.25 per hour. The plaintiff's duties include estimates, customer service and spray-finishing handcrafted furniture with a spray gun.
>
> 9. Based upon credible evidence, the undersigned find that from February 7, 1992, the last date Dr. Maloney saw the plaintiff, when the plaintiff reached maximum medical improvement, the plaintiff failed to make a reasonable effort to find other employment. The plaintiff was unable to identify employers to whom he had applied for work, if any, during 1992. The job search list submitted by the plaintiff for the first three months of 1993 contained false or misleading information on at least two of the entries, and plaintiff was vague about the nature of the contacts with the other entries on the list. The plaintiff did not offer evidence of any job search activities between March 30, 1993 and June 12, 1993, and the plaintiff did not attempt to utilize newspaper advertisements, the Employment Security Commission, or any other employment source which maintains information regarding job vacancies. Thus, the plaintiff's testimony and evidence regarding his job search are not accepted as being credible evidence of the extent of his wage earning capacity.
>
> 10. The *plaintiff has failed to establish by a preponderance of the credible evidence* that he has been disabled from earning wages from February 7, 1992 through June 12, 1993, pursuant to N.C.G.S. §§ 97-29 and 97-30. The plaintiff did not make a reasonable effort to seek employment and has not demonstrated any disability other than the 10 percent permanent partial disability to his back, as was previously assigned by Dr. Maloney by letter dated January 7, 1992.

(emphasis added). Plaintiff appeals.

In the arguments advanced in their appellate briefs, both parties proceed on the assumption that at the 23 August 1993 hearing, plaintiff bore the burden of proving he retained a disability as defined by N.C.G.S. § 97-2(9). In a general sense, it is true an injured employee has the burden of showing he is incapable of earning the same wages he previously earned, either in the same or in any other employment. *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425

S.E.2d 454, 457 (1993). However, a recent opinion of this Court has clarified that, upon execution of a Form 21 agreement and subsequent approval by the Commission, the employee enjoys a presumption of disability. *See Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996). Absent waiver, in order to terminate an employee's benefits thereafter, the employer must request a hearing at which it bears the burden of showing the employee is no longer disabled. *Id.* Moreover,

> The employee need not present evidence at the hearing unless and until the employer 'claim[ing] that the plaintiff is capable of earning wages . . . come[s] forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is *capable* of getting one, taking into account both physical and vocational limitations.

Kisiah, (citing *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (emphasis supplied in *Kisiah*)); *see also Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382 (1996).

In the case *sub judice*, although a Form 21 agreement had been executed and approved by the Commission 18 August 1989, defendants twice terminated payment of benefits to plaintiff absent a hearing—first, when plaintiff returned to work in August 1989, and also in January 1991, when Dr. Montgomery "released him to work." The Commission ratified the latter action simply by stamping as "approved" defendants' Form 24 application to stop payment of compensation. When a hearing was finally held at the request of *plaintiff*, a Deputy Commissioner determined that plaintiff's benefits had been wrongfully terminated in January 1991. Plaintiff was deprived of benefits for approximately one and one-half years between cessation of payments in January 1991 and the Deputy Commissioner's decision in June 1992. This sequence of events aptly demonstrates the importance of the holding in *Kisiah* that compensation awarded by virtue of a Form 21 agreement approved by the Commission may not be terminated "absent [waiver or] the opportunity for a hearing." *Kisiah*, 124 N.C. App. at 81, 476 S.E.2d at 439.

On appeal, the Commission's findings of fact are binding if support by evidence in the record; however, its legal conclusions are subject to review. *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985). At the 23 August 1993 hearing subsequent to plaintiffs' attaining maximum medical improvement in February

1992, which hearing is the subject of the instant appeal, the Commission erred under *Kisiah* by determining *plaintiff* failed to carry his burden of proving continued disability. Although plaintiff assigns as error the Commission's ruling that he "failed to establish by a preponderance of the credible evidence that he has been disabled" under G.S. §§ 97-29 or 97-30, plaintiff in his brief does not argue that he was erroneously assigned the burden of proof, but rather that the burden was met.

In our discretion under N.C.R. App. P. 2, "[t]o prevent manifest injustice to a party," we suspend N.C.R. App. P. 28(a) which mandates that our review be limited to questions presented by the parties' briefs. Considering there may have been a question as to the law regarding the manner in which a claimant's benefits may be terminated and the applicable burdens of proof, and that the *Kisiah* opinion which definitively speaks to these issues has only recently been handed down, we believe it would indeed constitute "manifest injustice" to fail to accord plaintiff herein the presumption of disability now firmly recognized in *Kisiah*.

Accordingly, the 16 February 1995 Opinion and Award of the Commission is reversed and this case remanded to the Commission for such further hearing or proceedings as may be necessary and appropriate.

Reversed and remanded.

Judges JOHNSON and SMITH concur.

CHRISTOPHER THOMAS VESTER, BY HIS GUARDIAN AD LITEM, SAM Q. CARLISLE, II AND THOMAS H. VESTER, PLAINTIFFS-APPELLANTS v. NASH/ROCKY MOUNT BOARD OF EDUCATION, DEFENDANT-APPELLEE

No. COA95-1355

(Filed 5 November 1996)

Schools § 172 (NCI4th)— assault on a school bus—personal injury action against school board—sovereign immunity

The trial court did not err by dismissing an action against a school board arising from an assault on a student on a school bus for lack of jurisdiction on the basis that defendant was immune

where plaintiffs had argued that defendant waived its sovereign immunity by purchasing insurance, but there was an exclusion in defendant's insurance policy from actions from the ownership, maintenance, operation, use, loading or unloading of an automobile. The alleged acts here are related to the ownership, maintenance, operation, use, loading and unloading of a school bus and a strict construction of the government's waiver of immunity in actions involving the purchase of liability insurance leads to the conclusion that plaintiff's claims are excluded. The defense of sovereign immunity is applicable.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 42 et seq., 59 et seq.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning. 33 ALR3d 703.

Tort liability of public schools and institutions of higher learning for accident occurring during school athletic events. 35 ALR3d 725.

Appeal by plaintiff from judgment entered 18 September 1995 by Judge G. K. Butterfield in Nash County Superior Court. Heard in the Court of Appeals 11 September 1996.

Anderson & Anderson, by Michael J. Anderson, for plaintiffs-appellants.

Valentine, Adams, Lamar, Etheridge, Sykes & Britt, L.L.P., by L. Wardlaw Lamar, for defendant-appellee.

JOHNSON, Judge.

On 26 May 1993, plaintiff Christopher Thomas Vester, a fourteen-year-old student of Southern Nash Junior High School in Spring Hope, North Carolina, rode on a school bus driven by Warnita Alston. Chris and several of the other students on the bus started passing one of the student's hat back and forth. As Chris passed the hat, the hat flew out of the bus window. Shortly thereafter, it is alleged that Braxton Gilliam grabbed Chris, and Martez Scott struck Chris in the stomach. Defendant Board of Education alleges that the horseplay on the moving school bus was in violation of school bus safety rules and school policy.

Plaintiffs allege that prior to 26 May 1993, Ms. Alston had "a lot of trouble" with Martez Scott. Plaintiffs also allege that Ms. Alston reported Martez to the principal many times for a variety of discipline problems, including hitting other students. Martez was suspended from riding the bus a few times, but more often than not, no disciplinary action was taken. Other students were afraid and uneasy when they were around Martez. Defendant answered plaintiffs' complaint admitting that on two prior occasions, Ms. Alston had reported Martez for inappropriate action on the school bus—throwing objects (broken pencils and thumbtacks), and striking other students with the objects and causing a potential hazard. For each such incident, W. Thomas Finch, assistant principal of Southern Nash Senior High School, suspended Martez from riding on the bus for five days.

Defendant alleges that while Martez had some discipline problems, the bus driver did not have "a lot of trouble" with him and did not report him to the principal "many times" as alleged by plaintiffs. There were no disciplinary actions or reports of violence concerning Martez. Defendant also denied having any knowledge that other students were afraid of Martez. Moreover, defendant adds that for the thirty-one (31) year period prior to the injury to Chris Vester, there were no serious injuries resulting from an assault on a school bus operated by defendant.

As a result of the assault, Chris Vester suffered a ruptured spleen which resulted in a splenectomy. He also incurred medical and other expenses. Additionally, Thomas H. Vester, Chris' father, incurred medical expenses as a result of the injuries sustained by his son.

Plaintiffs filed an action for personal injuries and resulting damages suffered by Chris Vester and for damages suffered by his father, Thomas H. Vester. Defendant filed a motion to dismiss, an answer, a motion for summary judgment and affidavits. At the hearing on the motions, the parties agreed that the hearing was limited to defendant's motion to dismiss for lack of jurisdiction over the person and subject matter, for failure to state a claim, for failure to join a necessary party and for summary judgment based on sovereign immunity. Subsequently, the trial court dismissed plaintiffs' action on the basis that defendant was immune from prosecution and that no jurisdiction over the person existed. Plaintiffs appeal.

Plaintiffs argue that the trial court erred by dismissing their action because defendant waived its sovereign immunity by purchasing insurance. We disagree.

Plaintiffs first contend that defendant waived its sovereign immunity by its purchase of liability insurance. Thus, we must determine whether plaintiffs have a viable claim in light of the exclusion in defendant's insurance policy for actions arising from the ownership, maintenance, operation, use, loading or unloading of an automobile.

The Nash/Rocky Mount Board of Education purchased liability insurance from the North Carolina School Boards Insurance Trust, Agreement #92/93-EOGL-640. This policy provides general liability insurance for "the Ultimate Net Loss resulting from any Claim or Claims . . . for any Personal Injuries . . . [or] for any Wrongful Act . . . of the Member or any other person for whose actions the Member is legally responsible . . . [.]" An exclusion set out in the policy provides that "*Coverage Agreement does not apply: . . . 25. To any Claim arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile.*" (emphasis added). "Automobile," as defined in the policy, "means a land motor vehicle, trailer or semi-trailer designed for travel on public roads but does not include mobile equipment." For purposes of the policy, the school bus is an automobile.

The injuries allegedly sustained in this action were sustained by a student engaged in behavior "while being transported by a school bus." Thus, the alleged negligent act, the assault, occurred while the student was being transported by the school bus. Therefore, the issue is whether the assault arose out of the ownership, maintenance, operation, use, loading or unloading of the bus.

Plaintiffs argue that the exclusion is inapplicable for the following reasons:

1. Punching someone in the stomach has nothing to do with the inherent nature of the automobile.

2. Although this happened on the bus, arising out of does not mean while using.

3. The vehicle did not produce the injury.

However, this Court in *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 99 N.C. App. 753, 394 S.E.2d 242 (1992), held that the school board had not waived its immunity from liability in an action where the plaintiff contended that the school board was negligent in its design and location of a school bus stop. Our Court in *Beatty*, also held that the school board's negligence was the proximate cause of

injuries suffered by an eleven-year-old student struck by a truck while trying to reach his bus stop. *Id.* Further, this Court stated that, "it is inconceivable to us that defendant Board intended to exclude liability for injuries suffered by pupils while being transported by a school bus . . . , but intended to waive immunity for injuries associated with the design of a bus route or the location of a bus stop." *Beatty*, 99 N.C. App. at 756, 394 S.E.2d at 244-45.

The allegations made by plaintiffs in the complaint alleged that defendant was negligent in that it:

(a) Failed to insure the safety of its student school bus passengers by removing violent students from its premises.

(b) Knew or in the exercise of reasonable care should have known that a danger existed to student passengers on a bus when Martez T. Scott and Braxton Gilliam were on board.

(c) Failed to provide a safe environment for students aboard school transportation services.

(d) Failed to provide a monitor on Nash County School Bus #260.

(e) The defendant, Nash/Rocky Mount Board of Education failed to employ a transportation safety assistant to preserve order on the minor plaintiff's bus when it knew or in the exercise of reasonable care should have known that the minor plaintiff's safety was at risk. N.C.G.S. 115C-1, et. seq.

(f) Failed to formulate, publish and enforce policies and practices to control the behavior of the students while on buses.

(g) Failed to formulate, publish and enforce policies and practices to provide for the orderly, safe and efficient transportation of pupils in consideration of the students health, safety and general welfare.

Plaintiffs argue that as these acts did not occur on the school bus on 26 May 1993, they do not fall within the policy exclusion. However, a review of the allegations reveals that the alleged negligent acts are related to the ownership, maintenance, operation, use, loading and unloading of the school bus.

The cases cited as authority by plaintiffs are not controlling in the case *sub judice* because those cases involve automobile liability insurance coverage. Whereas, this action concerns a public school board which is protected by sovereign immunity. Further, *Newgent v.*

Buncombe County Bd. of Education, 340 N.C. 100, 455 S.E.2d 157 (1995), relied upon by plaintiffs is distinguishable from the instant case. In *Newgent*, a school bus driver failed to recognize the danger of a school bus stop while driving the bus. *Id.* The case is distinguishable in that it was an Industrial Commission action regarding a jurisdictional question as to whether the bus driver was operating the bus in the course of her employment. *Newgent* was not an action involving sovereign immunity.

Accordingly, a strict construction of the government's waiver of immunity in actions involving the purchase of liability insurance leads to the conclusion that plaintiffs' claims are excluded. *See Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 348 S.E.2d 524 (1986). Therefore, the defense of sovereign immunity is applicable, and the trial court properly dismissed plaintiffs' claims.

Defendant also argues several defenses should this Court determine that plaintiffs' claims are not excluded by the sovereign immunity doctrine; however, we need not address defendant's additional arguments based on our disposition of the action.

Affirmed.

Judges LEWIS and WYNN concur.

BOBBY G. COGGINS, PLAINTIFF v. TRESSIE VONHANDSCHUH, DEFENDANT

No. COA95-1341

(Filed 5 November 1996)

Divorce and Separation § 155 (NCI4th)— marital property—order to purchase spouse's interest—repairs required for mortgage

The trial court did not err by allowing defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12 (b)(6) in an action to require defendant to pay one-half of the cost of repairs to marital property where a prior district court order had given plaintiff fourteen days to purchase defendant's one-half interest or vacate the home, plaintiff elected to purchase the home, and repairs were required for the mortgage loan. There is no indication in the

record that both parties discussed or even assumed that there were any major structural defects which would require repairs; as there was no intent on behalf of the parties to share in any repairs, defendant did not have an obligation to share in payment for the repairs and was not obligated to reduce the court ordered rental for the period of time allegedly required for repairs; and there was no provision in the final judgment regarding repairs, no requirement that plaintiff secure a loan as a condition to his purchasing defendant's one-half interest, and no requirement that the property was to be used as collateral.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

Appeal by plaintiff from order entered 21 August 1995 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 1996.

Bobby G. Coggins, plaintiff-appellant, pro se.

James H. Wade for defendant-appellee.

JOHNSON, Judge.

Plaintiff and defendant were married on 31 August 1968 and owned certain parcels of property—pertinent to this action, the parcel located at 2901 Park Road, Charlotte, North Carolina. During the years of the marriage, from 1968 until the date of separation, 25 November 1989, this property was used exclusively as rental property.

The divorce of the parties on 31 December 1990 terminated the tenancy by the entirety and created a tenancy in common for the property at 2901 Park Road, free and clear of all encumbrances, and with neither party having sole possession of said property. Both parties stipulated that the property was valued at $114,205.00, and both parties assumed that there were no major structural defects which would impair an orderly transfer of title subsequent to the impending equitable distribution order.

A final equitable distribution order was rendered by Judge William G. Jones on 14 May 1993, and a revised order entered on 3

June 1994. From this action, a Rule 60 motion was made by plaintiff and the motion was consequently denied. As stated in the equitable distribution order, a partition by sale was ordered on the property at 2901 Park Road, giving plaintiff the option of selling the entire property for $125,000.00 and the net proceeds therefrom with the cost of selling to be divided equally with defendant. In the alternative, plaintiff could purchase defendant's one-half (1/2) interest in the property for $57,102.50, and pay defendant the sum of $300.00 per month from December 1993 until the date of closing, a share of the ad valorem taxes and one-half (1/2) of the home insurance up to the closing date from the 14 of December 1993. The court gave plaintiff fourteen (14) days to decide. Further, the final judgment provided that in the event plaintiff elected not to purchase the one-half (1/2) interest of defendant, then he was ordered either (a) to move from said house within a fourteen (14) day period, or (b) remain therein and pay as rental to defendant the sum of $300.00 per month so long as he remained in the house prior to its sale, together with the obligation on the part of plaintiff to pay all utilities, upkeep and expenses, and one-half (1/2) of the amount of taxes and insurance.

On 16 January 1994, plaintiff filed a motion to set aside judgment pursuant to Rule 60, but did not appeal the entry of the final judgment. The district court denied the relief sought by plaintiff as to the final judgment, found that plaintiff still remained in possession of the house on Park Road and that plaintiff did not elect within the fourteen (14) days following the filing of the final judgment to purchase the one-half (1/2) interest in the property by paying defendant $57,102.50. Pursuant to the order, plaintiff was ordered to pay defendant $300.00 per month for the length of time he remained in possession of the house, and to pay a pro rata share of the ad valorem taxes owed on the property for the year 1994 to the date that he vacated the property. Further, the order gave plaintiff fourteen (14) days from the filing to elect to purchase defendant's one-half (1/2) interest or to vacate the home. Plaintiff appealed the entry of this order and in an unpublished opinion, this Court affirmed the district court's refusal to grant plaintiff relief pursuant to Rule 60. *Coggins v. Coggins*, 120 N.C. App. 642, —— S.E.2d —— (1995) (unpublished).

Plaintiff, within the time specified, elected to purchase defendant's one-half (1/2) interest in the property for $57,102.50, contingent, according to plaintiff, upon obtaining a loan in the amount necessary to complete the court ordered sale. On 3 June 1994, plaintiff applied for a mortgage loan from the State Employees' Credit Union pledging

the property at 2901 Park Road as collateral. The closing was scheduled for 29 June 1994 at 12:00 p.m. in the law office of Carnegie and Miller, plaintiff's attorney for the closing.

The lending institution's mandated Uniform Residential Appraisal was conducted on the property by P & S Realty Services and the report filed on 11 June 1994 stated that the roof needed to be replaced on the house and garage due to water leaks which were found. A mandated termite inspection was conducted on the property by Collier-Ray Company on 23 June 1994 and damage was discovered in the floor area of the kitchen.

The State Employees' Credit Union informed plaintiff's attorney that the loan on the property could not be approved until the structural damage to the property had been repaired and the property brought up to code. A letter from the credit union to this effect was submitted to plaintiff upon his request. The closing scheduled for 29 June 1994 had to be postponed until such repairs were made.

Plaintiff, through his attorney, requested that defendant reimburse him for fifty percent (50%) of the cost to repair their property. Defendant, through her attorney, refused. Plaintiff, having no personal funds available, was required to secure a personal loan from the credit union to pay for the necessary repairs. After the closing on 4 August 1994, plaintiff, in compliance with the court order, gave defendant $57,102.50 in cash. Additionally, plaintiff paid defendant rent monies in the amount of $2,100.00 which represented rent ordered paid for the seven months from 14 December 1993 through 4 August 1994. Subsequent to the closing, plaintiff again requested defendant to reimburse him fifty percent (50%) for the repairs to the property, and again, defendant refused. On 10 March 1995, plaintiff filed a complaint against defendant to recover one-half (1/2) of the expenses incurred. Defendant alleges that there was no requirement in the judgment that she share in any repair of the house, nor was there any requirement that plaintiff secure a loan to make the purchase. Finally, the HUD-1 Settlement Statement, as signed by plaintiff and defendant represented the final appraisal and settlement of all disbursements relating to plaintiff's purchase of the property. In that statement, plaintiff consented to his liability for the full amount of the repair cost. The case was assigned to arbitration.

Defendant filed a motion to dismiss plaintiff's complaint based on the fact that the complaint failed to state a claim upon which relief

can be granted. The trial court granted defendant's motion to dismiss. Plaintiff appeals.

Plaintiff argues that the trial court abused its discretion in allowing defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We disagree.

Dismissal pursuant to a Rule 12(b)(6) motion is appropriate where the complaint if liberally construed, fails to state a claim upon which relief can be granted under any legal theory. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). "The question for the court [on a motion to dismiss] is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

Plaintiff argues that defendant is responsible for one-half (1/2) the costs of repairs to the property relating to the rights and obligations of co-tenants with respect to the joint ownership of the property; however, the issue to be decided in this action is based on the equitable distribution proceeding—more specifically, the final judgment entered on 13 December 1994.

Pursuant to the final judgment, plaintiff opted to purchase the property for $57,102.50. Contrary to the assertion made by plaintiff, there is no indication in the record that both parties discussed or even assumed that there were any major structural defects which would require repairs. Therefore, as there was no intent on behalf of the parties to share in any repairs, defendant did not have an obligation to share in payment for the repairs, nor was she obligated to reduce the court ordered rental for the period of time allegedly required for repairs. In fact, the unambiguous language of the final judgment gave plaintiff the option of selling the property or in the alternative, to purchase defendant's one-half (1/2) interest in the property himself. There was no provision in the judgment regarding repairs, nor any requirement that plaintiff secure a loan as a condition to his purchasing defendant's one-half (1/2) interest in the property, nor was there any requirement that said property was to be used as collateral in obtaining a loan. Thus, the complaint on its face failed to show sufficient facts to make out a claim upon which relief could be granted. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

For the reasons stated herein, the decision of the trial court is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

GAIL OWENS HUFF, PLAINTIFF, v. AUTOS UNLIMITED, INC., A CORPORATION, DAVID GRANGER AND WILLIAM BRITT, D/B/A K & A BODY SHOP AND AUTO SALES, DEFENDANTS

No. COA95-1270

(Filed 5 November 1996)

1. Unfair Competition or Trade Practices § 43 (NCI4th)— sale of salvage automobile—failure of dealer to inspect

The trial court did not err in an action arising from the sale of a wrecked automobile by ruling that defendants' actions were unfair or deceptive practices as defined in N.C. Gen. Stat. Chapter 75. Defendants not only failed to visually inspect the vehicle with the knowledge that it had been wrecked, but sold it to a consumer with assurances of its reliability. An automobile dealer with knowledge that a car he intends to sell has been wrecked should not escape liability by pleading ignorance where the damage can be detected by visual inspection; nor should he be allowed to sell the same car with assurances of reliability.

Am Jur 2d, Consumer and Borrower Protection §§ 373 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1154 et seq.

2. Unfair Competition or Trade Practices § 45 (NCI4th)— sale of salvage automobile—damages

The trial court correctly concluded that plaintiff had suffered an actual injury as a proximate result of defendant's misrepresentations in an action for unfair and deceptive practices arising from the sale of a wrecked automobile where the trial court found that the car was neither safe nor reliable and that plaintiff had been misled by defendants into believing otherwise, the record contains sufficient evidence that the car purchased from

defendants was severely structurally damaged and was not safe to operate, and the record evidence shows that plaintiff purchased the car based on the assurances of defendant and would not have purchased the car had she known it was a reconstructed vehicle.

Am Jur 2d, Consumer and Borrower Protection §§ 373 et seq.; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1154 et seq.

Appeal by defendants from judgment entered 25 July 1995 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 26 August 1996.

Reid, Lewis, Deese, Nance & Person, by James R. Nance, Jr., for plaintiff-appellee.

Bennett & Blancato, L.L.P., by Rodney A. Guthrie, for defendants-appellants.

LEWIS, Judge.

Plaintiff commenced this action on 29 June 1994 alleging fraud, unfair and deceptive trade practices, and violations of N.C. Gen. Stat. section 20-71.4 and N.C. Gen. Stat. section 20-348. The trial court, sitting without a jury, found violations of G.S. 20-348 and N.C. Gen. Stat. Chapter 75 ("Chapter 75"). Plaintiff was awarded treble damages in the amount of $7,701.00. Defendants appeal.

At issue in this case is the sale of a 1992 Oldsmobile Achieva from defendant Autos Unlimited, Inc. ("Autos Unlimited") to plaintiff on 1 October 1993. Plaintiff testified that prior to the purchase, Defendant Granger assured her several times that the car was reliable. He told her that, although the car had been in a "fender-bender" causing six hundred dollars in electrical work, it was still a good car.

Plaintiff further testified that a couple of days after buying the car, she took it to Triangle Automobiles where she was told that the car had been severely damaged and was given a list of the damaged parts. When she confronted defendant Granger with this list, he denied that the enumerated damages existed, but agreed to fix anything he found wrong with the vehicle. When Ms. Huff later picked up the car, Defendant Granger told her that there was nothing wrong with the vehicle.

Plaintiff testified that at some point thereafter, the alternator quit and the axle fell out twice. Ms. Huff testified after the axle fell out the second time, she did not use the car again. Ms. Huff confirmed that she was never informed that the vehicle had been totalled or that it was a salvaged vehicle. Ms. Huff did acknowledge that she signed an "as-is" warranty at the time she bought the car.

K.W. Benoit, an inspector with the North Carolina Division of Motor Vehicles, testified that after receiving a complaint from Ms. Huff, he ran a computer check on the car. It revealed that the car Ms. Huff purchased from Autos Unlimited had been salvaged. Mr. Benoit acknowledged, however, that the title received by Autos Unlimited did not indicate that the vehicle was salvaged or reconstructed or that it had ever been involved in a serious accident.

Mr. Billy Melvin, an employee of Triangle Automobiles, stated that upon examination of Ms. Huff's vehicle, he noticed several badly damaged parts. He then ran a computer check which revealed that the car had been totaled in 1992. It was Mr. Melvin's testimony that the car was not safe to operate on the streets of North Carolina. Furthermore, based upon his thirty-four years in the car business, he opined that any person experienced in dealing with automobiles should have known upon looking under the hood that the car had been significantly damaged.

Defendant David Granger testified that he and his wife have owned Autos Unlimited since November 1991 and that he has been in the automobile business since 1981. He further testified that he knew when he purchased it that the car he sold to Gail Huff had been wrecked, but that he had not received any disclosure form indicating that it was a salvaged or reconstructed vehicle. Mr. Granger testified that he personally examined the vehicle at the time he purchased it. He stated that, despite the fact that he had been told the car had been wrecked, he made no attempt to determine the amount of damage the vehicle had suffered.

We first note that in violation of Appellate Rule 28(b)(5), defendants have failed to reference an assignment of error after either argument presented in their brief. This failure subjects defendants' appeal to dismissal. *Hines v. Arnold*, 103 N.C. App. 31, 37, 404 S.E.2d 179, 183 (1991). However, exercising our discretion under Appellate Rule 2, we have chosen to suspend the requirements of Rule 28 since the assignment of error intended is fairly evident from the content of the arguments. In doing so, we observe that, although defendants pre-

sented three assignments of error, they only argue two in their brief. Assignment of error number one is deemed abandoned. N.C.R. App. P 28(b)(5) (1996).

[1] Defendants argue that the trial court erred in ruling that their acts were unfair or deceptive trade practices as defined in Chapter 75. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "[A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." *Id.* In order to prevail in a Chapter 75 claim, a plaintiff must show: "(1) an unfair or deceptive act or practice . . . , (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff or to his business." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991). The second requirement, that the act or practice be "in or affecting commerce," is not at issue in this case.

The trial court's findings of fact in a bench trial are conclusive on appeal if they are supported by competent evidence. *Foster v. Foster Farms, Inc.*, 112 N.C. App. 700, 706, 436 S.E.2d 843, 847 (1993). This is true even though the evidence might also support contrary findings. *Id.* When no assignment of error is made to findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982).

Defendants did not assign error to any of the following findings of fact. They are therefore presumed to be supported by competent evidence and are binding on appeal.

> 8. That the Defendant Granger represented to the Plaintiff that the vehicle was a reliable and safe vehicle and that the Plaintiff reasonably relied upon that representation.
>
> 9. That the Oldsmobile Achieva was previously a salvaged or reconstructed vehicle.
>
> 10. That the Defendant Autos Unlimited, Inc. through its servants, agents, and employees and particularly the Defendant Granger did not disclose to the Plaintiff that the vehicle was or had been a salvaged or reconstructed vehicle.

* * *

> 12. That the Plaintiff was misled by the Defendant into believing that there had not been a substantial change to the vehicle as a result of accident or damage.
>
> * * *
>
> 17. That the Defendant Granger purchased the vehicle for resale to the public and knew at the time of the purchase that the vehicle had been wrecked but took no steps to determine the extent of the damage of the vehicle including a reasonable inspection of the vehicle itself.

Defendants correctly argue that their failure to conduct a complete title search cannot subject them to liability under Chapter 75. *See Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 191, 374 S.E.2d 135, 138 (1988). However, we hold that the failure to conduct a simple visual inspection of the car once a dealer knows of its involvement in an accident can subject the dealer to liability under Chapter 75 under certain circumstances. In this case, defendants not only failed to visibly inspect the vehicle with the knowledge that it had been wrecked, but additionally sold it to a consumer with assurances of its reliability. These actions are surely unethical, unscrupulous, substantially injurious to consumers and have the capacity or tendency to deceive. An automobile dealer with knowledge that a car he intends to sell has been wrecked should not escape liability by pleading ignorance where the damage can be detected by visual inspection; nor likewise, should he be allowed to sell the same car with assurances of reliability.

[2] Therefore, the only issue left for our consideration is whether Ms. Huff suffered an actual injury as a proximate result of defendants' misrepresentations. This requirement is clearly satisfied here. The trial court found that the car purchased by Ms. Huff was neither safe nor reliable and that she had been misled by defendants into believing otherwise. The record contains sufficient evidence that the car purchased from defendants was severely structurally damaged and was not safe to operate. Furthermore, the record evidence shows that Ms. Huff purchased this car based on the assurances of defendant Granger and would not have purchased the car had she known it was a reconstructed vehicle. The trial court was correct in concluding that Ms. Huff suffered actual injury as a proximate result of defendants' misrepresentations.

We therefore affirm the trial court's ruling that defendants committed unfair and deceptive trade practices in violation of Chapter 75

of the North Carolina General Statutes. Accordingly, there is no need to review defendants' remaining assignment of error since a violation of Chapter 75 is sufficient alone to sustain the treble damages awarded by the trial court.

Affirmed.

Judges JOHNSON and WYNN concur.

JOHN T. TIERNEY, W. R. ARMSTRONG, JR., DIANNE JUBY, W. W. BECK, JR., JAMES C. HEDGECOCK, JACQUE HEDGECOCK, ROBERT DOWNING, STEVEN COHEN, TIMOTHY J. DENAULT, SUSAN P.A. DENAULT, DENNIS HALL, CAROL HALL, CAREY BERG, CONNALLY BRANCH, AND SUBSCRIBERS OF FIRST CONSUMERS STATE BANK, SOUTHERN PINES (PROPOSED), PLAINTIFFS v. ROBERT M. GARRARD, DEFENDANT

No. COA95-1399

(Filed 5 November 1996)

Limitations, Repose, and Laches § 125 (NCI4th)— absence of defendant from state—defendant amenable to service by publication—limitations period not tolled

The statutes of limitations for plaintiffs' claims against defendant based upon conduct in this state while defendant was a resident of this state were not tolled by N.C.G.S. § 1-21 after defendant left this state where defendant was amenable to personal jurisdiction pursuant to service by publication under N.C.G.S. § 1-75.4(3). The second paragraph of § 1-21 exempting from the tolling provisions a defendant amenable to process pursuant to N.C.G.S. § 1-75.4 does not apply only to defendants amenable to personal process.

Am Jur 2d, Courts §§ 102-104; Limitation of Actions §§ 154-155.

Appeal by plaintiffs from orders entered 5 June 1995 and 24 July 1995 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 18 September 1996.

Plaintiffs filed a suit against defendant alleging securities fraud, breach of fiduciary duty, and fraud relating to a failed banking busi-

ness venture, in which defendant was chairman of the proposed bank's Incorporators and Steering Committee. Specifically, plaintiffs claimed that defendant misapplied organizational funds entrusted to his control, both for personal gain and as part of a continuing scheme to defraud potential and existing subscribers to the proposed bank. They asserted that as a result of defendant's alleged misconduct, the proposed bank suffered a net earnings loss of $207,360.00, and plaintiffs individually suffered a personal loss of $126,000.00.

Plaintiffs alleged that the conduct complained of occurred when defendant resided in Moore [County], North Carolina, before or in early August 1990. They also claimed, however, that "soon after the events alleged," defendant left and remained out of the state, and they did not learn of some of the alleged misappropriations until September 1990.

Plaintiffs filed their complaint on 28 December 1994, more than four years after the alleged events occurred. On 20 February 1995 defendant filed a Motion to Dismiss, based in part on the applicable statutes of limitations, and on or about 1 March 1995, he filed an Answer and Counterclaims and a Motion for Judgment on the Pleadings. On or about 4 May 1995, defendant filed an Amended Motion to Dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, asserting that plaintiff's complaint disclosed on its face that the action was barred by the applicable statutes of limitations and other time-based defenses.

After a hearing on 5 June 1995, the trial court ordered dismissal of the action pursuant to Rule 12(b)(6) and Rule 12(c) of the North Carolina Rules of Civil Procedure. Plaintiffs filed a Motion to Set Aside Order of Dismissal on or about 14 June 1995. After hearing arguments and reviewing plaintiffs' motion and several affidavits concerning defendant's location following his alleged misconduct, the trial court denied plaintiffs' Motion to Set Aside the Order of Dismissal on 24 July 1995, finding that plaintiffs "failed to assert 'new evidence' that would change the outcome of the Court's prior ruling."

Plaintiffs now appeal both the trial court's original order of dismissal and its order denying plaintiffs' motion to set aside the dismissal order.

Britt & Britt, by William S. Britt, for plaintiff appellants.

Bugg & Wolf, P.A., by John E. Bugg and William J. Wolf, for defendant appellee.

ARNOLD, Chief Judge.

The only issue for our review is plaintiffs' first assignment of error, which addresses whether N.C. Gen. Stat. § 1-21 (1983) operates to toll the statutes of limitations applicable to their claims, and in turn whether the trial court correctly dismissed the action. Plaintiffs cite no authority and make no argument in support of their second assignment of error, which asserts that the trial court erred in denying their Motion to Set Aside the Order of Dismissal. We therefore deem plaintiffs' second assignment of error abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, and we consider only such evidence in the record as applies to the trial court's 5 June 1995 order of dismissal.

Pursuant to N.C. Gen. Stat. § 1-52 (Supp. 1995), a three-year statute of limitations applies to plaintiffs' claims of fraud and breach of fiduciary duty. A two-year statute of limitations applies to plaintiffs' claims of securities fraud under N.C. Gen. Stat. § 78A-56(f) (1994). In their complaint, plaintiffs alleged that defendant's fraudulent conduct occurred in August 1990, and they discovered it in September 1990. Plaintiffs did not file their complaint, however, until more than four years later, on 28 December 1994. Therefore, to maintain their cause of action, plaintiffs argue that the statutes of limitations were tolled by G.S. § 1-21, which provides, in pertinent part:

> If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. . . . .
>
> *The provisions of this section shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of G.S. 1-75.4.*

(Emphasis added.) "The burden of proof is upon plaintiff to show that defendant comes within the purview of N.C.G.S. 1-21." *Burkhimer v. Gealy*, 39 N.C. App. 450, 452, 250 S.E.2d 678, 680-81, *disc. review denied*, 297 N.C. 298, 254 S.E.2d 918 (1979).

In 1979 the North Carolina legislature amended G.S. § 1-21 by adding the second paragraph, in an attempt to resolve potential conflict between the tolling statute and the long-arm statute. *See* 1979 N.C. Sess. Laws ch. 525, § 1. Prior to that time, this Court addressed the tolling statute and suggested the propriety of such an amendment:

> We are in full accord with those who have said that the application of a tolling statute when defendant has at all times been subject to the service of process by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. We also agree with those who say there is no need for a tolling statute when a nonresident defendant is amenable to process. For these and other very logical reasons the legislative bodies of several states have amended their tolling statutes to provide expressly that statutes of limitation are not tolled during the absence of a defendant who remains amenable to service that would give the court personal jurisdiction.

Duke University v. Chestnut, 28 N.C. App. 568, 572, 221 S.E.2d 895, 898, *appeal dismissed*, 289 N.C. 726, 224 S.E.2d 674 (1976); *see* Note, *Tolled Statute of Limitations v. Long-Arm Statute Amenability*, 12 Wake Forest L. Rev. 1041 (1976).

The addition of the second paragraph of G.S. § 1-21 provides, in effect, that G.S. § 1-21 is not applicable to toll a statute of limitations if a defendant is amenable to long-arm jurisdiction under G.S. § 1-75.4. *See Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 113, 323 S.E.2d 470, 475 (1984), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985). *See Laurent v. U.S. Air, Inc.*, 124 N.C. App. 208, 476 S.E.2d 443 (1996) (holding that the second paragraph of G.S. § 1-21 nullifies the statute's tolling provision). The long-arm statute provides, in pertinent part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:
>
> . . . .

> (3) Local Act or Omission.—In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

G.S. § 1-75.4.

In this case, plaintiffs admit in their complaint that at the time of the conduct alleged, defendant was a citizen and resident of North Carolina, and that defendant left the state only *after* the events alleged. Clearly, as is shown on the face of plaintiffs' complaint, defendant was amenable to personal jurisdiction pursuant to G.S. § 1-75.4(3), if not another subsection of that provision. *See, e.g.*, G.S. § 1-75.4(1) (Local Presence or Status); G.S. § 1-75.4(5) (Local Services, Goods or Contracts).

While G.S. § 1-75.4 prescribes the *grounds* upon which a court may exercise personal jurisdiction, Rule 4 of the North Carolina Rules of Civil Procedure provides the *manner* in which personal jurisdiction is exercised or asserted. *See* G.S. § 1A-1, Rule 4 cmt. to original rule (1990). Rule 4(j1) provides for service by publication on a party that cannot otherwise be served:

> [S]ervice of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.

G.S. § 1A-1, Rule 4(j1) (Supp. 1995).

Accordingly, plaintiffs could have served defendant by publication, even if they did not know where he was located. Clearly, defendant was, at all relevant times after the conduct complained of, amenable to process pursuant to G.S. §§ 1-75.4 and 1A-1, Rule 4.

Plaintiffs contend that the last paragraph of G.S. § 1-21, exempting from the tolling provisions a defendant amenable to process pursuant to G.S. § 1-75.4, "must be read to mean *personal* process of some sort," and not service by publication. They urge that a different reading of the interplay between §§ 1-21, 1-75.4, and 1A-1, Rule 4 "has the effect of turning the whole of § 1-21 into a nullity." Plaintiffs make

a novel argument, but we find that the plain language of the second paragraph of G.S. § 1-21 is unambiguous and does not limit the exemption from its tolling provisions to those defendants amenable only to personal process. Plaintiffs' arguments to the contrary are unpersuasive.

Plaintiffs may not avail themselves of the tolling statute by their own failure to timely serve defendant when he was statutorily amenable to process. We reiterate that to apply the tolling statute when a defendant "has at all times been subject to the service of process by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations." *Chestnut*, 28 N.C. App. at 572, 221 S.E.2d at 898.

Plaintiffs have failed in their burden of proving that G.S. § 1-21 operates to toll the applicable statutes of limitations in this case. *See Burkhimer*, 39 N.C. App. at 452, 250 S.E.2d at 680-81. "A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred." *Long v. Fink*, 80 N.C. App. 482, 484, 342 S.E.2d 557, 559 (1986). The trial court's order dismissing plaintiffs' claims pursuant to Rule 12(b)(6) and 12(c) of the North Carolina Rules of Civil Procedure is, therefore,

Affirmed.

Judges JOHNSON and GREENE concur.

GLORIA A. BLAIR, EMPLOYEE, PLAINTIFF; v. AMERICAN TELEVISION & COMMUNICATIONS CORPORATION, EMPLOYER; TRAVELERS INSURANCE COMPANY OF ILLINOIS, CARRIER, DEFENDANTS

No. COA95-1397

(Filed 5 November 1996)

1. Workers' Compensation § 426 (NCI4th)— change in condition—causal relation to work-related injury

A change in the physical condition of an employee's left hand could not support a conclusion that the employee had sustained a change of condition warranting modification of a prior com-

pensation award under N.C.G.S. § 97-47 where there was no finding by the Industrial Commission that the change in condition was causally related to the employee's work-related injury.

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

2. **Workers' Compensation § 426 (NCI4th)— increased disability—inability to find employment—reasonable effort—insufficient evidence—causal relation to work-related injury**

The evidence did not support the Industrial Commission's determination that plaintiff had shown increased disability in that she had made a reasonable but unsuccessful effort to obtain employment where the evidence showed only that plaintiff had contacted the Department of Vocational and Rehabilitation Services and the Employment Security Commission to see if there might be suitable employment for her; there was no evidence that she pursued employment through these agencies and she testified that she had abandoned her efforts through these agencies; and she had not applied for employment with any employers. Assuming that she made a reasonable effort to find employment, the conclusion that her increased disability is a changed condition cannot stand because there was no finding that the increased disability was causally related to her work-related injury.

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

Appeal by defendants from Opinion and Award for the Full Commission entered 28 September 1995. Heard in the Court of Appeals 18 September 1996.

Marvin Schiller for plaintiff-appellee.

Young Moore and Henderson, P.A., by J.D. Prather, for defendant-appellants.

GREENE, Judge.

American Television and Communications Corporation (employer) appeals from a 28 September 1995 Opinion and Award of the North Carolina Industrial Commission (the Commission) concluding that Gloria A. Blair (employee) sustained a "change in condition" in her left hand which entitled her to temporary total disability until further order of the Commission.

On 21 January 1992 the Commission entered an opinion and award concluding that the employee sustained "an injury by accident in the nature of an occupational disease of carpal tunnel syndrome arising out of and in the course" of her employment with the employer. The Commission also concluded that the employee was entitled to "temporary total disability compensation benefits" through 30 May 1990 and "permanent partial disability compensation benefits" for a thirty-week period commencing on 30 May 1990. The permanent partial disability award was based on a "fifteen percent permanent partial disability of the right hand." In support of the temporary total award, the Commission found that the employee "was [on 31 January 1990] medically excused from work [because she suffered] from carpal tunnel syndrome in both hands" and was released to return to work on 30 May 1990.

On 29 April 1992 the employee filed a "Notice of Change in Condition" requesting a modification of the 21 January 1992 opinion and award. She alleged that her condition had changed "as a result of the reoccurrence of pain, and a greater percentage of disability." The undisputed findings of the Commission reveal that since 30 May 1990 the employee's "right hand has not worsened" and that her left hand "has significantly worsened." The Commission also found in pertinent part:

> 8. After [30 May 1990, the employee], made reasonable, but unsuccessful, efforts to obtain employment.
>
> 9. As a result of [the employee's] contraction of carpal tunnel syndrome, permanent partial disability of the right hand, diabetes, reasonable but unsuccessful efforts to obtain employment, and significant worsening of the carpal tunnel syndrome in [employee's] left hand after [30 May 1990], [the employee] has been incapable of earning wages with . . . employer or in any other employment . . . .

The Commission then concluded that the employee was entitled to temporary total disability compensation because of her "substantial change for the worse in her condition of the left hand" and because she had made "reasonable but unsuccessful efforts to obtain employment."

The evidence shows that the employee has not been employed since January 1990 and that she has not applied for employment with any employers. She testified that she had contacted, without success,

the Department of Vocational and Rehabilitation Services and the Employment Security Commission to see "if there might be some suitable employment" available for her. She further testified that she was no longer in contact with these agencies.

The issues are whether (I) the findings support the conclusion that the changes in the employee's left wrist amount to a change in condition within the meaning of section 97-47; and (II) the evidence supports the finding of the Commission that the employee made a reasonable effort to find employment.

The Commission may review any award of compensation "upon its own motion or upon application of any party in interest on the grounds of a change in condition," and "on such review may make an award ending, diminishing, or increasing the compensation previously awarded." N.C.G.S. § 97-47 (1991). The statute does not identify what is required in order to show a "change in condition." Our case law describes a "change in condition" as a condition occurring after a final award of compensation that is "different from those existent when the award was made." *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987). This "change in condition" can consist of either a change in the claimant's physical condition that impacts his earning capacity, *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982); *Dinkins v. Federal Paper Bd. Co.*, 120 N.C. App. 192, 195, 461 S.E.2d 909, 910 (1995), a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, *Smith v. Swift & Co.*, 212 N.C. 608, 610, 194 S.E. 106, 108 (1937); *Weaver*, 319 N.C. at 248, 354 S.E.2d at 480; 3 Arthur Larson, *The Law of Workmen's Compensation* § 81.31(e) (1996) [hereinafter *Larson*], or a change in the degree of disability even though claimant's physical condition remains unchanged. *West v. Stevens Co.*, 12 N.C. App. 456, 461, 183 S.E.2d 876, 879 (1971). In all instances the burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify. *Willis v. Davis Indus.*, 13 N.C. App. 101, 105, 185 S.E.2d 28, 31 (1971); *Weaver*, 319 N.C. at 249 n.3, 354 S.E.2d at 481 n.3; *Larson* § 81.31(b).

In this case, the employee claims that her condition has changed since the entry of the 21 January 1992 award. In support of this claim she asserts that her pain has reoccurred and that her disability has increased. Consistent with these assertions, the Commission found

that, since 21 January 1992, the physical condition of the employee's left hand has "significantly worsened" and that her earning capacity has decreased. The employer argues that the Commission erred in both findings.

I

[1] The employer first contends that because there is no finding by the Commission that the change in the physical condition of the employee's left hand is causally related to her injury of 10 January 1990 (the subject of the 21 January 1992 award), that change cannot support a conclusion that the employee sustained a change of condition within the meaning of section 97-47. For the reasons hereinbefore given, we agree.

II

[2] The employee also seeks to show a change of condition by proving that her disability has increased since the entry of the final award of compensation. Pursuant to this Court's opinion in *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), an employee has four methods of showing that her earning capacity has decreased (increased disability). In this case, the Commission determined the employee had, consistent with one of the tests set forth in *Russell*, met her burden: although she was capable of some work, she was now totally disabled because she had "made reasonable, but unsuccessful, efforts to obtain employment."

The employer contends that the evidence does not support the determination that the employee made a reasonable effort to obtain employment. We agree. The employee made no effort to locate employment with any employers. Her contact with the Department of Vocational and Rehabilitation Services and the Employment Security Commission is not on this record sufficient to support a finding that she made a reasonable effort to find employment. There is no evidence that she aggressively pursued employment through these agencies. Indeed, her testimony is that she had abandoned her efforts to seek employment through these agencies. Furthermore, there is no evidence with regard to the efforts these agencies made to secure employment for the employee. In any event, even assuming she made a reasonable effort to find employment, the conclusion that her increased disability is a changed condition cannot stand because there is no finding that the increased disability was causally related to the 10 January 1990 injury.

Accordingly the opinion and award is reversed and this case is remanded to the Commission for findings on whether the change in the employee's left hand was causally related to the 10 January 1990 injury. On remand the Commission will also determine whether the employee has met her burden of showing an increased disability pursuant to any other method provided for in *Russell*, and if so, whether that increased disability is causally related to the 10 January 1990 injury.

Reversed and remanded.

Chief Judge ARNOLD and Judge JOHNSON concur.

BETH L. HOCKADAY, SHEPARD L. HOCKADAY, WILLIAM D. WOOD, SYLVIA L. WOOD, KENNETH M. LEE, AMELIA T. LEE, W. THEL JOHNSON, NELL W. JOHNSON, CHARLES B. THORNTON, JUAN D. SUAREZ, AND CONNIE SUAREZ, PLAINTIFFS v. EARL LEE AND DENNIS LEE, D/B/A LEE BROTHERS FARMS, DEFENDANTS

No. COA95-1379

(Filed 5 November 1996)

1. Judgments § 38 (NCI4th)— taxing of costs by emergency superior court judge—order signed after adjournment

An emergency superior court judge had jurisdiction to enter an order requiring plaintiffs to pay deposition expenses and expert witness fees as part of the costs of the underlying action where the judge made and announced his decision to tax plaintiffs with costs in open court and before adjournment, although the order taxing specific amounts was signed later. The judge's period of assignment extended from 8 May 1995 "until the business [of the court was] completed" and the business of the court was not completed in this case until the execution of the judgment and the setting of the costs. Also, the determination of the amount of the costs, made after the adjournment of the session, was merely an implementation of the decision rendered in session and thus relates within the meaning of N.C.G.S. § 1A-1, Rule 6 (c) to that decision. *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, held that Rule 6(c) permits a judge to sign an order out of session so long as the hearing to which the order

relates was held in session. The Rule does not limit its applicability to regular judges and applies to all judges, including emergency judges.

Am Jur 2d, Judgments § 81.

2. Costs § 10 (NCI4th)— costs of action—setting of amount—hearing waived

A superior court judge did not err by denying plaintiffs' motion under N.C.G.S. § 1A-1, Rule 60 for relief from an order requiring them to pay certain costs of an action without a hearing where plaintiffs waived any right to a hearing. The failure of the plaintiffs to contact the judge to note their objections within the three week period between their receipt of notice of the motion (and a copy of the letter forwarding the motion to the judge specifically soliciting their input) and the judge's signing of the order under these circumstances implies that plaintiffs had no objections and did not seek a hearing on the matter.

Am Jur 2d, Costs §§ 15, 94.

Appeal by plaintiffs from order entered 11 July 1995 in Johnston County Superior Court by Judge Napoleon Barefoot. Heard in the Court of Appeals 12 September 1996.

Morgan & Reeves, by Robert B. Morgan and Eric Reeves, for plaintiff-appellants.

Ward and Smith, P.A., by Kenneth R. Wooten, for defendant-appellees.

GREENE, Judge.

Beth L. Hockaday, Shepard L. Hockaday, William D. Wood, Sylvia L. Wood, Kenneth M. Lee, Amelia T. Lee, W. Thel Johnson, Nell W. Johnson, Charles B. Thornton, Juan D. Suarez, and Connie Suarez (plaintiffs) appeal an order entered 11 July 1995 which denied their motion to set aside a previous order entered 19 June 1995 requiring them to pay Earl Lee and Dennis Lee, doing business as Lee Brothers Farms (defendants) deposition expenses and expert witness fees as part of the costs of the underlying action.

The Honorable D.M. McLelland (Judge McLelland), emergency superior court judge (retired), was commissioned to preside over a

Special Session of Johnston County Superior Court, running from 8 May 1995 and continuing two weeks, "or until the business is completed." On 23 May, during the special session, after the jury returned a verdict for the defendants, Judge McLelland stated in open court that the "action . . . is hereby dismissed and . . . the plaintiffs [are ordered to] pay the costs." He then instructed the defendants' attorney to "prepare the necessary judgment." Finally, he noted in open court: "And I take it there's no objection to its [sic] being mailed to me?" Plaintiffs' attorney answered: "No." Judge McLelland then told the sheriff to announce "an adjournment, *sine die*, of this Court." On 23 May 1995, Judge McLelland signed a judgment dismissing the complaint and ordering that "the costs of this action [be] taxed against the [p]laintiffs."

On 26 May 1995, the defendants made a motion requesting that the order of costs include the deposition expenses and expert witness fees. A copy of this motion was served on plaintiffs' attorney by depositing it in the mail on 26 May 1995. This motion was also mailed to Judge McLelland at his home in Burlington along with a letter to him. The letter stated in pertinent part:

> I have served a copy of this Motion on [p]laintiff's [sic] counsel along with a copy of the proposed Order so that you may receive their input before ruling on this Motion. If a hearing is required, [d]efendants would agree to a telephone hearing or, if necessary, to appearing in Johnston County.

On 19 June 1995, Judge McLelland signed an order taxing, "as part of the costs of this action," deposition expenses in the amount of $4,160.30 and expert witness fees in the amount of $4,500.00. On that same date, Judge McLelland mailed the signed order to defendants' attorney along with a letter stating in pertinent part: "As I have had no indication from [plaintiffs' attorney] that they desire to be heard in opposition to your motion [with regard to deposition expenses and expert witness fees], I have signed your proposed order." On 26 June 1995 the plaintiffs filed a motion requesting a hearing on the defendants' 26 May 1995 motion. The 19 June 1995 order was filed on 29 June 1995. On 30 June 1995, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, the plaintiffs filed a motion requesting that they be relieved from the 19 June 1995 order on the grounds that it was "null and void and of no legal effect because [Judge McLelland] had no jurisdiction to enter the order since it was signed out of term and without the consent of all the parties" and on the grounds that

they were entitled to and denied a hearing on the 26 May 1995 motion. Judge Napoleon Barefoot (Judge Barefoot) denied the plaintiffs' motion.

The dispositive issue is whether Judge McLelland had jurisdiction to sign the 19 June 1995 order.

[1] Plaintiffs first argue Judge McLelland, an emergency judge, did not have jurisdiction to execute the 19 June order because the motion on which it was based "was made after the expiration of the special trial session" to which he had been assigned. We disagree.

An emergency superior court judge has the same powers, "in open court and in chambers," "that regular judges holding the same courts would have." N.C.G.S. § 7A-48 (1995). These powers, however, exist only during the period of their assignment. *Id.* In this case, Judge McLelland's period of assignment extended from 8 May 1995 "until the business [of the court was] completed." The business of the court was not completed, in this case, until the execution of the judgment and the setting of the costs.

Even if Judge McLelland's special assignment had not extended "until the business [was] completed," he had authority under Rule 6(c) of our Rules of Civil Procedure to sign the judgment and determine the costs, after the jury rendered its verdict and the court was adjourned. Our Supreme Court has held that Rule 6(c) "permits a judge to sign an order out of . . . session . . . so long as the hearing to which the order relates was held in . . . [session]." *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 159, 446 S.E.2d 289, 294-95, *reh'g denied*, 337 N.C. 807, 449 S.E.2d 566 (1994); N.C.G.S. § 1A-1, Rule 6(c) (1990). The Rule does not limit its applicability to regular judges and we read it as applying to all judges, including emergency judges. *See Strickland v. Kornegay*, 240 N.C. 758, 760, 83 S.E.2d 903, 904 (1954) (emergency judge has authority to sign judgment after termination of the session to which he had been assigned). In this case, Judge McLelland made and announced, in open court and before its adjournment, his decision to tax plaintiffs with the costs. The determination of the amount of those costs, made after the adjournment of the session, was merely an implementation of the decision rendered in session and thus "relates" (within the meaning of Rule 6(c)) to that decision. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 679, 360 S.E.2d 772, 778-79 (1987). Judge McLelland thus had jurisdiction to enter the 19 June 1995 order.

[2] The plaintiffs also argue that, even if Judge McLelland had jurisdiction, the 19 June 1995 order nonetheless must be set aside because they were not given a hearing on the issue of the amount of the costs to be assessed.[1] We need not address that question because, even assuming a right to a hearing, *see* 20 C.J.S. *Costs* § 150, at 126 (1990) ("Generally, a party is entitled to be heard on the question as to costs."), on this record the plaintiffs waived any such right. *See Carrow v. Weston*, 247 N.C. 735, 737, 102 S.E.2d 134, 136 (1958) (any right waivable "unless forbidden by law or public policy"); 20 C.J.S. *Costs* § 156, at 131 (irregularities in taxation of costs may be waived). They received notice of the 26 May 1995 motion and a copy of the letter forwarding that motion to Judge McLelland. The letter specifically solicited the plaintiffs' "input" on the motion. It was not until some three weeks later that Judge McLelland signed the order, at which time he noted that he had not received any "indication" from the plaintiffs that they wished to be heard on the motion. The failure of the plaintiffs to contact Judge McLelland within the three week period to note their objections to the motion, under these circumstances, implies they had no objections and did not seek a hearing on the matter. *See* 28 Am Jur 2d *Estoppel and Waiver* § 160, at 846 (1966) (implied waiver arises where person pursues course of conduct "as to evidence an intention to waive a right"). Judge McLelland thus correctly proceeded with the execution of the order.

Accordingly, Judge Barefoot did not err in denying the plaintiffs' Rule 60 motion.

Affirmed.

Judges JOHN and MARTIN, Mark D., *concur.*

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1. The plaintiffs do not dispute that Judge McLelland had authority to determine the costs or that he abused his discretion in setting the amount of the costs. *See* N.C.G.S. § 6-20 (1986) (granting trial court discretion to award costs); N.C.G.S. § 7A-305 (1995) (listing expenses recoverable as costs in civil actions); N.C.G.S. § 7A-314 (setting out method for determining amount of witness fee); *Sealey v. Grine*, 115 N.C. App. 343, 347, 444 S.E.2d 632, 635 (1994) (permitting inclusion of deposition expenses as part of costs).

THOMAS E. STRICKLAND, PLAINTIFF-APPELLANT v. TOWN OF ABERDEEN, DEFENDANT-APPELLEE

No. COA95-1267

(Filed 5 November 1996)

1. Declaratory Judgment Actions § 3 (NCI4th)— negligence action—question of fact—not proper

The trial court correctly determined that an action was not proper under the Declaratory Judgment Act where plaintiff alleged that defendant was negligent in failing to notify an insurance carrier of a cancellation and failing to notify plaintiff that he had been terminated from group coverage, and negligent in continuing to accept payments for insurance premiums. While questions of fact necessary to the adjudication of the legal questions involved may be determined in a declaratory judgment action, the remedy is not available for determination of issues of fact alone and a negligence action, with unresolved issues of fact, cannot properly be decided under the Declaratory Judgment Act.

Am Jur 2d, Declaratory Judgments § 32.

Supreme Court's view as to what is a case or controversy within the meaning of Article III of federal constitution or an actual controversy within the meaning of Declaratory Judgment Act (28 USCS § 2201). 40 L. Ed. 2d 788.

2. Pleadings § 14 (NCI4th)— notice pleading—petition for declaratory judgment—surplusage—claim under some theory still required

Although a plaintiff contended that the designation of the pleading in a negligence action as a "petition for declaratory judgment" was immaterial surplusage and should have been disregarded, the allegations of a mislabeled claim must still reveal that plaintiff has a claim under some legal theory.

Am Jur 2d, Pleading § 69.

3. Pleadings § 117 (NCI4th)— 12(b)(6) motion to dismiss—consideration of matters outside pleadings—converted to motion for summary judgment

A defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) was converted to a Rule 56 motion for summary judg-

ment where plaintiff filed a "Petition for Declaratory Judgment"; defendant Town filed an answer, including several motions to dismiss; after reviewing the file and hearing arguments of counsel, the trial court entered an order dismissing the action as being inappropriate under the Declaratory Judgment Act. The motion was converted to a motion for summary judgment because the trial court considered evidence outside the pleadings.

Am Jur 2d, Summary Judgment § 13.

Sufficiency of showing, under Rule 56(f) of Federal Rules of Civil Procedure, of inability to present by affidavit facts justifying opposition to motion for summary judgment. 47 ALR Fed. 206.

4. Negligence § 95 (NCI4th)— acceptance of insurance premiums—duty owed

Plaintiff could not establish a *prima facie* case for negligence where defendant town had accepted insurance premiums for plaintiff for COBRA coverage beyond the expiration date and forwarded them to the insurer. The facts of the case disclose no duty that defendant owed plaintiff other than the duty to utilize ordinary care in transmitting the money submitted to it to the insurer, the duty that the Town embarked upon.

Am Jur 2d, Negligence §§ 435, 922, 1920.

Appeal by plaintiff from order entered 7 September 1995 by Judge Michael E. Beale in Moore County District Court. Heard in the Court of Appeals 26 August 1996.

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

Brown & Robbins, L.L.P., by P. Wayne Robbins and Carol M. White, for defendant-appellee.

JOHNSON, Judge.

Plaintiff Thomas E. Strickland was employed by defendant Town of Aberdeen until 3 September 1988. While employed with defendant, plaintiff was covered by a health insurance policy through Municipal Insurance Trust (hereinafter "Municipal Insurance"). After leaving defendant's employ, plaintiff elected to take advantage of COBRA coverage through Municipal Insurance. Defendant's Employee's

Handbook provided that "following the employee's termination, COBRA coverage is available for eighteen months." In addition, the form signed by plaintiff electing COBRA coverage, informed plaintiff that said coverage would only be available for eighteen months. As of March 1990, the eighteen month COBRA coverage expired.

Defendant was not a party to the insurance contract between plaintiff and Municipal Insurance. However, while under COBRA, plaintiff delivered his monthly premium payments to defendant which, as an accommodation, forwarded that payment to Municipal Administrative Corporation as agent for Municipal Insurance. No money was withheld or paid to defendant for this service. While plaintiff's coverage under COBRA was set to expire as of March 1990, plaintiff continued to make his monthly premium payments to Municipal Insurance in this manner, until August or September 1990.

In September 1990, plaintiff incurred approximately $4,000.00 in medical expenses. Plaintiff's coverage had expired in March 1990, and therefore, these expenses were not covered under COBRA. However, plaintiff did not receive notice of cancellation of COBRA coverage until 30 October 1990. Thereafter, defendant attempted to reimburse plaintiff $571.23 for overpaid premiums, which plaintiff refused to accept.

Consequently, on 23 June 1993, plaintiff filed a Petition for Declaratory Judgment in Moore County District Court, requesting that defendant be ordered to pay the medical bills in question. On 24 August 1993, defendant filed an Answer and Motions to Dismiss. Defendant's motions to dismiss came on for hearing before Judge Michael E. Beale on 6 September 1995. After hearing the arguments of both parties and considering all of the evidence before him, Judge Beale entered an order dismissing plaintiff's action. Plaintiff appeals.

Plaintiff's sole argument on appeal is that the trial court erred in granting defendant's motions to dismiss. We cannot agree.

[1] Generally, only questions of law are appropriate to be determined under the Declaratory Judgment Act, North Carolina General Statutes § 1-253 *et seq.* While questions of fact necessary to the adjudication of the legal questions involved may be determined in a declaratory judgment action, the remedy is not available for determination of issues of fact alone. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E.2d 619 (1940). As such, a negligence action, with unresolved issues of fact, cannot be properly decided under the

Declaratory Judgment Act. *See Laughter v. Southern Pump & Tank Co., Inc.*, 75 N.C. App. 185, 330 S.E.2d 51, *cert. denied*, 314 N.C. 666, 335 S.E.2d 495 (1985) (stating that a negligence case is one in which a jury as fact finder ordinarily should decide the reasonableness of a party's actions).

In the instant action, plaintiff filed a "Petition for Declaratory Judgment" in which he alleged (1) "that the Town was negligent in that it failed to notify the insurance carrier of the cancellation, and failed to notify Mr. Strickland that he had been terminated off of the group coverage as of March 3, 1990"; (2) "that the Town was negligent in continuing to accept payments for insurance premiums when it knew, or should have known, that he was not covered"; and (3) "[t]hat the [defendant] contends that it was not negligent and that the Town has no liability in the matter." Therein, on the face of plaintiff's complaint, is revealed a factual issue to be determined by a jury and not by a trial judge in a declaratory judgment action. Accordingly, the trial court correctly determined that this action was not proper under the Declaratory Judgment Act.

[2] Plaintiff also contends that the designation of the pleading as a "Petition for Declaratory Judgment" was immaterial surplusage, and should have been disregarded in the interests of justice. *See Wentz v. Unifi., Inc.*, 89 N.C. App. 33, 365 S.E.2d 198, *disc. review denied*, 322 N.C. 610, 370 S.E.2d 257 (1988) (stating that "[t]he adoption of the notice theory of pleading indicated the legislature's intention that controversies be resolved on their merits, '. . . following [ ] opportunity for discovery, rather than resolving them on technicalities of pleadings.' " *Id.* at 38, 365 S.E.2d at 200 (quoting *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986))). Notably, however, in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), our Supreme Court noted that the allegations of a mislabeled claim must still reveal that plaintiff has properly stated a claim under some legal theory.

[3] Assuming *arguendo* that the designation of the pleading was mere surplusage as plaintiff contends, we must now address the proper procedural posture under which we consider this contention. If matters outside of the pleadings are presented and not excluded by the trial court, a Rule 12(b)(6) motion to dismiss is converted to a Rule 56 motion for summary judgment; and the inquiry then becomes whether there is any genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Industries,*

Inc. v. Construction Co., 42 N.C. App. 259, 257 S.E.2d 50, *disc. review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979). In contrast to a Rule 12(b)(6) motion, a Rule 56 motion embraces matters outside of the pleadings—for example, affidavits, depositions, and other information obtained through discovery. *Id.*

In the instant action, plaintiff filed a "Petition for Declaratory Judgment." Defendant Town filed an answer, therein including several motions to dismiss. On 6 September 1995, this matter came on for pre-trial conference and hearing on defendant's motions to dismiss. After reviewing the file and hearing arguments of counsel, the trial court entered an order on 7 September 1995, dismissing this action as being inappropriate under the Declaratory Judgment Act. As the trial court considered evidence outside of the pleadings, defendant's 12(b)(6) motion was converted to a Rule 56 motion for summary judgment.

[4] Our inquiry, therefore, is whether in the light most favorable to plaintiff, the evidence shows that there is no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. *See* N.C.R. Civ. P. 56; *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). The moving party bears the burden to establish the lack of issue of triable fact; and may meet this burden if it can show that an essential element of the non-moving party's claim does not exist, or the non-moving 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).

In order to establish a prima facie case for negligence, plaintiff must introduce evidence tending to show that "defendant had a duty to conform to a certain standard of conduct, that defendant breached that duty, that plaintiff was injured, and that plaintiff's injury was proximately caused by the breach." *Simpson v. Cotton*, 98 N.C. App. 209, 211, 390 S.E.2d 345, 346 (1990) (citing *Jenkins v. Theatres, Inc.*, 41 N.C. App. 262, 254 S.E.2d 776, *disc. review denied*, 297 N.C. 698, 259 S.E.2d 295 (1979)).

However, the facts of this case disclose no duty that defendant owed plaintiff, other than the duty that the Town embarked upon—the duty to utilize ordinary care in transmitting the moneys submitted to it to plaintiff's insurer. As plaintiff has alleged no other duty to exist, nor any breach thereof, plaintiff cannot establish a prima facie case for negligence.

In light of the foregoing, the trial court's decision is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

BETTY C. HALLMAN, PLAINTIFF, v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, DEFENDANT

No. COA96-74

(Filed 5 November 1996)

1. **Appeal and Error § 118 (NCI4th)— summary judgment—governmental immunity—immediately appealable**

The denial of a summary judgment for defendant school board was immediately appealable although interlocutory where the basis for the motion was governmental immunity.

Am Jur 2d, Appellate Review §§ 169, 170.

2. **Schools § 172 (NCI4th)— injury on school grounds—liability of school board—claim for less than minimum insurance amount—governmental immunity**

Summary judgment should have been granted for defendant Board of Education in an action alleging that plaintiff had injured her right ankle while walking on school grounds where plaintiff had filed a Rule 8(a)(2) statement that she was seeking $45,000 in damages and defendant Board established that it was not insured for claims under $1,000,000. Defendant Board's participation in the City of Charlotte's risk management agreement is not tantamount to the purchase of liability insurance as authorized by N.C.G.S. § 115C-42 and does not constitute a waiver of governmental immunity pursuant to the statute for claims not covered by insurance.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 42 et seq., 59 et seq.

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning. 33 ALR3d 703.

Appeal by defendant from order entered 27 October 1995 by Judge Claude Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 1996.

Price, Smith & Hargett, by William Benjamin Smith and Sheri A. Harrison, for plaintiff-appellee.

Smith Helms Mulliss & Moore, by James G. Middlebrooks and Mark R. McGrath, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff, Betty C. Hallman, brought this action against the Charlotte-Mecklenburg Board of Education ("Board") alleging that she had injured her right ankle while walking on the grounds of Devonshire Elementary School in Charlotte, North Carolina. She alleged that her injury occurred as a proximate result of negligence on the part of unspecified agents and employees of defendant Board. After defendant answered, interposing a Rule 12(b)(6) motion for plaintiff's failure to plead its waiver of governmental immunity, denying the material allegations of the complaint, and asserting plaintiff's contributory negligence as an affirmative defense, plaintiff was permitted to amend her complaint to allege that the Board had waived its defense of governmental immunity by purchasing insurance. The Board denied the allegations contained in the amendment.

Plaintiff filed a Rule 8(a)(2) statement of amount of monetary relief sought, stating that she is seeking $45,000 in damages. The Board subsequently moved for summary judgment on the grounds that it did not have liability insurance which would provide coverage for plaintiff's claim and, therefore, had not waived its governmental immunity.

In support of its motion, the Board submitted the affidavit of Daniel J. Pliszka, manager of the Division of Insurance and Risk Management of the Finance Department for the City of Charlotte. Mr. Pliszka stated that his department administers insurance and self-retention programs for defendant Board of Education and that on the date of plaintiff's injury, the risk of liability for negligence of the Board or its employees was self-retained by the Board for amounts up to $1,000,000. He further stated that the Board had purchased insurance coverage for liability exceeding $1,000,000. Since plaintiff sought $45,000 in damages, Mr. Pliszka stated that the Board had not purchased insurance for the damages alleged in plaintiff's complaint. Plaintiff did not offer any evidence in opposition to defendant's

motion for summary judgment. The trial court denied defendant's motion and defendant appeals.

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[1] As a general rule, denial of a motion for summary judgment is interlocutory and hence not immediately appealable. However, if the defense of governmental immunity is asserted as grounds for the summary judgment motion, the denial of the motion has been held to affect a substantial right, and the order is immediately appealable pursuant to G.S. § 1-277(a) and G.S. § 7A-27(d). *Hickman v. Fuqua,* 108 N.C. App. 80, 422 S.E.2d 449 (1992), *disc. review denied,* 333 N.C. 462, 427 S.E.2d 621 (1993). Here, the Board asserted its governmental immunity as an affirmative defense to plaintiff's claim and as a basis for its summary judgment motion. Thus, the order denying the motion is immediately appealable.

[2] Defendant Board's sole assignment of error is the denial of its motion for summary judgment. Defendant argues that it is entitled to judgment because it has not waived its governmental immunity from liability pursuant to G.S. § 115C-42. We agree.

The party moving for summary judgment has the burden of establishing the absence of a triable issue of fact, which may be satisfied by showing that the party cannot overcome an affirmative defense which would bar the claim. *Taylor v. Ashburn,* 112 N.C. App. 604, 436 S.E.2d 276 (1993), *cert. denied,* 336 N.C. 77, 445 S.E.2d 46 (1994). Once the moving party meets its burden, the non-movant must come forward with facts showing that it will be able to make out a *prima facie* case at trial. *Landfall Group v. Landfall Club, Inc.,* 117 N.C. App. 270, 450 S.E.2d 513 (1994).

A local board of education is immune from suit and may not be liable in a tort action unless the Board has duly waived its governmental immunity. *Fields v. Board of Education,* 251 N.C. 699, 111 S.E.2d 910 (1960); *Overcash v. Statesville City Bd. of Educ.,* 83 N.C. App. 21, 348 S.E.2d 524 (1986). However, a board of education may waive such immunity by purchasing liability insurance. G.S. § 115C-42 (1994) provides in pertinent part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the

> course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

In the present case, defendant Board established through the affidavit of Mr. Pliszka that it was not insured for claims under $1,000,000 and, therefore, had not waived its immunity pursuant to G.S. § 115C-42. Plaintiff argues, however, that Mr. Pliszka's affidavit also shows that defendant Board participates in the City of Charlotte's risk management agreement. Relying on *Lyles v. City of Charlotte*, 120 N.C. App. 96, 461 S.E.2d 347, *review allowed*, 342 N.C. 414, 465 S.E.2d 542 (1995), plaintiff argues that the Board's participation in the risk management agreement constitutes "insurance" and operates as a waiver of the Board's immunity. We find *Lyles* inapposite to the present case and reject plaintiff's argument.

In *Lyles*, this Court held that the City of Charlotte's participation in a risk management agreement made it a participant in a "local government risk pool" and resulted in at least a partial waiver of the City's governmental immunity pursuant to G.S. § 160A-485(a), which specifically provides that participation in a local government risk pool "shall be deemed to be the purchase of insurance for the purposes of this section." N.C. Gen. Stat. § 160A-485(a) (1994). However, waiver of immunity for local boards of education is governed by G.S. § 115C-42, which contains no authorization, such as that contained in G.S. § 160A-485(a), for waiver of immunity by participation in a risk pool. The courts of North Carolina have applied a rule of strict construction to statutes authorizing waiver of sovereign immunity, *Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522, 299 S.E.2d 618 (1983), including, specifically, G.S. § 115C-42. *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 99 N.C. App. 753, 394 S.E.2d 242 (1990); *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 348 S.E.2d 524 (1986).

Moreover, G.S. § 115C-42, which must be strictly construed against waiver, provides that a contract of insurance, in order to constitute a waiver of immunity, "shall be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance . . . ." Mr. Pliszka's affidavit establishes, without contradiction from plaintiff, that Charlotte's Division of Insurance and Risk Management (DIRM) is not an insurance company and has not been

deemed so by state statutes, that it does not issue insurance policies or enter into contracts of insurance, and that "DIRM is not regulated by the Commissioner of Insurance nor is it licensed and supervised by the Commissioner of Insurance, as required of all insurance companies pursuant to N.C. Gen. Stat. § 58-2-125 . . . ." Thus, we hold that defendant Board's participation in the City of Charlotte's risk management agreement is not tantamount to the purchase of liability insurance as authorized by G.S. § 115C-42 and does not constitute a waiver of its governmental immunity pursuant to the statute for claims not covered by insurance.

Summary judgment is appropriate whenever the movant establishes a complete defense to plaintiff's claim. *Overcash v. Statesville City Bd. of Educ.*, *supra*; *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E.2d 240 (1984); *Ballinger v. Secretary of Revenue*, 59 N.C. App. 508, 296 S.E.2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E.2d 645 (1983). Defendant Board has established the complete defense of governmental immunity. Accordingly, the trial court erred in denying defendant's motion for summary judgment and we must reverse its order and remand this case for the entry of summary judgment in favor of defendant Board of Education.

Reversed and remanded.

Judges EAGLES and SMITH concur.

TERRY BANNER, PLAINTIFF v. JERRY EARL HATCHER, DEFENDANT

No. COA96-7

(Filed 5 November 1996)

Appeal and Error § 106 (NCI4th)— modification of child support—order setting aside judgment—no immediate appeal

The trial court's order setting aside a judgment modifying child support and granting a new trial on the issue of whether there had been a substantial change of circumstances was interlocutory, did not affect a substantial right, and was not immediately appealable.

Am Jur 2d, Appellate Review §§ 194 et seq.

Appeal by defendant from order entered 22 September 1995 by Judge Roland H. Hayes in Forsyth County District Court. Heard in the Court of Appeals 25 September 1996.

Plaintiff and defendant are the parents of a minor child, Michael E. Banner, born out-of-wedlock on 1 March 1991. On 24 March 1992, the court entered approval of a voluntary support agreement ordering defendant to pay $302.00 in monthly child support. Because of a change in social security benefits received, this amount was reduced to $234.00 per month on 12 July 1993. Thereafter, on 15 November 1994, defendant filed a motion seeking another decrease in child support. After hearing, the trial court granted defendant's motion and reduced defendant's child support obligation to $143.00 per month. The trial court's order was entered on 26 January 1995 and plaintiff did not appeal.

On 7 March 1995, plaintiff through counsel filed a motion pursuant to Rule 60(b)(1), (2) and (6) to set aside the trial court's order of 26 January 1995 and pursuant to Rule 59(a) requesting a new hearing. On 22 September 1995, the trial court granted plaintiff's motion to set aside the order of 26 January 1995, granted plaintiff's motion for a new hearing, and reinstated the previous order obligating defendant to pay $234.00 per month in child support.

Defendant appeals.

Smith & Murphrey, by Steven D. Smith and John R. Combs, for plaintiff-appellee.

D. Blake Yokley for defendant-appellant.

EAGLES, Judge.

Defendant purports to appeal the trial court's grant of plaintiff's motion pursuant to Rule 60(b) to vacate and set aside the trial court's previous order of 26 January 1995. Although the issue is not raised by either party, we recognize that "[a]ppeals from such orders must be dismissed as interlocutory." *Braun v. Grundman*, 63 N.C. App. 387, 388, 304 S.E.2d 636, 637 (1983) (citing *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 433-34 (1980)).

The trial court's order of 22 September 1995 setting aside judgment and granting a new trial is not an appealable final order. *See, e.g.*, *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). Our analy-

sis is unchanged by the fact that the order set aside here was a child support order. As in other contexts, the trial court's order setting aside judgment here is interlocutory "because further action by the trial court is necessary to settle and determine the entire controversy between the parties." *First American Savings & Loan Assoc. v. Satterfield*, 87 N.C. App. 160, 162, 359 S.E.2d 812, 813 (1987).

The sole issue before the trial court here is whether circumstances have changed sufficiently that a modification of child support is justified. That issue remains unresolved. In the child support context, an order setting child support is not a final order for purposes of appeal until no further action is necessary before the trial court upon the motion or pleading then being considered. *See, e.g., Massey v. Massey*, 121 N.C. App. 263, 268-70, 465 S.E.2d 313, 316-17 (1996); *Craig v. Kelley*, 89 N.C. App. 458, 459, 366 S.E.2d 249, 250 (1988); *Coleman v. Coleman*, 74 N.C. App. 494, 496-97, 328 S.E.2d 871, 872-73 (1985). Under this standard, an order providing for temporary child support is not an appealable final order, whereas an order providing for permanent child support until emancipation is an appealable final order even though permanent child support orders "may be modified subsequently upon a motion in the cause and a showing of change of circumstances as provided in G.S. 50-13.7." *Massey*, 121 N.C. App. at 269, 465 S.E.2d at 317 (quoting *Coleman*, 74 N.C. App. at 496, 328 S.E.2d at 872). We note that this is the same standard we apply when we review orders regarding alimony. *Gillespie v. Gillespie*, 116 N.C. App. 660, 661, 448 S.E.2d 857, 858 (1994).

As the trial court correctly noted in its order setting aside judgment, the child support order of 12 July 1993 remains in effect pending final resolution by the trial court of the question of whether there has been a substantial change of circumstances since 12 July 1993. Determining that the child support amount established in the 12 July 1993 order remains in effect is ultimately no different in result than expressly ordering defendant to pay temporary child support during the pendency of the litigation. As we have recognized, an order providing for temporary child support is interlocutory and not an immediately appealable final order. *Coleman*, 74 N.C. App. at 497, 328 S.E.2d at 873. Accordingly, because further action is necessary before the trial court, we conclude that plaintiff's appeal here is interlocutory. *First American Savings & Loan*, 87 N.C. App. at 162, 359 S.E.2d at 813.

Having determined that the trial court's order setting aside judgment and granting a new trial is interlocutory, we recognize that

"[i]nterlocutory orders are immediately appealable only if they affect a substantial right and will work injury to the appellant if not corrected before an appeal from a final judgment." *Id.* "A right is substantial only if it 'will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.' " *Id.* (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)). Here, allowing the trial court to proceed with rehearing will not cause appellant's rights to be clearly lost or irremediably affected. As we have recognized, the "avoidance of a rehearing or trial is not a 'substantial right' entitling a party to an immediate appeal." *Blackwelder*, 60 N.C. App. at 335, 299 S.E.2d at 780.

We note also here that defendant has "adequately preserved the question of the appropriateness of the trial court's order setting aside the judgment and granting a new [hearing]." *Deal Construction Co. v. Spainhour*, 59 N.C. App. 537, 538-39, 296 S.E.2d 822, 823 (1982). Defendant may raise that question, if necessary, upon an appeal from the final order determining whether or not a change of circumstances has in fact occurred. Accordingly, defendants' appeal is dismissed.

Dismissed.

Judges MARTIN, JOHN C., and SMITH concur.

DAVID R. FISHER AND SHIRLEY L. FISHER, PLAINTIFFS, v. AUDREY FISHER GAYDON, DEFENDANT

No. COA96-17

(Filed 5 November 1996)

1. Divorce and Separation § 383 (NCI4th)— visitation by grandparents—standing—intact family

Grandparents have standing under N.C.G.S. § 50-13.1(a) to seek visitation with their grandchildren when those children are not living in an "intact family."

Am Jur 2d, Divorce and Separation § 1002.

Grandparents' visitation rights. 90 ALR3d 222.

2. Divorce and Separation § 383 (NCI4th)— single parent living with child—intact family—grandparent visitation action prohibited

A single parent living with his or her child constitutes an "intact family" which is insulated from grandparent visitation actions pursuant to N.C.G.S. § 50-13.1(a). An intact family does not exist only when both natural parents are living together with their children.

Am Jur 2d, Divorce and Separation § 1002.

Grandparents' visitation rights. 90 ALR3d 222.

3. Divorce and Separation § 383 (NCI4th)— visitation by grandparents—failure to show custody being litigated

Grandparents failed to show that custody of their grandchild was "in issue" or "being litigated" so as to give them standing under N.C.G.S. § 50-13.2(b1) to seek visitation where the child's mother filed a complaint against the alleged biological father seeking custody and child support but dismissed this complaint without prejudice, and there was no showing that the alleged father was contesting the mother's claim to custody.

Am Jur 2d, Divorce and Separation § 1002.

Grandparents' visitation rights. 90 ALR3d 222.

Appeal by plaintiffs from order entered 6 November 1995 in Cabarrus County District Court by Judge Clarence E. Horton, Jr. Heard in the Court of Appeals 18 September 1996.

Morton, Grigg and Phillips, L.L.P., by James A. Phillips Jr., for plaintiff-appellants.

Ferguson and Scarbrough, P.A., by Edwin H. Ferguson, Jr., for defendant-appellee.

GREENE, Judge.

David R. Fisher and Shirley L. Fisher (the grandparents) appeal from the trial court's order dismissing their 23 February 1995 complaint which sought visitation with their grandchildren.

The grandparents are the parents of Audrey Fisher Gaydon (Ms. Gaydon). Ms. Gaydon is the mother and sole custodian of two children, age six and age three. The oldest child, Jessica Michelle Fisher

(Jessica), was born during the marriage of Ms. Gaydon to Jeffrey Byron Plyler (Mr. Plyler). During the divorce proceeding between Ms. Gaydon and Mr. Plyler, Mr. Plyler denied his paternity of Jessica. In 1994, a paternity action was filed against the biological father of Jessica, Jessie Eugene Saunders (Mr. Saunders). Mr. Saunders' parental rights with respect to Jessica were terminated on 15 August 1994.

Lesley Delane Fisher (Lesley) was born 9 August 1993 while Ms. Gaydon was involved with Tommy Jeffrey Kepley (Mr. Kepley). She and Mr. Kepley were not married. On 24 August 1993, Ms. Gaydon filed a complaint against Mr. Kepley seeking an "Order awarding [her] custody of" Lesley and an "Order directing [Mr. Kepley] to pay" child support to Ms. Gaydon. Ms. Gaydon, on 16 October 1995, "dismissed [this complaint] without prejudice."

On 6 November 1995, the trial court dismissed the grandparents' complaint seeking visitation finding that the grandparents did not have standing to file the action.

The issues are whether (I) a single parent living with her children can constitute an "intact family" within the meaning of *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995); and (II) there was an ongoing custody dispute between Ms. Gaydon and the alleged biological father of one of the children entitling the grandparents to seek visitation pursuant to N.C. Gen. Stat. § 50-13.2(b1).

I

[1] In *McIntyre v. McIntyre*, our Supreme Court held that grandparents do not have standing, pursuant to N.C. Gen. Stat. § 50-13.1(a) (1995), to seek visitation with their grandchildren when the "natural parents have legal custody of their children and are living with them as an intact family." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749. It follows that under the broad grant of section 50-13.1(a), grandparents have standing to seek visitation with their grandchildren when those children are *not* living in a *McIntyre* "intact family." Additionally, there are three specific statutes that grant grandparents standing to seek visitation with their grandchildren. N.C.G.S. § 50-13.2(b1) (1995) (when "custody of minor child" at issue); *see Moore v. Moore*, 89 N.C. App. 351, 353, 365 S.E.2d 662, 663 (1988) (grandparent has standing to seek visitation under N.C. Gen. Stat. § 50-13.2(b1) only when "custody of minor children is being litigated"); N.C.G.S. § 50-13.5 (1995) (after custody of minor child has been determined); N.C.G.S.

§ 50-13.2A (1995) (when child adopted by "stepparent or a relative of child"). The grandparents argue that it is only parents residing with their children in an "intact nuclear family" that are insulated from grandparent visitation actions pursuant to section 50-13.1(a). More specifically, that only those families consisting of a mother, a father, and a child residing in a single residence qualifies as an "intact family" within the meaning of *McIntyre*. We disagree.

We acknowledge that the nuclear family, consisting of *married* parents living with their children, is the family unit accorded traditional recognition in our society. *Unmarried* parents living with their children have also been accorded recognition as family units. *See Michael v. Gerald D.*, 491 U.S. 110, 123 n.3, 105 L. Ed. 2d 91, 106 n.3 (1989). The traditional two-parent model, however, is not the determinative factor qualifying a group of persons as a family. *See Moore v. East Cleveland*, 431 U.S. 494, 539, 52 L. Ed. 2d 531, 562 (1977) (declaring unconstitutional statute that did not include grandmother living with her son and grandchildren as a "family"); *see also Hodgson v. Minnesota*, 497 U.S. 417, 417, 111 L. Ed. 2d 344, 350 (1990) (declaring constitutional state statute that permitted minor to obtain abortion after notifying only one parent).

[2] We acknowledge that both parents in *McIntyre* were living together with their children. We do not, however, read that opinion to hold that an "intact family" exists *only* when both natural parents are living together with their children. We believe a proper construction of that opinion is that a single parent living with his or her child *is* an "intact family" within the meaning of *McIntyre*. *See Lambert v. Riddick*, 120 N.C. App. 480, 484 n.2, 462 S.E.2d 835, 837 n.2 (1995) (dissenting opinion) ("[i]t would appear that an intact family should include a single parent living with his or her child").

In this case the record reveals that Ms. Gaydon was living with her two children at the time the complaint was filed, had lived with them for at least two years prior to the filing of the action and thus qualifies as an "intact family." The grandparents thus did not have standing to pursue their visitation action under section 50-13.1(a).

II

[3] The grandparents argue that, even if Ms. Gaydon and her children are treated as an "intact family" and the grandparents' action is precluded under section 50-13.1(a), N.C. Gen. Stat. § 50-13.2(b1) is specific in allowing them to proceed with their visitation request. This

argument is based on their contention that there was an ongoing custody dispute (with regard to that child) between Ms. Gaydon and the claimed biological father of Lesley. Although the existence of such a dispute would grant standing to the grandparents to seek visitation, in this case there is no evidence of such a dispute. There is nothing in this record showing that the alleged biological father was contesting Ms. Gaydon's claim of custody. It is only when the custody of a child is "in issue" or "being litigated" that the grandparents are entitled to relief pursuant to N.C. Gen. Stat. § 50-13.2(b1). We therefore reject this argument.

Affirmed.

Chief Judge ARNOLD and Judge JOHNSON concur.

BROOKWOOD UNIT OWNERSHIP ASSOCIATION, PLAINTIFF v. WELBON DELON AND BARBARA A. DELON, DEFENDANTS

No. COA96-21

(Filed 5 November 1996)

1. **Housing § 74 (NCI4th)— condominium—assessment—attorney's fees—in excess of fifteen percent**

The trial court did not err in awarding plaintiffs attorney's fees in excess of fifteen percent of plaintiffs' judgment in an action arising from a condominium assessment. The controlling statute is N.C.G.S. § 47C-4-117, which provides for the award of a reasonable attorney's fee to the prevailing party. Although defendant argues that N.C.G.S. § 6-21.2(2) creates a broad general rule that "reasonable" attorney's fees always mean fifteen percent of the outstanding balance, N.C.G.S. § 47C-4-117 is a subsequently enacted more specific statute and, absent express direction from the General Assembly, the Court of Appeals cannot give greater effect to the earlier, more general provisions.

Am Jur 2d, Condominiums and Cooperative Apartments § 37.

Expenses for which condominium association may assess unit owners. 77 ALR3d 1290.

2. Housing § 74 (NCI4th); Attorneys at Law § 55 (NCI4th)—condominium—assessment—attorney's fees—no findings as to reasonableness

The trial court erred by not making findings of fact as to whether plaintiffs' attorney's fees were reasonable in an action arising from a condominium assessment.

Am Jur 2d, Condominiums and Cooperative Apartments § 37.

Expenses for which condominium association may assess unit owners. 77 ALR3d 1290.

Appeal by defendants from order entered 31 August 1995 by Judge Joseph Buckner in Orange County District Court. Heard in the Court of Appeals 25 September 1996.

Plaintiff Brookwood Unit Ownership Association ("Association") is a unit ownership project organized pursuant to the North Carolina Unit Ownership Act. G.S. 47A-1 to -37 (1983). Defendants Welbon Delon and Barbara A. Delon, as owners of condominium unit number 13, are members of plaintiff Association.

In the summer of 1988, architect Knox Tate investigated the cause of a sagging floor in one unit and found that poor ventilation and a build-up of excess moisture had caused extensive "dry rot" in the structural members under the unit. Upon learning of this problem, the Association's Board of Directors ("Board") directed Mr. Tate to inspect the remainder of the premises. Mr. Tate's completed inspection revealed that the moisture problem had caused severe and extensive structural problems affecting fifty-seven of the total sixty-one condominium units. The extent of the damage threatened the stability of the structures and the safety of the occupants.

Upon Mr. Tate's recommendation, the Board undertook various repairs including replacing damaged structural members, installing fans, adding foundation vents, installing plastic sheeting at ground level and installing new drainage equipment. The Board determined that the repairs were maintenance expenses and assessed a common charge on every unit, including those units not directly affected by the repairs. As their unit was unaffected by the dry rot, defendants refused to pay the common charge, contending that the repairs were capital improvements for which they could only be charged a special assessment following a vote by the unit owners.

Ultimately, on 19 October 1988, plaintiff Association filed a complaint against defendants seeking arrearage in the amount of $1,670.00, which complaint plaintiff later amended to seek total damages of $5012.00. After trial, the court entered judgment in favor of defendants, finding that the Board had indeed violated the Association's own bylaws in charging defendants as it did. On 5 April 1993, plaintiff appealed and on 3 January 1995 this Court reversed the judgment of the trial court and remanded the cause to the district court for entry of judgment in favor of plaintiff.

Thereafter, on 7 April 1995, plaintiff filed a "motion for appeal costs and attorney's fees." Orange County District Court Judge Joseph Buckner heard plaintiff's motion and, on 31 August 1995, Judge Buckner ordered defendants to pay plaintiff $15,408.00 for attorney's fees and costs incurred in bringing the cause of action against defendants.

Defendants appeal.

Hunter Law Firm, by R. Christopher Hunter and Gregg S. Pasternack, for plaintiff-appellee.

Paul G. Ennis for defendant-appellants.

EAGLES, Judge.

[1] Defendants first argue that the trial court erred in awarding reasonable attorney's fees in excess of fifteen percent of the plaintiff's judgment. Defendants argue that G.S. 6-21.2(2) is controlling and provides the fifteen percent limitation on the recovery of attorney's fees. We disagree.

Plaintiff Association is a unit ownership project created prior to 1 October 1986 and organized pursuant to the North Carolina Unit Ownership Act. G.S. 47A-1 to -37 (1983). Thereafter, effective 1 October 1986, the General Assembly enacted the North Carolina Condominium Act as codified at 47C-1-101 *et seq.* (1986). Generally speaking, the Condominium Act applies prospectively "to all condominiums created . . . after October 1, 1986." G.S. 47C-1-102 (1986). The Condominium Act also expressly lists, however, a number of sections which are to be retroactively applied to condominiums created prior to 1 October 1986.

One of these provisions, G.S. 47C-4-117, expressly authorizes the recovery of attorney's fees and provides in pertinent part:

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of person adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney's fees to the prevailing party.

G.S. 47C-4-117 (1986). This statute is specific authority contained within the very Chapter that currently governs in part the operation of plaintiff Association. G.S. 47C-1-102 expressly provides that G.S. 47C-4-117 applies to plaintiff Association and all others similarly situated. Accordingly, we conclude that G.S. 47C-4-117 is controlling here.

Defendant would have us believe that G.S. 6-21.2(2) somehow supersedes G.S. 47C-4-117 and creates a broad general rule that "reasonable" attorney's fees always means fifteen percent of the outstanding balance. We are not persuaded. In 1967, the General Assembly enacted G.S. 6-21.2 as part of a package of provisions designed to amend the "Uniform Commercial Code 'and other related statutes.' " *Stillwell Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 293, 266 S.E.2d 812, 816-17 (1980) (citations omitted). Nineteen years later, in 1986, the General Assembly enacted the North Carolina Condominium Act, which was based upon the Uniform Condominium Act promulgated by the National Conference of Commissioners on Uniform State Laws. Had the General Assembly wished that the recovery of attorney's fees under the Condominium Act be governed by G.S. 6-21.2, the General Assembly could have included language to that effect. G.S. 47C-4-117 is a subsequently enacted, more specific statute and, absent express direction from the General Assembly, we cannot give greater effect to the earlier, more general provisions of G.S. 6-21.2.

[2] Defendant next argues that the trial court erred in failing to make findings of fact as to whether plaintiff's attorney's fees were "reasonable." We agree.

It is well-settled that when awarding reasonable attorney's fees, the trial court must make findings of fact to support the award. *E.g.*, *Hill v. Jones*, 26 N.C. App. 168, 170, 215 S.E.2d 168, 170, *disc. review denied*, 288 N.C. 240, 217 S.E.2d 664 (1975).

> [T]o determine if an award of counsel fees is reasonable, "the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and

the experience or ability of the attorney" based on competent evidence.

West v. Tilley, 120 N.C. App. 145, 151, 461 S.E.2d 1, 4 (1995) (quoting *United Laboratories, Inc. v. Kuykendall*, 102 N.C. App. 484, 494, 403 S.E.2d 104, 111 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993) (citations omitted)). The record here contains no findings whatsoever with regard to the reasonableness of the attorney's fees awarded. Accordingly, we remand with direction to the trial court to make findings of fact as to the reasonableness of the attorney's fees sought to be recovered by plaintiff.

Affirmed in part, reversed in part and remanded.

Judges MARTIN, JOHN C., and SMITH *concur*.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, PETITIONER-APPELLANT v. NORTH CAROLINA MOTOR VEHICLE REINSURANCE FACILITY, RESPONDENT-APPELLEE

No. COA95-1336

(Filed 5 November 1996)

Insurance § 383 (NCI4th)— ceded automobile insurance—use of Reinsurance Facility forms

An insurer writing automobile insurance in North Carolina is not permitted to use its own policy forms on insurance policies ceded to the Reinsurance Facility but must use only those forms filed by or on behalf of the Reinsurance Facility. The Reinsurance Facility is not required to approve and file with the Commissioner of Insurance policy forms for motor vehicle insurance ceded to the Reinsurance Facility that are the same as those used by the insurer in its voluntary business because the insurer is required by N.C.G.S. § 58-37-25(b) to provide the "same type of service" to ceded business that it provides to its voluntary business. N.C.G.S. § 58-37-25(1).

Am Jur 2d, Insurance §§ 1831-1841.

Reinsurer's liability for primary liability insurer's failure to compromise or settle. 42 ALR4th 1130.

Appeal by petitioner from judgment entered 25 August 1995 in Wake County Superior Court by Judge Henry V. Barnette. Heard in the Court of Appeals 10 September 1996.

Bailey & Dixon, L.L.P., by J. Ruffin Bailey and Alan J. Miles, for petitioner-appellant.

Young Moore and Henderson, P.A., by William M. Trott and R. Michael Strickland, for respondent-appellee.

GREENE, Judge.

St. Paul Fire and Marine Insurance Company (petitioner) appeals a judgment of the Wake County Superior Court affirming the final agency decision of the North Carolina Commissioner of Insurance holding that when petitioner writes motor vehicle liability insurance that is ceded to the North Carolina Motor Vehicle Reinsurance Facility (Facility) (respondent) it must use only those forms filed by or on behalf of the respondent.

The facts in this case are not in dispute. In 1979 the petitioner, an insurer licensed to write within North Carolina motor vehicle insurance, requested permission from the Commissioner of Insurance (Commissioner) to use its "readable" insurance policy for commercial automobile insurance. The policy form was approved. Simultaneous with that approval, the petitioner began using that approved form for both its voluntary commercial automobile business and that business ceded to the Facility, pursuant to N.C. Gen. Stat. § 58-37-25 (1994). This information was discovered by the Facility in early 1991 while conducting a routine audit. In March 1991, the Facility notified petitioner that its policy form was not proper for the issuance of insurance ceded to the Facility.

The petitioner thereafter requested the Facility to approve its policy form for use in ceded business and that the approved form be filed with the Commissioner pursuant to N.C. Gen. Stat. § 58-37-35(l) (1994). The Facility rejected the petitioner's request and the petitioner appealed, pursuant to N.C. Gen. Stat. § 58-37-65(b) (1994), to the Commissioner. The Commissioner approved the decision of the Facility and directed that the petitioner "use Facility forms for business ceded to the Facility." The petitioner, pursuant to N.C. Gen. Stat.

§ 58-2-75(a) (1994),[1] appealed to the Superior Court. The Superior Court affirmed the Commissioner.

The dispositive issue is whether an insurer, writing automobile insurance in North Carolina, is permitted to use its own policy forms on insurance policies ceded to the Facility.

In North Carolina every "insurer[] licensed to write and engaged in writing within this State motor vehicle insurance or any component thereof," N.C.G.S. § 58-37-5 (1994), is required to "accept and insure any otherwise unacceptable applicant therefor who is an eligible risk if cession of the particular coverage and coverage limits applied for are permitted in the Facility." N.C.G.S. § 58-37-25(a). The insurer is required to "provide the same type of service to ceded business that it provides for its voluntary market." N.C.G.S. § 58-37-25(b). "The classifications, rules, rates, rating plans and policy forms used on motor vehicle insurance policies [ceded to] the Facility may be made by the Facility or by any licensed or statutory rating organization or bureau on its behalf and shall be filed with the Commissioner [of Insurance]." N.C.G.S. § 58-37-35(l).

The petitioner argues that because it is required to provide the same "type of service" to ceded business that it provides to its voluntary business, N.C.G.S. § 58-37-25(b), the Facility is required to approve and file with the Commissioner policy forms for motor vehicle insurance ceded to the Facility that are the same as those used by the insurer in its voluntary business. We disagree.

Section 58-37-35(l) is unambiguous in stating that insurers are required to use, in the writing of motor vehicle insurance policies ceded to the Facility, only those policy forms "made" by the Facility or those "made" by "any licensed or statutory rating organization or bureau" and filed with the Commissioner. N.C.G.S. § 58-37-35(l).[2] Therefore, even if we accept the petitioner's argument, which we seriously question, that "type of service" can be construed to include pol-

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1. *See N.C. Reinsurance Facility v. Long*, 98 N.C. App. 41, 46, 390 S.E.2d 176, 179 (1990), holding that N.C. Gen. Stat. § 150B-51 (1995), "is the controlling judicial review statute" with respect to review of the decisions of the Commissioner. The Court further noted, however, that "[t]o the extent that G.S. sec. 58-2-75 adds to and is consistent with the judicial review function of G.S. sec. 150B-51, we will proceed by applying the review standards articulated in both statutes."

2. There is no dispute in this case that the forms filed by the Facility with respect to commercial automobile insurance are those "made" by Insurance Services Office, a rating organization.

icy forms, because the legislature has specifically stated in another statute that policy forms are to be determined by the Facility, the more specific statute prevails. *See Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967). Thus there is no violation of the anti-discrimination provision of section 58-37-25(b) when the Facility mandates the uniform use of policy forms for all ceded motor vehicle insurance business.

We have carefully considered the other arguments asserted by the petitioner and overrule them. Accordingly, the judgment of the Wake County Superior Court is

Affirmed.

Judges JOHN and MARTIN, Mark D., concur.

ASKEW KAWASAKI, INC.; TIMOTHY L. ASKEW AND WIFE, KAREN M. ASKEW; JACKIE COLSON AND WIFE, THELMA COLSON; KAWASAKI MOTOR FINANCE; LLOYDS OF LONDON; ITT COMMERCIAL FINANCE CORP.; ITT LYNDON PROPERTY INSURANCE COMPANY, PLAINTIFFS v. CITY OF ELIZABETH CITY, DEFENDANT

No. COA95-1420

(Filed 5 November 1996)

Municipal Corporations § 445 (NCI4th)— purchase of insurance—waiver of immunity

The trial court erred by denying defendant-municipality's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) an action alleging that the Elizabeth City Fire Department negligently fought a fire. A city's purchase of liability insurance does not deprive it of immunity under N.C.G.S. § 160A-293(b). The exception to the common-law rule of governmental immunity established by N.C.G.S. § 160A-485(a) was not meant to abrogate any statutory defenses available to a municipality.

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

Appeal by defendant from order entered 24 October 1995 by Judge J. Richard Parker in Pasquotank County Superior Court. Heard in the Court of Appeals 24 September 1996.

C. Everett Thompson, II, P.A. for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan, for defendant-appellant.

LEWIS, Judge.

The only issue for our consideration in this appeal is whether the trial court erred in denying defendant-appellant's Rule 12(b)(6) motion to dismiss.

On 23 March 1995, plaintiffs filed a complaint in Pasquotank Superior Court alleging negligence against the City of Elizabeth City ("Elizabeth City") under the theory of respondeat superior. Specifically, plaintiffs alleged that on 7 March 1994, the Elizabeth City Fire Department negligently fought a fire which broke out in a small wooden warehouse building adjacent to a larger building, both owned by the Askews. The remaining plaintiffs were either tenants or insurers of the burned building.

Defendant answered and moved to dismiss the complaint for failure to state a claim. The parties stipulated that the building owned by the Askews was located beyond Elizabeth City's corporate limits. After hearing, the trial court denied defendant's motion to dismiss. Defendant appeals.

Defendant argues that plaintiffs' claims are precluded by immunity granted under N.C. Gen. Stat. section 160A-293(b).

G.S. 160A-293 states in relevant part:

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

G.S. § 160A-293(b) (1994).

Plaintiffs argue that any immunity Elizabeth City may have had was waived pursuant to N.C. Gen. Stat. section 160A-485 when it purchased liability insurance. G.S. 160A-485 provides that "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract

from tort liability." G.S. § 160A-485(a) (1994). However, G.S. 160A-485 further states that "[e]xcept as expressly provided herein, nothing in this section shall be construed to deprive any city of any defense to any tort claim lodged against it, or to restrict, limit, or otherwise affect any defense that the city may have at common law or by virtue of any statute." G.S. § 160A-485(c) (1994).

G.S. 160A-485(a) establishes "an exception to the *common-law* rule" of governmental immunity. *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985) (emphasis added). As the above language demonstrates, this statute was not meant to abrogate any statutory defenses available to a municipality. In this case, defendant is not asserting common law governmental immunity in response to this claim. Rather, it contends that it is immune by statute, namely G.S. 160A-293(b). We agree and hold that a city's purchase of liability insurance does not deprive it of immunity under G.S. 160A-293(b).

Accordingly, since defendant has immunity from plaintiffs' allegations under 160A-293(b), the trial court erred in denying its motion to dismiss.

Reversed.

Judges WALKER and MARTIN, MARK D. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
FILED 5 NOVEMBER 1996

BARLOW v. BARLOW No. 95-1256	Durham (94CVD3149)	Dismissed
BONHAM v. CONITEX USA, INC. No. 96-447	Ind. Comm. (400954)	The portion of the 25 September 1995 Opinion and Award granting compensation for past medical treatment is vacated and the case is remanded for further findings of fact in accordance with this opinion. Otherwise, the Opinion and Award filed 25 September 1995 and the "Amended Opinion and Award" filed 5 October 1995 are affirmed. Opinion and Award filed 25 September 1995—vacated and remanded in part; affirmed in part. Amended Opinion and Award filed 5 October 1995—affirmed.
BOYCE v. GROVE PARK INN No. 96-52	Buncombe (95CVS02084)	Reversed
BRIETZ v. PLANK No. 96-107	Mecklenburg (95CVS9376)	Reversed and Remanded
BROOKSHIRE v. KERFOOT No. 96-132	Caldwell (93CVS1596) (93CVD1597)	No Error
BULLINS v. ABTco, INC. No. 95-1381	Surry (95CVS443)	Dismissed

CANTRELL v. CANTON HARDWOOD CO. No. 96-368	Madison (94CVS202)	Reversed and Remanded
CARRINGTON v. WAKEMAN No. 96-43	Moore (94CVD366)	Dismissed
EMERSON PHARES LUMBER CO. v. GOSHA No. 95-1394	Johnston (94CVD2248)	Reversed
ESTATE OF BURGESS v. BARBEE No. 95-1240	Cabarrus (95CVD285)	Affirmed
FOSTER v. SUTER No. 95-925	Tyrrell (94CVS16)	Reversed and Remanded
GREEN v. CRANE No. 96-89	Avery (88CVD36)	Reversed and Remanded
GREEN v. NEILL No. 95-1019	Bladen (94CVS700)	Affirmed
HANEY v. MILLER No. 95-1198	Avery (95CVS62)	Dismissed
HASH v. PALM HARBOR HOMES No. 96-101	Ind. Comm. (040701)	Affirmed
HYATT v. GENUINE PARTS CO. No. 95-1322	Cabarrus (95CVS00112)	Affirmed
IN RE ROBINSON No. 96-120	Pender (93J64) (93J67)	Affirmed
KING v. WEAVIL No. 96-179	Davidson (93SP119) (WBTS-15512)	No Error
LATHAM v. McBRIDE No. 96-175	Montgomery (94CVS1484) (92CVD74)	Reversed and Remanded
LEE v. DAVIS No. 96-25	Stanly (89SP56)	Reversed and Remanded
MARTIN v. VILLA CAPRIANI HOMEOWNERS ASSN. No. 95-867	Onslow (94CVS1145)	Affirmed
MAXEY v. MAXEY No. 95-1438	Guilford (95CVS5997)	Affirmed
MID-STATE OIL CO. v. WALTON No. 95-1001	Davidson (93CVS2347)	Affirmed in part Reversed in Part and Remanded

MORRIS v. DECATO BROTHERS, INC. No. 96-255	Granville (93CVS408)	Vacated and Remanded
N.C. DEPT. OF CRIME CONTROL v. MASSENBURG No. 95-1263	Wake (94CVS11689)	That portion of Judge Bullock's order dismissing the Department's petition based on his conclusion that the Department is not entitled to judical review was error. However, since Judge Bullock, in the alternative, correctly affirmed the Commission's decision, we affirm his order.
NELSON v. HAYES No. 95-1313	Ind. Comm. (351559)	Affirmed
OWENS v. WILSON No. 96-362	Brunswick (92SP236)	Affirmed
PARSONS v. CAROLINA MEDICORP, INC. No. 96-128	Surry (94CVS227)	Affirmed
PHELPS v. PHELPS No. 95-1017	Orange (89CVD1325) (89CVD891)	Affirmed in Part and Reversed and Remanded in Part
PHELPS v. PHELPS No. 95-1418	Orange (89CVD1325) (89CVD891)	Affirmed
ROY BURT ENTERPRIES v. MARSH No. 95-1327	Moore (87CVS913)	Affirmed
SAMUEL v. McQUEEN No. 96-514	New Hanover (95CVS2734)	Appeal Dismissed
SANDERSON v. CAMP No. 95-879	Onslow (92CVS1065)	Dismissed
SEELEY v. OAKWOOD HOMES No. 95-153	Ind. Comm. (257891)	Affirmed
SHEARIN v. STATE FARM FIRE AND CASUALTY CO. No. 96-10	Carteret (95CVS329)	Affirmed

STATE v. ANDREWS No. 95-1216	Pender (94CRS1815)	New Trial
STATE v. BAILEY No. 95-656	Gaston (93CRS28085)	No Error
STATE v. BROWN No. 95-1441	Durham (94CRS30016) (94CRS30017)	No Error
STATE v. BROWN No. 96-402	Guilford (95CRS15072)	No Error
STATE v. BURNETTE No. 96-16	Durham (94CRS20447)	No Error. Remanded for further proceedings.
STATE v. CLARK No. 96-72	Yadkin (95CRS81)	No Error
STATE v. CURRY No. 96-263	Alamance (94CRS32670)	No Error
STATE v. DAVIS No. 96-423	Greene (94CRS652)	No Error
STATE v. FACON No. 95-1324	Pamlico (94CRS355) (94CRS356)	Defendant had a fair trial, free of prejudicial error. However, since the court erred in imposing the sentence on the armed robbery charge, we remand for re-sentencing on this charge.
STATE v. FARLEY No. 96-73	Guilford (95CRS40980) (95CRS40981) (95CRS40982)	No Error
STATE v. FARRIOR No. 94-21-2	Onslow (92CRS3493)	No Error
STATE v. FORD No. 95-829	Macon (94CRS1621) (94CRS1622)	Vacated in Part and Remanded for Resentencing

STATE v. GODWIN No. 95-1354	Robeson (86CRS14231) (87CRS7370) (87CRS7371) (87CRS7372) (87CRS7373)	No Error
STATE v. HALE No. 96-473	Haywood (95CRS1139) (95CRS1140) (95CRS1141)	No Error
STATE v. HAIRSTON No. 95-1191	Wilkes (94CRS3649) (94CRS3650) (94CRS3651)	No Error
STATE v. JOHNSON No. 95-1353	Wilkes (91CR098)	No Error
STATE v. KNOWLES No. 96-366	Onslow (91CRS11421) (91CRS11422) (91CRS11423) (91CRS11426) (91CRS14914)	No prejudicial error in the guilt or innocence phase of defendant's trial; error in sentencing phase. Remanded for Resentencing
STATE v. LATTIMORE No. 96-221	Catawba (94CRS1317) (94CRS1318) (94CRS1319) (94CRS1320) (94CRS1321) (94CRS1322) (94CRS1323) (94CRS1324)	Reversed and remanded for resentencing
STATE v. LIDE No. 95-1402	Mecklenburg (94CRS88218)	Affirmed
STATE v. MUTTS No. 96-404	Wake (94CRS94674)	No Error
STATE v. PEGUES No. 96-322	Gaston (95CRS3472)	No Error
STATE v. POWELL No. 96-569	Wilson (95CRS11954)	No Error
STATE v. RAGSDALE No. 95-788	Guilford (94CRS41817)	No Error

STATE v. REDDICK No. 96-552	Pitt (92CRS12)	No Error
STATE v. SIFFORD No. 96-455	Catawba (92CRS17276) (92CRS17278)	No error; remand for correction of judgment
STATE v. SIMMONS No. 96-304	Forsyth (95CRS10962)	No Error
STATE AUTO INS. COS. v. McCLAMROCH No. 95-1331	Forsyth (94CVS8896)	Affirmed
STEVENS v. GAB BUSINESS SERVICES No. 95-1333	Wake (94CVS01973)	Affirmed
TERRY v. SMITH No. 95-1422	Guilford (94CVS6939)	Affirmed
THOMPSON v. WHITLEY & COMPANY REAL ESTATE No. 96-274	Ind. Comm. (408928)	Affirmed
TROUTMAN v. HAYZLIP No. 95-1316	Iredell (92CVS1483)	Affirmed
VIEREGGE v. N.C. STATE UNIVERSITY No. 95-512	Ind. Comm. (536600)	Affirmed
WAGONER v. OSBORNE No. 96-34	Wilkes (94CVS657)	Reversed and Remanded

STATE v. JOHNSON

[124 N.C. App. 462 (1996)]

STATE OF NORTH CAROLINA v. MELVIN RICKY JOHNSON

No. COA95-514

(Filed 19 November 1996)

1. Constitutional Law § 304 (NCI4th)— effective assistance of counsel—failure to make speedy trial motion—no denial of speedy trial

Defendant's conviction for possession of cocaine was not obtained without effective assistance of counsel based on failure to move for dismissal for violation of constitutional speedy trial rights where defendant was charged on 29 August 1992 and tried on 17 October 1994. Balancing the four factors enunciated in *Barker v. Wingo,* 407 U.S. 514, defendant was not denied the right to a speedy trial; thus there was no reasonable probability that had counsel advanced a motion to dismiss based on denial of that right the result of the proceeding would have been different.

Am Jur 2d, Criminal Law § 985.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters. 6 ALR4th 1208.

2. Constitutional Law § 304 (NCI4th)— effective assistance of counsel—failure to compel informant's identity—acquittal on charge to which informant's testimony would have related

Defendant's conviction for possession of cocaine was not obtained without effective assistance of counsel based on his second attorney's withdrawal of a motion, filed by the first attorney, to compel disclosure of an informant's identity where defendant was acquitted of possession with intent to sell or deliver and therefore suffered no prejudice from the absence of testimony corroborating his denial of selling cocaine.

Am Jur 2d, Criminal Law §§ 748, 749.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer. 76 ALR2d 262.

Accused's right in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3rd 8.

3. Evidence and Witnesses § 724 (NCI4th)— conviction of possession of cocaine—admission of evidence of drug activity in which defendant not involved—acquittal of intent to sell—no prejudice

There was no prejudice in a conviction for possession of cocaine in the admission of evidence of drug activity which did not involve defendant at the location at which defendant was arrested where defendant was acquitted of the offense of possession with intent to sell or deliver cocaine.

Am Jur 2d, Criminal Law § 985.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR4th 934.

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

4. Narcotics, Controlled Substances, and Paraphernalia § 216 (NCI4th)— possession of cocaine—sentencing—restitution of cost of drug analysis

The trial court did not err when sentencing defendant for possession of cocaine by ordering defendant to pay restitution to the SBI for the cost of analyzing the cocaine pursuant to N.C.G.S. § 90-95.3(b). Although defendant maintains that the statute violates the principle of separation of powers, he relies solely upon dicta in *Shore v. Edmisten, Atty. General*, 290 N.C. 628, and *Shore* relies on *Ex parte Coffelt*, 228 P.2d 199 (1951), which has been overruled. Notwithstanding, the legislative branch in enacting N.C.G.S §. 90-95.3(b) did not improperly control the actions of the judiciary in that the ordering of restitution for the analysis of drugs is clearly incidental to the primary function of the trial court sitting in a criminal matter and is reasonably related to the costs of administering the criminal justice system; the General Assembly cannot be accused of tax gathering through the court system because the burden imposed bears a direct relation to the cost of prosecuting the individual defendant; and the problem of deterring the exercise of the right to stand trial before conviction is not present here.

Am Jur 2d, Criminal Law §§ 572, 575.

5. Narcotics, Controlled Substances, and Paraphernalia § 42 (NCI4th)— possession of cocaine—acquittal of intent to sell—forfeiture of cash on person

The trial court erred in sentencing defendant for possession of cocaine by ordering forfeiture of $460 seized from defendant's person at his arrest where defendant was acquitted of possession with intent to sell and deliver. N.C.G.S. § 90-112(a)(2) is a criminal (or *in personam*) as opposed to a civil (or *in rem*) forfeiture statute. Criminal forfeiture must follow criminal conviction.

Am Jur 2d, Forfeitures and Penalties § 32; Searches and Seizures § 212.

Conviction or acquittal in criminal prosecution as bar to action for seizure, condemnation, or forfeiture of property. 27 ALR2d 1137.

Appeal by defendant from judgment entered 20 October 1994 by Judge A. Leon Stanback in Durham County Superior Court. Heard in the Court of Appeals 29 January 1996.

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

Christy & Ferguson, by Jay H. Ferguson, for defendant-appellant.

JOHN, Judge.

Defendant was found guilty by a jury 20 October 1994 of possession of cocaine. He received a suspended sentence and was placed on five years supervised probation. The trial court ordered defendant, *inter alia*, to pay $100 restitution to the State Bureau of Investigation for the cost of analyzing the cocaine and to forfeit "to the School Fund" $460 seized from his person. Defendant appeals.

The essentially undisputed background facts are as follows: As the result of an August 1992 tip to the Durham Police Department that controlled substances were being sold at 1212 Dawkins Street, Investigator Milton Alston (Alston) conducted surveillance of the premises and observed activity consistent with that of trafficking in drugs. Alston subsequently enlisted an informant who was successful in buying cocaine from an unidentified individual at the residence in question. A second, subsequent transaction produced similar results.

Based upon his observations and the two purchases of cocaine, Alston obtained a search warrant for the premises at 1212 Dawkins Street. The warrant was executed 29 August 1992, at which time defendant, his mother, and a young woman were present. While searching defendant, police officers located a plastic bag containing 2.1 grams of cocaine in his front right pants pocket and discovered $481 in cash in his front left pocket. Police also found two plastic bags containing three grams of marijuana in a kitchen cabinet, and scales, plastic "baggies," and twist ties in the kitchen.

Defendant was arrested and later indicted on charges of possession of marijuana, possession of cocaine and possession with intent to sell or deliver cocaine. The marijuana charge was subsequently dropped and defendant was acquitted at trial of the offense of possessing cocaine with the intent to sell or deliver. Judgment was entered 20 October 1994 on the possession conviction.

I.

[1] Defendant's first contention is that his conviction was obtained without the effective assistance of counsel guaranteed by the Constitutions of the United States and North Carolina. He maintains a motion by counsel to dismiss the charges against him for violation of his federal and state constitutional rights to a speedy trial would have been granted, yet was never made. Defendant was charged with the crimes *sub judice* 29 August 1992, but was not tried until the 17 October 1994 session of court.

When claiming denial of effective assistance of counsel,

> [a] defendant must [first] show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)).

However, if the appellate court determines "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," it need not consider in the first instance whether counsel's performance was actually deficient. *Id.* at 563, 324 S.E.2d at 249. The standard measuring ineffective assistance of counsel is the same under the United States and North Carolina constitutions. *Id.* at 562, 324 S.E.2d at 248. Therefore, our initial step is to examine whether defendant was indeed denied the right to a speedy trial such that "the result of the proceeding would have been different," *id.* at 563, 324 S.E.2d at 249, had defendant's counsel made a dismissal motion grounded upon violation of this right.

The United States Supreme Court has set forth a balancing test to assess whether a defendant's Sixth Amendment right to a speedy trial has been transgressed. The test focuses upon four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972). No one factor alone is decisive of the issue for or against a defendant; rather, the factors must be examined as a whole, "with such other circumstances as may be relevant." *Id.* at 533, 33 L. Ed. 2d at 118. The test under the speedy trial provision of Article 1, § 18 of the North Carolina Constitution is identical. *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994).

As to the first factor, the duration of time between arrest and trial is not determinative of whether a violation of the constitution has occurred; an overly lengthy time period merely triggers examination of the other three factors. *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984). We believe the twenty-six month lag herein between defendant's arrest and trial requires consideration of the remaining factors. *See State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975) (twenty-two month delay); *see also Webster*, 337 N.C. at 679, 447 S.E.2d at 351 (sixteen month delay).

Although mutually conceding the record is unclear concerning the reason for the delay in defendant's trial, both defendant and the State advance countervailing assertions in their appellate briefs. The State points out that the defendant's initial appointed counsel moved to withdraw 2 September 1993, citing a "fundamental disagreement" with defendant regarding the handling of his case and defendant's specific request that counsel withdraw. Substitute counsel was

appointed 8 November 1993. Defendant responds that "the charges [were] not of such complexity to require an unusual amount of preparation for either the State or the defendant" and notes defendant's pretrial motions were all filed by 2 September 1993, more than thirteen months prior to trial.

"The defendant has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution." *Webster*, 337 N.C. at 679, 447 S.E.2d at 351. On the instant record, which defendant concedes is inconclusive, defendant has not met that burden.

Regarding the third factor, a letter in the record from defendant to Judge Gregory Weeks, apparently written shortly after a 28 June 1994 hearing, states, "I have previously and is [sic] currently requesting, to no avail, that a motion for a speedy trial be brought before the court." Assertion of the right to a speedy trial is " 'entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.' " *Id.* at 680, 447 S.E.2d at 352 (quoting *Barker*, 407 U.S. at 531-32, 33 L. Ed. 2d at 117). In the case *sub judice*, no assertion of the right to a speedy trial appears of record until approximately twenty-two months following defendant's arrest, notwithstanding defendant's claim to have earlier pressed for such a motion to be filed. As in *Webster*,

> [d]efendant's failure to assert [his] speedy trial right sooner in the process does not foreclose [his] speedy trial claim, but it does weigh somewhat against [his] contention that [he] has been unconstitutionally denied a speedy trial.

Id.

Lastly, we consider the issue of prejudice. The purpose of the constitutional right to speedy trial is:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. at 681, 447 S.E.2d at 352 (emphasis omitted) (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118).

Defendant was not incarcerated pending trial, but claims the delay hampered his ability to mount a defense. Defendant's mother died 13 August 1994, two months prior to his trial. Defendant insists

that had his mother been alive at the time of trial, she could have explained the "innocuous nature" of the scales, plastic "baggies," and twist ties found in her kitchen and would also have testified concerning the source and ownership of the money found in defendant's pocket. In the absence of his mother, defendant continues, he was compelled to testify on his own behalf regarding these matters so as to protect himself from a conviction of possession with intent to sell or deliver cocaine. In consequence of the necessity of his taking the stand, defendant concludes, he was forced to acknowledge ownership of the cocaine found in his pocket, thereby incriminating himself on the possession charge. Defendant's argument is unpersuasive.

First, defendant was acquitted of the greater crime of possession with intent to sell or deliver a controlled substance. Further, defendant was not prejudiced by the admission contained in his testimony.

A felonious possession of narcotics conviction requires proof the defendant (1) possessed the controlled substance at issue (2) knowingly. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985). Ownership of the controlled substance need not be shown. *State v. Pevia*, 56 N.C. App. 384, 388, 289 S.E.2d 135, 138, *cert. denied*, 306 N.C. 391, 294 S.E.2d 218 (1982). Moreover, when narcotics are found on premises under the control of a defendant, this circumstance, in and of itself, gives rise to the inference that the defendant had possession of the drugs as well as knowledge of their presence. *Weldon*, 314 N.C. at 403, 333 S.E.2d at 703.

In the case *sub judice*, Alston testified he recovered a bag containing 2.1 grams of cocaine from defendant's right front pants pocket, *i.e.*, from his *person*, thus giving rise to the inference defendant knowingly possessed the cocaine. In addition, ownership was not an element of the charge, and defendant's acknowledgment of ownership was of small consequence. In sum, in view of the substantial other evidence attributable to the charge of possession, we believe defendant would in all likelihood have been convicted of that crime even absent the admission of ownership occasioned by his testimony.

Balancing the four factors enunciated in *Barker v. Wingo*, we conclude defendant was not denied the right to a speedy trial; thus, there was no "reasonable probability" that had counsel advanced a motion to dismiss based on denial of that right "the result of the proceeding would have been different," *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. Defendant's contention he was denied effective assistance of counsel on this basis therefore fails.

II.

[2] Defendant also claims he was denied effective assistance of counsel by virtue of his second attorney's withdrawal of a motion, filed by the first, to compel disclosure of the informant's identity. According to defendant,

> [t]he informant was a material and necessary witness for the defendant to corroborate that it was not the defendant who sold the drugs during the controlled buys and that others lived in the residence.

To the contrary, we again note defendant was acquitted of possession with intent to sell or deliver cocaine. He therefore suffered no prejudice from the absence of testimony by the informant corroborating his denial of selling cocaine at 1212 Dawkins Street. Defendant's alternative claim of ineffective assistance of counsel therefore also fails. *See Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 ("defendant must show that [counsel's] deficient performance prejudiced the defense").

III.

[3] Defendant's third contention is that the trial court erred by admitting evidence of drug activity at the Dawkins Street location which did not involve defendant. He points, for example, to Alston's testimony relating to two controlled narcotics purchases which did not identify defendant as the seller. However, as defendant was acquitted of the offense of possession with the intent to sell or deliver cocaine, he has failed to show prejudice in the admission of the challenged evidence. *See* N.C.G.S. 15A-1443(a) (1988) (defendant must show "reasonable possibility" that had error not been committed, different result would have occurred).

IV.

[4] Defendant next argues the trial court erred by ordering restitution of the expense of analyzing the cocaine found in his possession. The applicable statute is N.C.G.S. § 90-95.3(b) (1993), which states:

> When any person is convicted of an offense under [the Controlled Substances Act], the court may order him to make restitution in the sum of one hundred dollars ($100.00) to the State of North Carolina for the expense of analyzing any controlled substance possessed by him or his agent as part of an investigation leading

to his conviction. Any funds received under this subsection shall be deposited in the General Fund.

In his argument, defendant relies on certain statements in *Shore v. Edmisten, Atty. General*, 290 N.C. 628, 633-34, 227 S.E.2d 553, 559 (1976), and maintains the statute violates the principle of separation of powers.

Defendant first points to the statement in *Shore* that

> [a] state or a local agency can be the recipient of restitution where the offense charged results in particular damage or loss to it over and above its normal operating costs.

Id. While its source is not specifically cited in *Shore*, the foregoing principle is enunciated in N.C.G.S. § 15A-1343(d) (1988 & 1995 Cum. Supp.) (restitution to government agency permitted only for damage or loss "over and above its normal operating costs"). At common law, costs in criminal cases were unknown; liability for costs in criminal cases is therefore dictated purely by statute. H.C. Lind, Annotation, *Items of Costs of Prosecution for which Defendant May Be Held*, 65 A.L.R.2d 854, § 2 (1959).

Defendant further cites dicta in *Shore* that

> [i]t would not . . . be reasonable to require the defendant to pay the State's overhead attributable to the normal costs of prosecuting him.

290 N.C. at 634, 227 S.E.2d at 559. However, the overhead faced by a court and the particular costs it experiences in prosecuting individual cases may be viewed as distinctly separate items. Overhead, for example, is defined as:

> those general charges or expenses in a business which cannot be charged up as belonging exclusively to any particular part of the work or product.

Webster's Third New International Dictionary 1608 (1967).

The *Shore* opinion first supports the dicta cited by defendant by referencing *People v. Baker*, 112 Cal. Rptr. 137 (Cal. Ct. App.), *aff'd in part and vacated in part*, 113 Cal. Rptr. 248 (1974), which held that a defendant may not be charged with the costs of prosecuting his or her particular case. However, the California court in *Baker* was engaged solely in the interpretation of a state statute as opposed to acknowledging a widely recognized rule regarding costs. *See* 112 Cal.

Rptr. at 143-44. Indeed, many jurisdictions approve the imposition of costs relating to the actual expense of prosecution. *See* 65 A.L.R.2d 854, *supra*; 24 C.J.S. Criminal Law § 1738 (1989).

The *Shore* dicta upon which defendant premises his argument also cites to *State v. Mulvaney*, 293 A.2d 668 (N.J. 1972). However, the thrust of the *Mulvaney* decision was that no specific statute authorized the trial court to levy costs of prosecution against a defendant, not that it was either unreasonable or impermissible in general to do so.

The third case referred to by *Shore* is *People v. Teasdale*, 55 N.W.2d 149 (Mich. 1952), which interpreted a Michigan statute allowing imposition of "costs" as a condition of probation. The court determined the statute permitted only those costs incurred in connection with a particular defendant's case, and excluded

> expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law.

Id. at 151.

In sum, the statement in *Shore* upon which defendant relies regarding what costs may properly be imposed against a criminal defendant is at best ambiguous, and examination of the cases cited therein affords but limited illumination. Hence, the rule of law which may truly be gleaned from *Shore* is the statutory provision set out in G.S. § 15A-1343(d):

> no government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs . . . .

The question thus becomes whether assessment of the expense of analyzing narcotics authorized by G.S. § 90-95.3(b) may be considered part of the "normal operating costs" of the prosecuting governmental authority.

Statutes which are *in pari materia*, or relate to the same subject matter, must be construed together in order to ascertain legislative intent. *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984). However, if the statutes pose an "irreconcilable conflict, the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute." *State v. Hutson*, 10 N.C. App. 653, 657, 179 S.E.2d 858, 861 (1971).

In the case *sub judice*, the phrase "normal operating costs" in G.S. § 15A-1343(d) arguably may be interpreted to refer to overhead costs, and not to those incurred in connection with a specific prosecution. In such manner, G.S. § 90-95.3(b) would not conflict with G.S. § 15A-1343(d), as the cost of analyzing drugs is incurred by the prosecution only in connection with particular cases. However, assuming *arguendo* the expense of drug analysis is properly considered a "normal operating cost[]" of the governmental agency prosecuting criminal offenders, G.S. § 90-95.3(b) may be seen as "an exception to, or qualification of," *Hutson*, 10 N.C. App. at 657, 179 S.E.2d at 861, G.S. § 15A-1343(d), which is the earlier law (G.S. § 15A-1343(d) was enacted in 1978 and G.S. § 90-95.3(b) in 1990). Thus, whichever meaning is assigned to "normal operating costs" within G.S. § 15A-1343(d), the validity of G.S. § 90-95.3(b) is not affected.

As to defendant's argument regarding the separation of powers, *Shore* makes the following statement:

> It has been held that payments ordered by courts to reimburse the state for its general overhead attributable to prosecution costs violates the principle of separation of powers in that the judge is assuming the legislative function of allocating the resources of the state.

290 N.C. at 634, 227 S.E.2d at 559.

Shore cites *People v. Barber*, 165 N.W.2d 608 (Mich. Ct. App. 1968) for this proposition, although it appears the case was decided on a basis other than separation of powers. *Shore* also cites *Ex parte Coffelt*, 228 P.2d 199 (Okla. Crim. App. 1951). *Coffelt* addressed an Oklahoma law mandating assessment of $1.00 against each person convicted of violating any state law. The sum was to be placed in a Parole Fund used to defray salaries and expenses of the Pardon and Parole Officer. *Id.* at 200. The Criminal Court of Appeals of Oklahoma indicated that "costs taxed in a criminal proceeding must bear a true relation to the expenses of the prosecution," *id.* at 201, and held the assessment did not relate to the expenses of prosecution:

> [T]he legislature seeks to collect under the guise of costs a tax for the maintenance of the Pardon and Parole officer and his assistants. Such an attempt clearly violates the fundamentals of the division of powers. It is an attempt to make the courts discharge the function of the executive branch of the government and use them as a tax gathering agency, and appropriate the moneys thus

> collected for the maintenance of a branch of the executive department of government.

Id. at 202.

However, *Coffelt* has since been overruled by *State v. Claborn*, 870 P.2d 169 (Okla. Crim. App. 1994), which rejected the notion that costs must relate to a particular defendant's prosecution:

> as long as a criminal statutory assessment is reasonably related to the costs of administering the criminal justice system, its imposition will not render the courts "tax gatherers" in violation of the separation of powers doctrine.

Id. at 171.

In *State v. Ballard*, 868 P.2d 738 (Okla. Crim. App. 1994), the Oklahoma court also upheld against a separation of powers challenge a statute requiring assessment against persons convicted of violating the state's Uniform Controlled Dangerous Substance Act of between $500 and $3000 to be used for drug abuse education and prevention services. The *Ballard* court reasoned:

> The imposition of the assessment is not central to the function of the courts of this state: it has no bearing on a determination whether the defendant is guilty or innocent; the amount of time the defendant should be imprisoned within the statutory guidelines, or whether the court exercises discretion in granting probation; how much fine he is to pay; or any other issue central to the administration of criminal justice in this state. It is clearly incidental to the primary function of the trial court sitting in a criminal matter. Since it is clearly incidental, and does not otherwise interfere with the primary function of the Judicial branch of government, there is no unconstitutional violation of separation of powers by its imposition.

Id. at 742-43. Other states have also examined separation of powers arguments regarding costs and rejected them. *See, e.g.*, *State v. Lane*, 649 A.2d 1112 (Me. 1994); *Commonwealth v. Nicely*, 638 A.2d 213 (Pa. 1994); *State v. Smith*, 576 P.2d 533 (Ariz. Ct. App. 1978); *State v. Young*, 238 So.2d 589 (Fla.), *appeal dismissed*, 400 U.S. 962, 27 L. Ed. 2d 381 (1970).

The principle of separation of powers is enunciated in Article I, § 6 of our state constitution as follows:

> The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

Accordingly,

> [e]ach of these co-ordinate departments has its appropriate functions, and one cannot control the action of the other in the sphere of its constitutional power and duty.

State v. Holden, 64 N.C. 829 (1870).

The burden of showing the unconstitutionality of a statute rests upon the party challenging it. *State v. Greenwood*, 12 N.C. App. 584, 591, 184 S.E.2d 386, 390 (1971), *rev'd on other grounds*, 280 N.C. 651, 187 S.E.2d 8 (1972). Defendant relies solely upon dicta in *Shore* to support his contention that G.S. § 90-95.3(b) contravenes the constitutional provision for the separation of powers; in turn, *Shore* relies on *Coffelt*, which has been overruled. Notwithstanding, to address the heart of defendant's argument, we do not perceive the legislative branch as improperly controlling the actions of the judiciary through the enactment of G.S. § 90-95.3(b). The ordering of restitution for the analysis of drugs is "clearly incidental to the primary function of the trial court sitting in a criminal matter," *Ballard*, 868 P.2d at 742, and "reasonably related to the costs of administering the criminal justice system." *Claborn*, 870 P.2d at 171.

Moreover, the General Assembly cannot be accused of "tax gathering" through the court system by imposing the $100 cost under G.S. § 90-95.3(b). Even under the rule of *Coffelt*, which has been supplanted in Oklahoma by the much broader rule of *Claborn*, the statute would survive, as the burden it imposes bears a direct relation to the cost of prosecuting the individual defendant.

In addition, although the court in *Coffelt* expressed concern that unbridled imposition of costs upon criminal defendants would deter the exercise of the right to stand trial before conviction, 228 P.2d at 202, no such problem is present here. G.S. § 90-95.3(b) imposes a discrete cost for a specific service and thus can hardly be fairly characterized as unbridled. Further, we cannot say the $100 assessment is of such magnitude as to deter a defendant from forcing the prosecution to trial. Moreover, nothing in the statute restricts assessment of the analysis fee to individuals who have been convicted at trial rather than upon a guilty plea. Finally, a convicted defendant ordered to pay a fine or costs may not be imprisoned for failure to comply if the delinquency in paying was "not attributable to a failure on his part to

make a good faith effort to obtain the necessary funds for payment." N.C.G.S. § 15A-1364(b) (1988). Liability for costs may also be reduced or revoked entirely if the court finds the defendant lacks the ability to pay them through no fault of his own. *See* N.C.G.S. § 15A-1364(c) (1988).

In conclusion, defendant's reliance on *Shore* notwithstanding, we hold G.S. § 90-95.3(b) does not violate the principle of separation of powers.

VI.

[5] Defendant's final assignment of error relates to the trial court's order of forfeiture of $460 seized from defendant's person. N.C.G.S. § 90-112(a)(2) provides that the following shall be subject to forfeiture:

> All money . . . which [is] acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of [the Controlled Substances Act.]

At the time of defendant's arrest, $481 was located in his left pants pocket. Defendant testified the money consisted of approximately $300 given him by his mother for safekeeping in the hours prior to his arrest and $161 from his job with a janitorial service. Alston testified that a twenty-dollar bill found in defendant's pocket was the same bill used by the informant to purchase cocaine at 1212 Dawkins Street the day immediately preceding the date of defendant's arrest. Although the record is not entirely clear on the matter, it appears this latter $20 was not included in the court's forfeiture order and defendant has not argued for its return.

Defendant points to *State v. McKinney*, 36 N.C. App. 614, 617, 244 S.E.2d 455, 457 (1978), which held that currency is not subject to forfeiture under G.S. 90-112 "solely by virtue of being found in 'close proximity' to the controlled substance which defendant was convicted of possessing." *See also State v. Fink*, 92 N.C. App. 523, 533-34, 375 S.E.2d 303, 309 (1989) ("mere possession of currency in close proximity to narcotics does not warrant forfeiture"), and *State v. Teasley*, 82 N.C. App. 150, 167, 346 S.E.2d 227, 237 (1986), *appeal dismissed and disc. review denied*, 318 N.C. 701, 351 S.E.2d 759 (1987) ("mere possession of a large amount of money, together with narcotics, does not subject defendant" to forfeiture). Defendant maintains his acquittal of the crime of possession with intent to sell or deliver cocaine created an insurmountable obstacle to judicial deter-

mination that the seized money was acquired through selling or delivering cocaine and thus subject to forfeiture. We believe defendant's argument has merit.

G.S. § 90-112(a)(2) is a criminal, or *in personam*, forfeiture statute, as opposed to a civil, or *in rem*, forfeiture statute. *See U.S. v. Winston-Salem/Forsyth County Bd. of Educ.*, 902 F.2d 267, 271 (4th Cir. 1990); *State ex rel. Thornburg v. Currency*, 324 N.C. 276, 378 S.E.2d 1 (1989).

> Important differences exist between *in rem* and *in personam* forfeiture. First, while *in personam* forfeiture requires a criminal conviction of the property's owner, an *in rem* proceeding only requires the government to prove that the property was used for an illegal purpose or that the property constitutes contraband. Second, the government bears a lower burden of proof in an *in rem* forfeiture action than it does in an *in personam* action. Since an *in personam* action is criminal, the government must prove the charges against the defendant beyond a reasonable doubt. In an *in rem* action, on the other hand, only proof by a preponderance of the evidence is required.

Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When is Everything Too Much?*, 53 U. Pitt. L. Rev. 1, 6-7 (1991); *see also*, Drew J. Fossum, Comment, *Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees up for Grabs?*, 39 Sw. L.J. 1067, 1069-72 (1986) (historical overview of forfeiture laws).

Criminal forfeiture, therefore, must follow criminal conviction. Because defendant was found not guilty of possessing cocaine with the intent to sell or deliver, the trial court was precluded from declaring the money recovered from defendant's person was subject to criminal forfeiture under G.S. § 90-112(a)(2).

Accordingly, the order of the trial court directing forfeiture "to the School Fund" of $460 seized from defendant is hereby vacated. As the question is not before us, we express no opinion regarding the trial court's authority to direct that defendant apply the monies at issue to payment of other monetary assessments properly imposed upon him.

No error in the trial; order of forfeiture vacated.

Judges JOHNSON and SMITH concur.

CENTRAL CAROLINA BANK & TRUST COMPANY, N.A., EXECUTOR OF THE ESTATE OF MARTHA A. CONE, DECEASED, AND CO-TRUSTEE UNDER TRUST AGREEMENT DATED AUGUST 15, 1986, AS AMENDED, PETITIONER v. MARTHA CONE WRIGHT, CEASAR CONE, III, KRISTEN GREER CONE, LAURENCE M. CONE, JR., AND THE CEMALA FOUNDATION, INC., A NORTH CAROLINA CORPORATION, RESPONDENTS

No. COA95-1325

(Filed 19 November 1996)

Wills § 140 (NCI4th)— gift to charitable foundation—general or residuary bequest—intent of testatrix

When the language, punctuation and attendant circumstances of the execution of an amended trust agreement which distributed the trust estate at testatrix's death are considered, the testatrix intended that a gift to a charitable foundation of the lesser of sixty percent of the residuary estate or thirty million dollars was to be a general bequest, rather than a residuary bequest, which was to be paid to the foundation before division of the residuary estate.

Am Jur 2d, Wills § 1525.

Appeal by respondents Kristen Greer Cone and Laurence M. Cone, Jr. from Order entered 2 October 1995 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 September 1996.

This case involves interpretation of a will, trust agreement and amendment to the trust agreement which control distribution of the estate of Mrs. Martha A. Cone and the allocation of estate taxes between the individual beneficiaries and a private charitable foundation.

Martha A. Cone died 12 April 1993. She was survived by two living children, respondent-appellees Martha Cone Wright and Ceasar Cone, III, and by two grandchildren, the issue of her deceased son, respondent-appellants Kristen Greer Cone and Laurence M. Cone, Jr.

Mrs. Cone was the widow of Ceasar Cone, II who died on 14 November 1986. The bulk of Mr. Cone's forty million dollar estate had passed to Mrs. Cone. After receiving her distribution from her husband's estate, Mrs. Cone revised her estate plan. The last will of Martha A. Cone, dated 29 November 1988, devised the "rest, residue, and remainder" of her estate to "Central Carolina Bank & Trust

Company, N.A. as Co-Trustee under that certain trust agreement between me as Settlor and Central Carolina Bank & Trust Company, N.A. as a Co-Trustee executed prior to execution of this Will on August 15, 1986, and as amended to the date of my death."

Mrs. Cone's trust agreement, dated 15 August 1986, provided for the distribution of the trust estate at her death under Article V titled "Distribution and Termination." Article V of the 1986 trust agreement made general bequests to individuals and institutions in sections 5.01 through 5.11, then devised the "rest, residue and remainder of the Trust estate" to the "children of the Settlor surviving her in equal shares, provided, however, the issue of a deceased child surviving her shall take per stirpes the share their parent would have taken had he or she survived." Article IV of the 1986 Trust Agreement provided that the Trustees, in their discretion, pay "any estate, inheritance, succession, death or similar taxes payable by reason of the Settlor's death, together with any interest thereon or additions thereto, without reimbursement from the Settlor's executor or administrator, from any beneficiary of insurance upon the Settlor's life, or from any other person."

On 29 November 1988, Mrs. Cone amended her 1986 Trust Agreement and revoked Article V in its entirety and replaced the old Article V with a new Article V also titled "Distribution and Termination." The provisions of the new Article V are the subject of the controversy here. Under the new Article V, Mrs. Cone first directs that the Trustee "shall pay all estate, inheritance, succession, death, or similar taxes payable by reason of the Settlor's death, together with any interest thereon or other additions thereto, without reimbursement from the Settlor's executor or administrator, from any beneficiary, or from any other person, and then divide the Trust estate . . . and make the following distributions in termination of the trust: . . .". Immediately following, in sections 5.01 through 5.09, Mrs. Cone makes the following bequests and devises:

> 5.01. The sum of Twenty-Five Thousand dollars ($25,000) to the Holy Trinity Episcopal Church of Greensboro, North Carolina;
>
> 5.02. The sum of Ten Thousand dollars ($10,000) to each of the Settlor's grandchildren who survive her, provided, however, the issue surviving the Settlor of a deceased grandchild shall take per stirpes the share their parent would have taken had he or she survived.

5.03 The sum of Twenty Five Thousand dollars ($25,000) to each of the following nieces and nephews of the Settlor:

Milo A. Crawford, now residing at Chapel Hill, North Carolina;

Madge Crawford Street, now residing at Chillicothe, Ohio;

Eugene B. Crawford, Jr., now residing at Wilmington, Delaware;

Rosalind Abercrombie Shields, now residing at Bethlehem, Pennsylvania;

Lane Abercrombie Dickinson, now residing at Richmond, Virginia;

Charles L. Abercrombie, Jr., now residing at Danville, Virginia;

Ann Abercrombie Williams, now residing at Kill Devil Hill (sic), North Carolina;

Milo B. Abercrombie, Jr., now residing at Danville, Virginia;

Lura Patricia Holley, now residing at Winston-Salem, North Carolina;

Madeline Holley Schiffman, now residing at Greensboro, North Carolina;

Marion Holley Milner, now residing at Charlotte, North Carolina;

or if any such nieces or nephews of the Settlor shall have predeceased her leaving issue surviving her, then to the issue, (living at the Settlor's death) of such deceased niece or nephew per stirpes;

5.04. The sum of Twenty-Five Thousand dollars ($25,000) to the children of Martha Holley Green, to be divided equally among them and/or the issue (living at the Settlor's death) per stirpes of any of them that shall have predeceased the Settlor leaving issue surviving the Settlor;

5.05. The sum of Two Thousand dollars ($2,000) to Irene Marable, if she shall survive the Settlor;

5.06. The sum of Two Thousand dollars ($2,000) to the Settlor's former employee, John Marable, if he shall survive her;

> 5.07. The sum of Two Thousand dollars ($2,000) to Agnes Goldston, if she shall survive the Settlor;
>
> 5.08. The lesser of: (a) sixty percent (60%) of the rest, residue and remainder of the Trust estate, after the above distributions under this Article V or (b) the sum of Thirty Million Dollars ($30,000,000); to the Cemala Foundation, Inc., a non-profit corporation organized under the laws of North Carolina with its principal office in Greensboro, North Carolina, in cash or in kind, or partly in cash or partly in kind, provided that this distribution shall be adeemed if and to the extent a deduction for estate tax purposes is not allowed the Settlor's estate for such distribution under Section 2055 (or other applicable sections) of the Internal Revenue Code of 1986, as may be amended from time to time, and as finally determined in the Settlor's federal estate tax proceedings.
>
> 5.09. All the rest, residue and remainder of the Trust estate of every kind and description, wherever situated and whether acquired before or after the execution of this Trust Agreement, shall be distributed to the children of the Settlor surviving her in equal shares, provided, however, the issue of a deceased child surviving her shall take per stirpes the share their parent would have taken had he or she survived.

Central Carolina Bank & Trust Company filed a Petition for Declaratory Relief in Guilford County Superior Court seeking a declaratory judgment construing the terms of the will of Martha A. Cone dated 29 November 1988, the trust agreement dated 15 August 1986, and the amendment to the trust agreement dated 29 November 1988. Respondents Kristen Greer Cone and Laurence M. Cone, Jr., the two grandchildren of Martha A. Cone, filed an Answer to the Petition through their Guardian *ad litem* contending that sections 5.08 and 5.09 of the trust amendment, when read together, divide the residue of the trust estate between the family and the Cemala Foundation, capping the gift to the Cemala Foundation at sixty percent of the residuary estate. The grandchildren also contended that in construing the will and trust documents together, any federal estate taxes owing on the estate should be paid from the residuary estate, after the payment of the general bequests but before dividing the residuary estate between the family and the Cemala Foundation. Respondent Cemala Foundation disagreed. Respondents Martha Cone Wright and Ceasar Cone, III, the two children of Martha A. Cone, aligned themselves

with the Cemala Foundation in a separate Answer to the Petition for Declaratory Judgment. Each group of respondents moved for summary judgment. The trial court entered an order granting summary judgment to Respondents Martha Cone Wright, Ceasar Cone, III and the Cemala Foundation and denying summary judgment for respondents Kristen Greer Cone and Laurence M. Cone, Jr. Respondents Kristen Greer Cone and Laurence M. Cone, Jr. appeal.

Newsom, Graham, Hedrick & Kennon, P.A., by A. William Kennon, Katherine McKee Henrichs, and Joel M. Craig, for petitioner-appellants Central Carolina Bank and Trust Company, N.A.

Tuggle, Duggins & Meschan, P.A., by Barbara C. Ruby, for respondent-appellants Kristen Greer Cone and Laurence M. Cone, Jr.

Womble, Carlyle, Sandridge & Rice, by Elizabeth L. Quick, Ellen M. Gregg, and Jean T. Adams, for respondent-appellees Martha Cone Wright, Ceasar Cone, III and The Cemala Foundation, Inc.

EAGLES, Judge.

The threshold question here is whether the gift to the Cemala Foundation in section 5.08 of Article V of the amended trust agreement is a general bequest or a residuary devise. This distinction controls the total value of the estate shares to be received by the Cemala Foundation and the individual beneficiaries and the amount of estate taxes paid from the estate. The value of Mrs. Cone's gross estate for federal estate tax purposes exceeds sixty one million dollars. In granting the summary judgment motion for Martha Cone Wright and Ceasar Cone, III, ("the children"), and the Cemala Foundation, ("the Foundation"), the trial court determined that the gift to the Foundation in section 5.08 was a general bequest of the lesser of sixty percent of the residuary estate or thirty million dollars, to be paid to the Foundation before division of the residuary estate. When section 5.08 is construed in this manner, the estate owes approximately seventeen million dollars in estate and inheritance taxes; the Foundation receives thirty million dollars; and, the children and grandchildren share the net estate, approximately thirteen million, two hundred thousand dollars. In this scenario, each grandchild's share is approximately two million, two hundred thousand dollars.

Alternatively, if section 5.08 is a residuary devise to the Cemala Foundation, as respondents Kristen Greer Cone and Laurence M. Cone, Jr., the grandchildren, contend, the estate would owe approximately twenty one million, five hundred thousand dollars in estate and inheritance taxes, increasing the tax burden by approximately four million dollars. The Foundation would receive approximately twenty two million dollars from the net estate and the children and grandchildren will share the amount remaining, approximately seventeen million dollars. Each grandchild's share would be increased by approximately six hundred thousand dollars, leaving each grandchild a share of approximately two million eight hundred thousand dollars.

A general bequest is a gift of property from the estate that does not specify the exact piece of property the beneficiary shall receive. *Edmundson v. Morton*, 332 N.C. 276, 284, 420 S.E.2d 106, 111 (1992). It may be satisfied from any of the general assets of the estate. *Id.* The residue of an estate consists of the property remaining after the payment of all debts, taxes, costs of administration, bequests, legacies or any other payments directed by the testator. *Trust Co. v. Grubb*, 233 N.C. 22, 24, 62 S.E.2d 719, 721 (1950). The residuary beneficiary receives the balance of the estate after all of the estate's obligations are satisfied, including the payment of the general bequests.

Determining whether the devise in section 5.08 is residuary devise or a general bequest requires that we interpret the new Article V, Article V of the 1988 amendment to the 1986 trust agreement. Because it is rare to find two will cases factually alike, previous decisions provide little help in the exercise of interpreting Mrs. Cone's amended trust. However, we rely on past decisions for the applicable rules of construction.

"The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills . . .". *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960). Unless the testator's intent violates some established rule of law or public policy, it will be given effect. *Id.* In ascertaining the testator's intent, the language used in the instrument is the primary source of information. *Id.* The Supreme Court set forth the appropriate analysis for construing the testator's intent from the instrument's language in *Clark v. Connor:*

> Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its differ-

> ent clauses and provisions examined and compared, so as to ascertain the general plan and purpose of the testator, if there be one. Ordinarily nothing is to be added to or taken from the language used, and every clause and every word must be given effect if possible. Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense. If words and phrases are used which have a well- defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent.

253 N.C. 515, 521, 117 S.E.2d 465, 468-69 (1960).

In ascertaining the testator's intent, the court should also consider the instrument "in light of the conditions and circumstances existing at the time the will was made." *Pittman v. Thomas*, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983). The court's task is to place itself in the position of the testator. *Id.* The instrument must be construed "taking it by its four corners' and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant." *Pittman*, 307 N.C. at 492-93, 299 S.E.2d at 211 (*quoting Patterson v. McCormick*, 181 N.C. 311, 313, 107 S.E. 12, 12 (1921)). The "circumstances attendant" include "the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of the testator's property." *Id.* Therefore, in our attempt to glean Mrs. Cone's intent from her will and amended trust agreement, we look not only to the words and internal structure of the documents themselves, but also to circumstances surrounding the execution of the controlling instruments that indicate Mrs. Cone's plan for distributing her property.

Several factors lead us to conclude that the trial court was correct in its determination that Mrs. Cone intended a general bequest to the Cemala Foundation. First, we look to the actual text of the trust amendment. At the outset, we note that Article V is a self-contained provision of the trust, bearing the title "Distribution and Termination." All of the testator's property is devised within Article V. The article is divided into nine sections. Sections 5.01 through 5.07 leave specific cash bequests to an institution, the Holy Trinity Episcopal Church of Greensboro, Mrs. Cone's grandchildren, and fifteen other named individuals. The language of sections 5.01 through 5.07 begins consistently with the words "the sum of" and each of the

seven sections (with the exception of 5.02) closes with a semi-colon. A semi-colon is used to separate items in a series of similar items. W.A. Sabin, *The Gregg Reference Manual*, 42 (7th ed. 1993). Section 5.08 mirrors the preceding sections. It begins with the language "the lesser of (a) sixty percent of the rest, residue and remainder of the Trust estate . . . or (b) *the sum of* Thirty Million Dollars . . ."(emphasis added). Section 5.07 closes with a semi-colon, leading to the language of 5.08, however, section 5.08 closes with a period. Section 5.09 does not follow the same pattern of language and punctuation. It is punctuated as a self-contained paragraph and does not devise "the sum of" any particular amount of money to any particular beneficiary. Rather, section 5.09 devises "[A]ll the rest, residue, and remainder of the Trust estate of every kind and description, wherever situated" to the "children of the Settlor."

This Court has the discretion to "transpose words, phrases or clauses and to supply or disregard punctuation" to reach the intent of the testator. *Rawls v. Rideout*, 74 N.C. App. 368, 372, 328 S.E.2d 783, 786 (1985). Consequently, we are permitted to interpret the amended trust document emphasizing any punctuation and word choices which suggest Mrs. Cone's intent. It is reasonable to infer from the text of Article V that Mrs. Cone intended the residuary devise in section 5.09 to operate separately from the bequests in the preceding eight sections.

The grandchildren contend that the language in section 5.08 limiting the gift to the Foundation to the lessor of thirty million dollars or sixty percent of the residue was intended to cap the gift to the Foundation at sixty percent of the residue, providing a sixty-forty split between the family and the Foundation. The "circumstances attendant" to the execution of the amended trust suggest otherwise. Mrs. Cone's estate consists primarily of assets she received from the estate of her deceased husband, Ceasar Cone, II. Mr. and Mrs. Cone established the Cemala Foundation during their lifetimes and funded the trust with intervivos cash gifts until their deaths. In October 1986, Mr. Cone had drafted a trust agreement which provided a general bequest of thirty million dollars to the Foundation. Mr. Cone did not execute that amendment prior to his death. Approximately two months after the death of her husband, Mrs. Cone executed a codicil to her own will providing a general bequest to the Cemala Foundation of thirty million dollars. This codicil was revoked by her last will and testament executed in November of 1988. In 1976, Mr. and Mrs. Cone set up six separate trusts for each of their six grandchildren, funding

each trust with one million dollars. A short time before Mr. Cone's death, Mr. and Mrs. Cone made an additional one million dollar gift to the six separate trusts for the grandchildren and established and funded two additional trusts for two grandchildren born after 1976. At the time of her death, the total approximate value of these trusts was over fourteen million dollars. If Mrs. Cone had intended the devises to her family and the Foundation to stand on equal footing, she could have simply given "all the rest, residue and remainder of her trust estate" sixty percent to the Cemala Foundation and forty percent to the "children of the Settlor." However, she divided Article V into separate sections, addressing her gift to the Foundation separately and distinctly.

Our review of the text of the amended trust document and the circumstances attendant to its execution lead us to conclude that the trial court was correct in determining that Mrs. Cone intended to make a general bequest to the Cemala Foundation in section 5.08 of Article V. We conclude she intended her trustee to satisfy the bequest to the Foundation before dividing the residuary estate among her children and grandchildren.

The grandchildren also contend that Mrs. Cone intended that the estate and inheritance taxes owed on her trust estate be paid from the residuary before division among the beneficiaries and not apportioned between the beneficiaries in accordance with the tax burden on each beneficiary. Mrs. Cone explicitly directed that the residuary of her trust estate bear the burden of paying the taxes and expenses of her estate. Since the residue of an estate consists of the property remaining after payment of the bequests and other payments directed by the testator and, as we have determined that the gift to the Cemala Foundation is a general bequest, Mrs. Cone's bequest to the Cemala Foundation should be paid before the division of the residuary estate. Since the gift to the Cemala Foundation is a general bequest and not a residuary devise, we need not reach the question of how taxes should be apportioned among the residuary beneficiaries.

For all of the foregoing reasons, we affirm the ruling of the trial court.

Affirmed.

Judges WYNN and WALKER concur.

RANDOLPH H. TRULL, PLAINTIFF v. CENTRAL CAROLINA BANK & TRUST; RICHARD H. CRONK, JR.; PLAYER I, A NORTH CAROLINA GENERAL PARTNERSHIP AND KITTY PLAYER BECK, DEFENDANTS

No. COA95-1288

(Filed 19 November 1996)

1. Costs § 33 (NCI4th)— debt collection—attorneys' fees—deficiency action

The trial court did not err by awarding attorneys' fees to defendant-bank where the bank was unsuccessful in a deficiency action against plaintiff on a non-purchase money note. N.C.G.S. § 6-21.2 does not require that a party seeking attorneys' fees under the statute qualify as a "prevailing party" in litigation. To limit the operation of the statute to successful litigants would require the court to judicially amend the existing statute.

Am Jur 2d, Costs §§ 5, 57-70.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

2. Costs § 33 (NCI4th)— debt collection—attorneys' fees—ancillary action

The trial court did not err by awarding attorneys' fees to defendant-bank arising from the attempted collection of a non-purchase money note where plaintiff contended that N.C.G.S. § 6-21.2 should not apply to this action because defendant's failure in its deficiency action precludes the collection of a debt under the statute. Defendant's legal actions were in pursuit of payment of a debt evidenced by the same promissory note which contained the provision for reasonable attorneys' fees.

Am Jur 2d, Costs §§ 5, 57-70.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

3. Costs § 33 (NCI4th)— debt collection—non-purchase money note

A trial court's award of attorneys' fees arising from the attempted collection of a note was not precluded under *Merritt*

v. Edwards Ridge, 323 N.C. 330. The note at issue here is not a purchase money note; expanding the decision in *Merritt* to this non-purchase money, commercial transaction would deprive defendants of the benefits of a bargain, fairly and properly entered, which violates no established public policy.

Am Jur 2d, Costs §§ 5, 57-70.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

4. Costs § 33 (NCI4th)— debt collection—attorneys' fees—calculation of

The trial court did not abuse its discretion in its calculation of attorneys' fees in an action arising from the collection of a non-purchase money note where defendant lost a deficiency action. That action was ancillary to defendant's other actions to enforce the debt. The trial court calculated the attorneys' fees by applying the statutory percentage to the balance of the note on a date which falls within twenty-two days of the commencement of foreclosure proceedings.

Am Jur 2d, Costs §§ 5, 57-70.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

5. Costs § 33 (NCI4th)— debt collection—attorneys' fees—calculation of

The trial court did not err in calculating attorneys' fees in an action to collect a non-purchase money note by including fees incurred in the foreclosure action. Fees incurred by the bank's attorneys in the foreclosure proceeding or in any action connected with the collection of the debt are permissible under the N.C.G.S. § 6-21.2.

Am Jur 2d, Costs §§ 5, 57-70.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

6. Costs § 33 (NCI4th)— debt collection—attorneys' fees—15% reasonable amount

An award of attorneys' fees to defendant bank in an action on a non-purchase money note was not a windfall where plaintiff argued that the statutory 15% exceeded the actual attorneys' fees. The promissory note at issue provides for "reasonable attorneys' fees" and is therefore subject to the provisions in N.C.G.S. § 6-21.2 subsection (2), not subsection (1). Subsection (2) has predetermined that 15% is a reasonable amount.

Am Jur 2d, Costs §§ 5, 57-70.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

Judge WALKER concurring in part and dissenting in part.

Appeal by plaintiff from order entered 31 July 1995 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 28 August 1996.

This case involves a lender's statutory right to attorneys' fees under N.C.G.S. 6-21.2.

On 6 August 1990, the plaintiff, Randolph H. Trull, executed a promissory note in the principal sum of $650,000 representing a debt owed by plaintiff to defendant, Central Carolina Bank, secured by a deed of trust on real property in Wake County and by plaintiff's personal property pledged to defendant by a security agreement. The promissory note was not a purchase money note. Paragraph 4 of the promissory note provides: "[T]he Borrower(s) agree(s) to pay expenses and costs of collection and reasonable attorneys' fees incurred by the holder in enforcing the agreements of the Borrower(s)."

Trull defaulted in payment on the Note. On 8 April 1993, CCB notified Trull by certified mail that the loan was in default and demanded payment in full. The letter included notice of CCB's intent to enforce a claim for attorneys' fees in accordance with G.S. 6-21.2. As of 8 April 1993 the outstanding balance of principal and interest owed on the Note was $672,168.48.

On 15 April 1993, Trull brought suit against CCB seeking rescission of Trull's purchase of the Wake County real property, rescission

of the promissory note, and return of all the collateral and security held by defendant.

On 16 April 1993, CCB employed an attorney to defend Trull's claim and to enforce and collect the debt owed by Trull on the promissory note. CCB instituted foreclosure proceedings pursuant to the deed of trust on the Wake County real property on 30 April 1993. Trull obtained a preliminary injunction staying the foreclosure pending disposition of his lawsuit. On 1, 7, 21, and 24 June 1993, CCB liquidated all of Trull's personal property collateral subject to the security agreement. CCB applied the proceeds of that sale, $158,767.66, to reduce Trull's outstanding debt on the promissory note.

On 17 June 1993, CCB filed an Answer denying the allegations in Trull's Complaint and counterclaimed for the outstanding principal and interest due on the promissory note and reasonable attorneys' fees. CCB then moved for summary judgment as to all of Trull's claims against CCB. On 13 September 1993, Wake County Superior Court Judge Stephens granted CCB's motion for summary judgment, dismissed all of Trull's claims against CCB, and vacated prior orders to stay the foreclosure proceedings. Trull appealed Judge Stephens' ruling to this Court and this Court affirmed Judge Stephens' order on 6 December 1994. The Supreme Court denied Trull's petition for discretionary review on 9 February 1995.

On 18 November 1993, CCB foreclosed on the Wake County real property. CCB purchased the property at foreclosure for $350,000.00 and credited the balance due on the promissory note for that amount. This amount, combined with the proceeds from the earlier sale of Trull's personal property collateral, satisfied $508,767.66 of the $672,168.48 balance owing on the promissory note, leaving a deficit of $163,400.82. On 16 February 1994, CCB filed a supplemental counterclaim seeking the remaining balance due under the promissory note. That counterclaim included a claim for $99,588.35 in attorneys' fees accrued in the collection and foreclosure action. Trull defended CCB's action for the deficiency under the North Carolina Anti-Deficiency Statute, G.S. 45-21.36. In the deficiency action, a Wake County jury determined that the Wake County real property subject to the deed of trust was fairly worth $550,000.00 at the time of the foreclosure sale. The Wake County Superior Court then entered judgment for Trull, stating that Trull owed no deficiency to CCB and CCB was entitled to recover nothing by way of deficiency.

The court reserved ruling on CCB's request for attorneys' fees until a later time.

On 31 July 1995, Judge Narley L. Cashwell entered an order awarding attorneys' fees to CCB in the amount of $100,825.27, representing 15% of $672,168.48, the balance owed by Trull to CCB on 8 April 1993. CCB submitted evidence of attorneys' fees accrued prior to the 18 November 1993 foreclosure action totalling $94,588.35, including $5,785.35 in attorneys' fees directly related to the foreclosure sale.

Plaintiff now appeals the award of attorneys' fees to CCB.

Burns, Day & Presnell, P.A., by Lacy M. Presnell, III and Susan F. Vick, for plaintiff-appellant.

H. Spencer Barrow, for defendant-appellee Central Carolina Bank & Trust Company.

EAGLES, Judge.

The general rule in North Carolina has long been that a party cannot recover attorneys' fees "unless such a recovery is expressly authorized by statute." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). N.C.G.S. 6-21.2 allows an award of attorneys' fees in actions to enforce obligations owed under "an evidence of indebtedness" that itself provides for the payment of attorneys' fees. *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 372, 432 S.E.2d 394, 397 (1993). N.C.G.S. 6-21.2 provides, in pertinent part:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity . . .

The promissory note here provides for the payment of "reasonable attorneys' fees incurred by the holder in enforcing the agreements of the Borrower(s)." Because the note provides for "reasonable attorneys' fees" without referring to any specific percentage of fees to be paid, N.C.G.S. 6-21.2(2) applies. N.C.G.S. 6-21.2(2) provides:

> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys'

fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

I.

[1] Plaintiff contends that the trial court's award of attorneys' fees was improper. Plaintiff first argues that, despite the language in the note, CCB is not entitled to attorneys' fees under the statute because CCB was unsuccessful in its deficiency action against Trull. G.S. 6-21.2 does not require that a party seeking attorneys' fees under the statute qualify as a "prevailing party" in litigation. Although the General Assembly included this requirement in other statutes providing for attorneys' fees, the text of G.S. 6-21.2 does not state this requirement. (N.C.G.S. 75-16.1 (1994) limits recovery of attorneys' fees to the "prevailing party"). The Court "may not, under the guise of judicial interpretation, interpolate provisions which are wanting in the statute and thereupon adjudicate the rights of the parties thereunder." *Simmons v. Wilder*, 6 N.C. App. 179, 181, 169 S.E.2d 480, 481 (1969). Furthermore, the purpose of G.S. 6-21.2 is to allow the debtor a last chance to pay his outstanding balance and avoid litigation, not to reward the prevailing party with the reimbursement of his costs in prosecuting or defending the action. *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 373- 374, 432 S.E.2d 394, 398 (1993). To limit the operation of G.S. 6-21.2 to <u>successful</u> litigants would require this court to judicially amend the existing statute. We believe that to do so would improperly invade the province of the General Assembly.

[2] Trull also contends that G.S. 6-21.2 should not apply to this action because the statute requires that the attorneys' fees be "collectible as part of such debt" and that CCB's failure in its deficiency action precludes the collection of a debt under the statute. CCB's counterclaim for the deficiency was an ancillary action to the actual foreclosure proceeding. It is undisputed that as of 8 April 1993 Trull owed a debt of $672,168.48 to CCB. CCB's legal actions were in pursuit of payment of the debt evidenced by the same Promissory Note which contained the provision for "reasonable attorneys' fees."

[3] Plaintiff Trull further contends that the trial court's award of attorneys' fees should be precluded by the Supreme Court's decision in *Merritt v. Edwards Ridge* which held that the anti-deficiency statute applying exclusively to purchase money notes, N.C.G.S.

45-21.38 (1991), precludes the recovery of attorneys' fees under G.S. 6-21.2. 323 N.C. 330, 372 S.E.2d 559 (1988). The decision in *Merritt* follows the legislative intent behind G.S. 45-21.38, "to protect a vendor's assignee, who would not know the nature of the transaction." *Childers v. Parker's Inc.*, 274 N.C. 256, 263, 162 S.E.2d 481, 486 (1968). It is well established that under this anti-deficiency statute, the purchase money creditor is strictly limited upon foreclosure and sale to the proceeds which stand in place of the land. *Merritt*, 323 N.C. at 336, 372 S.E.2d at 563. Significantly, the note at issue here is not a purchase money note. Trull defended CCB's action for the deficiency under G.S. 45-21.36, using the reasonable value defense, not under G.S. 45-21.38. In fact, Trull's obligation to CCB arose from a commercial land transaction. Expanding the decision in *Merritt* to this non-purchase money, commercial transaction would "deprive[s] the [defendants] of the benefits of a bargain, fairly and properly entered, which violates no established public policy." *Merritt*, 323 N.C. at 338, 372 S.E.2d at 564 (Whichard, J., dissenting).

II.

[4] Plaintiff next contends that the trial court's calculation of attorneys' fees was improper and contrary to law. We disagree. When the trial court determines an award of attorneys' fees is appropriate under the statute, the amount of attorneys' fees awarded lies within the discretion of the trial court. *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 226, 319 S.E.2d 650, 655 (1984). Therefore, the award of attorneys' fees is conclusive absent an error of law or abuse of discretion by the trial court. *Id.*

N.C.G.S. 6-21.2(2) expressly authorizes an award of attorneys' fees of 15% of the "outstanding balance" in suits to collect any "evidence of indebtedness," when such evidence of indebtedness is collected "by or through an attorney at law after maturity." The term "evidence of indebtedness" refers to "any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 294, 266 S.E.2d 812, 817 (1980). The promissory note involved here fits that description.

The term "outstanding balance" is defined by N.C.G.S. 6-21.2(3) as "the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt." N.C.G.S. 6-21.2(3) (1986) (emphasis added).

CCB retained an attorney to collect and enforce the debt on 16 April 1993, instituted foreclosure proceedings on the Wake County real property on 30 April 1993, and liquidated Trull's personal property collateral between 1 June and 24 June 1993. The actual deficiency action was ancillary to CCB's other actions to enforce the debt. The trial court calculated the attorneys' fees by applying the statutory percentage to the balance of the note on 8 April 1993. That valuation date falls within twenty two days of the commencement of foreclosure proceedings. We find no abuse of the trial court's discretion in awarding attorneys' fees at 15% of the value of the note on this date.

[5] Plaintiff also contends that the court erred in calculating attorneys' fees in this case by including fees incurred in the foreclosure action. In prior decisions regarding the application of N.C.G.S. 6-21.2, this Court has stated that "when other actions are reasonably related to the collection of the underlying note sued upon, attorneys' fees incurred therein may properly be awarded under G.S. 6-21.2." *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 227-28, 319 S.E.2d 650, 655 (1984). In *Coastal*, this Court determined that attorney fees incurred in bankruptcy, receivership, and foreclosure actions were sufficiently connected to the collection of the note to satisfy the statutory requirement that the fees be "collected by or through an attorney at law." 70 N.C. App. at 228, 319 S.E.2d at 656; N.C.G.S. 6-21.2 (1986). We noted that in some cases ancillary claims may be necessary to collect and enforce the note and that fees incurred in pursuing those ancillary claims would not be barred by the statute. 70 N.C. App. at 228, 319 S.E.2d at 656. "Reasonableness, not arbitrary classification of attorney activity, is the key factor under all our attorneys' fees statutes." *Id.* Fees incurred by CCB's attorneys in the foreclosure proceeding or in any action "connected" with the collection of the debt owed by Trull are permissible under the statute.

[6] Plaintiff additionally argues that an award of attorneys' fees to CCB under these circumstances amounts to a windfall, in that the statutory 15% exceeds the actual attorneys' fees incurred by CCB. The promissory note at issue in this case provides for "reasonable attorneys' fees" and is therefore subject to the provisions in G.S. 6-21.2 subsection (2), not subsection (1). Under subsection (1) an award of attorneys' fees must be supported by evidence and findings of fact supporting the reasonableness of the award, however, subsection (2) has predetermined that 15% is a reasonable amount. *Barker v. Agee*, 93 N.C. App. 537, 544, 378 S.E.2d 566, 570 (1989); *RC*

Associates v. Regency Ventures, Inc., 111 N.C. App. 367, 373, 432 S.E.2d 394, 397 (1993). G.S. 6-21.2(2) expressly provides that when a contract authorizing attorneys' fees does not specify the fee percentage then it shall be construed to mean 15% of the "outstanding balance" owed on the instrument. *Nucor Corp. v. General Bearing Corp.*, 103 N.C. App. 518, 520-521, 405 S.E.2d 776, 778 (1991). In this case, the trial court did not err by calculating the fee awarded in accordance with the statutory mandate.

Affirmed.

Judge McGEE concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I agree with the majority's decision that the defendant was entitled to an award of attorneys' fees under N.C. Gen. Stat. § 6-21.2(2). However, I disagree that attorneys' fees should have been allowed on the $158,767.66 which the defendant received from the sale of the plaintiff's securities.

In *Coastal Production v. Goodson Farms*, 70 N.C. App. 221, 228, 319 S.E.2d 650, 656, *review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984), this Court found that, ". . . the evidence supports the court's findings that the bankruptcy, foreclosure and receivership actions and other legal activity undertaken by the plaintiff's attorney were 'connected' to the collection of the note. . . ." Additionally, N.C. Gen. Stat. § 6-21.2 provides for attorneys' fees ". . . upon any note . . .collected by or through an attorney. . . ."

I conclude from the language of *Coastal* and this statute that in order to receive attorneys' fees in connection with the collection of a debt, there must be some activity on the part of the attorney. Although the sale of the plaintiff's securities in this case may be "connected" to the collection of the debt owed, there is no evidence that there was any activity on the part of defendant's attorney with respect to this sale. Therefore, the calculation of attorneys' fees should not have been based on the $158,767.66 proceeds from the sale of securities. From this portion of the majority opinion, I respectfully dissent.

RETIREMENT VILLAGES, INC. AND LIBERTY HEALTHCARE LIMITED PARTNERSHIP, D/B/A COUNTRYSIDE VILLA OF DUPLIN, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT, AND BEAVER PROPERTIES/WALLACE, INC. AND BRIAN CENTER HEALTH & RETIREMENT/WALLACE, INC., RESPONDENTS-INTERVENORS

No. COA95-1209

(Filed 19 November 1996)

1. **Hospitals and Medical Facilities or Institutions § 12 (NCI4th)— certificate of need—funding by another entity**

Nothing in the statutory criterion for financial and operational projections precludes a certificate of need applicant from relying on the financial resources of another entity for its funding. N.C.G.S. § 131E-183(a)(5).

Am Jur 2d, Hospitals and Asylums §§ 1-5.

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.

2. **Hospitals and Medical Facilities or Institutions § 12 (NCI4th)— certificate of need—application—funding by another entity—commitment for funding**

Applicants for a certificate of need are not required to submit financial information about themselves when the project is to be funded by another entity. However, in such a case the application must contain evidence of a commitment to provide the funds by the funding entity.

Am Jur 2d, Hospitals and Asylums §§ 1-5.

3. **Hospitals and Medical Facilities or Institutions § 12 (NCI4th)— certificate of need—application—letters insufficient to show funding commitment**

A letter from a bank indicating its interest in lending a funding entity money for a project to add nursing beds and confirming that the second funding entity had in excess of $22,738 which could be used to fund the project, and a letter from the second funding entity's president stating that the entity would lend the applicant any funds necessary for working capital during the first

three years of operation, did not show a commitment by the funding entities to provide the necessary funds for the project as required by a statutory criterion. N.C.G.S. § 131E-183(a)(5).

Am Jur 2d, Hospitals and Asylums §§ 1-5.

4. **Hospital and Medical Facilities or Institutions § 12 (NCI4th)— certificate of need—application—patient origin—assumptions and methodology**

An application for a certificate of need for additional nursing home beds failed to comply with a statutory criterion and an agency rule where it contained no clear statement of the assumptions or methodology used by the applicant in projecting patient origin. N.C.G.S. § 131E-183(a)(3).

Am Jur 2d, Hospitals and Asylums §§ 1-5.

5. **Hospitals and Medical Facilities or Institutions § 12 (NCI4th)— certificate of need—application—type of service**

An applicant for a certificate of need for additional nursing home beds failed to define clearly the type of services it intended to provide as required by a statutory criterion where the application contained contradictory information as to whether the applicant proposed a dedicated Alzheimer's unit or only proposed Alzheimer's care within the general nursing home population. N.C.G.S. § 131E-183(a)(3).

Am Jur 2d, Hospitals and Asylums §§ 1-5.

Appeal by petitioners from final agency decision entered 30 June 1995 by John M. Syria, Director of the North Carolina Department of Human Resources Division of Facility Services. Heard in the Court of Appeals 22 August 1996.

Bode, Call & Green, L.L.P., by Robert V. Bode and S. Todd Hemphill, for petitioners-appellants.

Attorney General Michael F. Easley, by Assistant Attorney General Lauren M. Clemmons, for respondent-appellee.

Poyner & Spruill, L.L.P., by Mary Beth Johnston and Benjamin P. Dean, for respondents-intervenors.

LEWIS, Judge.

This appeal arises out of an award by the Department of Human Resources ("the Agency") of a certificate of need ("CON") to respondents Beaver Properties/Wallace, Inc. and Brian Center Health & Retirement/Wallace, Inc. (collectively "Beaver Properties") and the denial of a CON application by Retirement Villages, Inc. and Liberty Healthcare Limited Partnership, d/b/a Countryside Villa of Duplin (collectively "Countryside Villa").

The 1993 State Medical Facilities Plan identified a need for thirty nursing home beds in Duplin County. In response to this need, Countryside Villa submitted a CON application on 15 September 1993, seeking to expand the services at its existing Duplin County facility by adding thirty (30) beds. Simultaneously, Beaver Properties filed an application with the CON Section to convert twenty (20) Home for the Aged beds to nursing beds and to construct space for an additional ten (10) nursing beds. By letters dated 25 February 1994, the CON Section disapproved Countryside Villa's application and conditionally approved that of Beaver Properties.

On 24 March 1994, Countryside Villa filed a petition for a contested case hearing challenging the CON Section's decision. After an evidentiary hearing, the administrative law judge ("ALJ") issued a decision recommending that the Agency reverse the CON Section's decision as to the conditional approval of Beaver Properties' application and affirm its disapproval of Countryside Villa's application. The ALJ recommended that the beds at issue be available for a new review. The final agency decision, however, affirmed the entire decision of the CON Section. Countryside Villa appeals.

Countryside Villa asserts that the Agency made several errors in affirming the conditional approval of Beaver Properties' application because Beaver Properties did not satisfy several of the review criteria set out in N.C. Gen. Stat. section 131E-183. We find merit in at least two of these arguments and therefore reverse the Agency's decision as to Beaver Properties.

Our standard of review in reviewing an agency decision depends upon the nature of the alleged error. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). If the petitioner contends that the agency's decision was based on an error of law, including an error in statutory interpretation, "de novo" review is

required in which the court may 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). "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. 521, 524, 463 S.E.2d 254, 256 (1995). Under this test, an agency's ruling should only be reversed if it is not supported by substantial evidence. *Mendenhall v. N.C. Dept. of Human Resources*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995). "Proper application of the whole record test takes into account the administrative agency's expertise." *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 386, 455 S.E.2d 455, 461, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

Countryside Villa contends that the Agency erred in ruling that Beaver Properties' application conformed to G.S. 131E-183(a)(5) ("criterion 5"), which provides:

> (5) Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

N.C. Gen. Stat. § 131E-183(a)(5) (1994).

Countryside Villa maintains that since Beaver Properties only submitted financial information from Brian Center Management Corporation ("BCMC") and Brian Center Corporation ("BCC"), its application was "absolutely non-approvable." Countryside Villa contends that the application should have contained financial statements from the project's applicants because only the financial statements of the applicants themselves are sufficient to show the financial feasibility of the project.

[1] Essentially, Countryside Villa argues that the Agency's interpretation of criterion 5's requirements was error. Therefore, we apply de novo review; we find no error in the Agency's interpretation. Contrary to Countryside Villa's contentions, the above statutory criterion does not require the submission of financial statements by the applicants. It merely requires the Agency to determine the availability of funds for the project from the entity responsible for funding, which may or

may not be an applicant. The phrase "by the person proposing the service" describes the person who is to project the reasonable costs and charges. It does not, as Countryside Villa alleges, require the entity proposing the service to demonstrate its ability to finance the project itself. We find nothing in criterion 5 which precludes a CON applicant from relying on the financial resources of another entity for its funding.

[2] We reject Countryside Villa's assertion that a CON application may only be approved when the applicants themselves submit financial information. However, we agree that in cases where the project is to be funded other than by the applicants, the application must contain evidence of a commitment to provide the funds by the funding entity. We hold that without such a commitment, an applicant cannot adequately demonstrate availability of funds or the requisite financial feasibility.

[3] In the present case, the Agency made no finding that BCC and BCMC committed themselves to provide the necessary funding for Beaver Properties' proposed project; nor do the appellees assert that such documentation exists. Appellees instead focus on the fact that the applicants, BCC, and BCMC are interrelated corporations. However, this fact has little bearing on the issue of whether, for purposes of demonstrating financial feasibility and availability of funds, BCC and BCMC are committed to finance a project for which they are neither named applicants nor legally financially responsible.

Beaver Properties' application estimates that the capital costs to implement the proposed project would be $227,380. Beaver Properties anticipated that $204,642 would come from conventional loans and $22,738 from owner's equity. Although the application contains a letter from NationsBank indicating its interest in loaning BCMC $204,642 for the addition/conversion and confirming that BCC had in excess of $22,738 which could be used to fund the project, this does not constitute a commitment from BCMC that it will provide the financing; nor does it bind BCC to use its $22,738 for the project. The application also contains a letter from BCC's president stating that BCC would loan Beaver Properties any funds necessary for working capital during the first three years of operation. Although this letter may arguably show commitment to provide working capital during the first three years of operation, it does not commit BCC to expend any money for the capital expenses necessary to implement the project. Therefore, we hold that the Agency erred in finding that Beaver Properties satisfied criterion 5.

[4] Countryside Villa also contends that the Agency erred in finding Beaver Properties in conformity with G.S. 131E-183(a)(3) (criterion 3). This criterion requires:

> (3) The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

G.S. § 131E-183(3).

Countryside Villa's argument centers around Beaver Properties' answer to question 12 in Section III of the application, which asks for a projected percentage of patient origin. In response to this inquiry, Beaver Properties indicated that 80% of its new and existing patients would be from Duplin County. Countryside Villa maintains that, since there is no way to determine from the application how Beaver Properties arrived at this figure, its application should have been denied.

The Agency found Beaver Properties in conformity with criterion 3 because the question at issue did not require that any particular mathematical formula be used for this projection. The Agency also found that the project analyst at the CON section was aware that Beaver Properties utilized certain assumptions and that these assumptions and the specific methodology were "sufficiently clear" in the application.

While we agree that there is no specific methodology that must be used in determining patient origin, under CON regulations, patient origin must be projected and "[a]*ll assumptions, including the specific methodology by which patient origin is projected, must be clearly stated.*" N.C. Admin. Code tit. 10, r. 3R.1118 (March 1991) (emphasis added) ("rule .1118").

In its final decision, the Agency made the following relevant finding:

> 10. Among the assumptions *made and identified by* [Beaver Properties] was that [Beaver Properties] would serve all nursing facility patients, that [Beaver Properties] did not anticipate continuing to serve all of the same counties that it had been serving,

> and that a turnover of patients in the existing beds would occur over time, thus causing changes in the percentage of county of origin of the patients.

(emphasis added).

However, there is no evidence in the record which supports a finding that Beaver Properties identified any assumptions. After thoroughly reviewing Beaver Properties' application, we observe no clear statement of the assumptions or methodology used by the applicant in projecting patient origin, even though the application does specify assumptions related to other topics. The CON analyst testified that Beaver Properties made certain "assumptions," which he then described. However, the assumptions referred to are not clearly set out in the application. Rather, they appear to be assumptions which the analyst has pieced together from various parts of the application. We hold that such "assuming" of an applicant's "assumptions" does not satisfy rule .1118, which requires the assumptions and methodology for computing patient origin to be "clearly stated." The above Agency finding is not based on substantial evidence in the record.

Additionally, it appears that the Agency employed the wrong standard in determining whether the assumptions and methodology were contained in the application. Instead of finding that they were "clearly stated," the Agency found that they were "sufficiently clear" and "discernable." For these reasons, we hold that the Agency erred in finding that Beaver Properties' application conformed with criterion 3 and rule .1118.

[5] Countryside Villa also maintains that the Agency erred in affirming the rejection of its application. We find no merit in this argument and affirm the Agency's decision as to Countryside Villa.

Countryside Villa argues that the Agency erred in rejecting its application under criterion 3 on the ground that it proposed a dedicated Alzheimer's Unit. Countryside Villa contends that the application contained no such proposal, but actually proposed Alzheimer's care within the general nursing home population.

Since Countryside Villa essentially argues that there is insufficient evidence to support the Agency's findings, we employ the whole record test, taking into account the Agency's expertise. *See Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461. We hold that substantial evidence exists to support a finding that Countryside Villa failed to define clearly the type of services it intended to provide. The

application contains contradictory information regarding whether Countryside Villa proposed a dedicated Alzheimer's unit or not. Although the application states that the care will be provided to "residents at all levels of care, rather than in a distinct unit," it also refers to "the Alzheimer's Unit" and provides information on Alzheimer's special care units. Accordingly, the agency did not err in concluding that Countryside Villa failed to conform to criterion 3.

Since we have determined that Beaver Properties and Countryside Villa are each nonconforming to the statutory criteria on at least one ground, we see no need to reach the remainder of Countryside Villa's arguments.

In summary, we reverse that portion of the final agency decision which affirms the CON section's conditional approval of Beaver Properties' application. We affirm that portion of the final agency decision which affirms the CON section's disapproval of Countryside Villa's application. Accordingly, we remand this matter to the CON section for a new review to allocate the beds at issue.

Reversed in part, affirmed in part and remanded.

Judges JOHNSON and WYNN concur.

SHARON CREECH AND TRAVIS CREECH, GUARDIANS AD LITEM OF JUSTIN CREECH, MINOR, PLAINTIFFS-APPELLANTS v. EVELYN H. MELNIK, M.D., DEFENDANT-APPELLEE

No. COA95-1370

(Filed 19 November 1996)

1. Contracts § 26 (NCI4th)— medical malpractice—promise of attorney not to sue—implied contract

The trial court properly granted summary judgment for defendant on a breach of implied contract claim in a medical malpractice action arising from the delivery of a baby where defendant, a neonatologist who had resuscitated the child at birth, felt assured after talking with plaintiffs' attorney that she was not a potential defendant and provided information concerning the child's care as set out in the medical records and the standard of care for such an infant, and an action was ultimately brought against her. The uncontroverted facts support a finding of mutual

assent and consideration sufficient to warrant the conclusion that an implied contract was formed and that plaintiffs breached that contract by bringing suit against defendant. Although the attorney contends that he was not promising to refrain from suing defendant at some point in the future should further investigation reveal that she was liable, an attorney's carefully chosen words do not necessarily prevent the formation of an implied contract not to sue. Whatever the attorney's intention, defendant could reasonably interpret his actions as a promise not to sue and the trial court correctly concluded that defendant provided plaintiffs with valuable information in reliance on the attorney's assurance that she would not be sued.

Am Jur 2d, Contracts §§ 12-15.

2. Estoppel § 25 (NCI4th)— medical malpractice—promise of attorney not to sue—equitable estoppel

The trial court did not err in a medical malpractice action arising from the birth of a child by granting summary judgment for defendant on equitable estoppel where plaintiffs' attorney initially assured defendant-doctor that she was not a potential defendant, she talked with plaintiff's attorney on several occasions about the case, and an action was eventually brought against her. The doctor relied on the plaintiffs' attorney's representation and provided assistance interpreting the medical records and other information which made it possible for plaintiffs to maintain a successful suit against the hospital and other defendants. Clearly, defendant would be prejudiced if plaintiffs are allowed to maintain the suit after initially representing, at least by implication, that she would not be sued.

Am Jur 2d, Estoppel and Waiver §§ 26-34.

Judge JOHNSON dissenting.

Appeal by plaintiffs from order entered 8 June 1995 by Judge William C. Gore, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 11 September 1996.

Law Offices of Wade E. Byrd, by Wade E. Byrd and Mary Ann Tally, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, William H. Moss, and James Y. Kerr, II, for defendant-appellee.

WYNN, Judge.

At approximately 2:00 p.m. on 23 September 1980, Southeastern General Hospital in Lumberton, North Carolina urgently called the defendant, Dr. Evelyn H. Melnik, to assist in the delivery of twins born to the plaintiffs, Sharon and Travis Creech. At the hospital, Dr. Melnik, a neonatologist, resuscitated Justin Creech and determined that his APGARS (initial birth assessment) were very low. Once stabilized, Justin was transferred to the nursery for admission.

The record on appeal indicates that standard protocol at the hospital called for the attending pediatrician to be notified immediately upon an infant's admission to the nursery. A nurse wrote admitting orders for Justin, and the medical records reveal that at 4:20 p.m. the attending pediatrician, Dr. Elwood Coley, was notified of a decrease in Justin's blood pressure. The medical records further reveal that following the delivery, Dr. Melnik had no further involvement in Justin's care until early the next morning when she was called to the nursery to provide resuscitation to Justin. At approximately 7:30 a.m. on 24 September, Justin's care was transferred from Dr. Coley to Dr. Melnik.

In March of 1988, plaintiffs' attorney, W. Paul Pulley, contacted Dr. Melnik and informed her that plaintiffs were considering bringing a medical malpractice action against the health care providers involved in Justin's delivery. He stated that he was having difficulty understanding the medical records and wished to retain her to assist him in interpreting the records. During this initial conversation, Dr. Melnik asked Mr. Pulley whether she was a potential or possible defendant. Apparently, from his response, she felt assured that plaintiffs would not sue her.

Mr. Pulley and Dr. Melnik subsequently met and communicated by telephone regarding this case on several occasions over the next few months. During that time, she provided information regarding Justin's care as set forth in the medical records, as well as regarding the standard of care for treating an infant in Justin's situation. The medical records showed that no blood gases had been taken on Justin until 7:00 p.m. on the day he was born. As a result, Justin was not given sufficient oxygen causing him to suffer from neonatal asphyxia. Dr. Melnik expressed the opinion that Justin's pediatric care had been substandard the first few hours after his birth, and this would have contributed to his severely handicapped condition. Dr. Melnik further

stated that Dr. Coley was responsible for Justin's care during those hours.

As the investigation progressed, Dr. Melnik continued to have contact with and provide information to Mr. Pulley. The focus changed, however, when during a deposition on 13 July nurse Jean Reeves pointed out that Dr. Melnik may have been the person responsible for Justin's care in the first few hours after his birth.

Plaintiffs contend that following Ms. Reeves' deposition, Mr. Pulley contacted Dr. Melnik and informed her that she had potential malpractice exposure and advised her to retain an attorney. On the other hand, Dr. Melnik contends that Mr. Pulley had several subsequent information gathering conversations with her after he became aware that she was a potential defendant, and did not notify her that she was a potential defendant and should retain an attorney until after she was subpoenaed for a deposition. She also notes that there is no contemporaneous documentation of Mr. Pulley's alleged conversation on this matter in contrast with the extensive notes made by Mr. Pulley of his other conversations with Dr. Melnik.

On 12 October 1990, the plaintiffs filed suit against Dr. Melnik. After answering the complaint, Dr. Melnik moved for and was granted summary judgment based on the affirmative defenses of breach of implied contract not to sue and equitable estoppel. Plaintiffs appeal from this order.

On appeal, plaintiffs ask us to consider whether the trial court erred in granting summary judgment for defendant on the grounds of breach of contract and equitable estoppel. Because we find that summary judgment on both grounds was proper, we affirm the judgment of the trial court.

I. Breach of Contract

[1] Plaintiffs contend the trial court erred in granting summary judgment for defendant on the grounds that they breached an implied contract not to sue. We disagree.

As an initial matter, we note that the law of agency applies to the relationship between a client and his attorney. *Bank v. McEwen*, 160 N.C. 338, 342, 76 S.E. 222, 224 (1912). Thus, the client is bound by the acts of his attorney within the scope of his authority. *Id.* Since neither party addresses the question of whether the attorney under the facts of this case could lawfully bind his clients to a contract, we need not

reach that issue in this appeal. Therefore, we proceed to consider the question of whether the course of conduct between the parties in this case gave rise to a valid implied contract.

A contract implied in fact arises where there is no express intention of the parties, but an agreement creating an obligation can be implied or presumed from their acts. *Snider v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980). "An implied contract is valid and enforceable as if it were express or written." *Id.* A validly formed contract requires mutual assent and consideration.

The record in this case reveals that Mr. Pulley initiated the contact with Dr. Melnik. Before providing any information, Dr. Melnik specifically asked Mr. Pulley whether she was being looked at as a defendant. In his deposition, Mr. Pulley stated: "I did at some point tell her that I wasn't looking at her. I didn't know of any reason for her to be a defendant in this action. . . . [I]t's not entirely incorrect that I did give her assurances that we had no interest in making her a defendant." Apparently, Dr. Melnik relied on Mr. Pulley's representations and provided valuable information regarding Justin's care.

Mr. Pulley contends that by telling Dr. Melnik that he had no reason to consider her as defendant in light of the information he had at that time, he was not promising to refrain from suing her at some point in the future should further investigation reveal that she was potentially liable. Therefore, he argues that since there was no mutual assent, no contract was formed and the suit against Dr. Melnik does not constitute a breach of contract.

We find, however, that an attorney's carefully chosen words do not necessarily prevent the formation of an implied contract not to sue. When finding mutual assent between the parties, "[t]he undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts." *Howell v. Smith*, 258 N.C. 150, 153, 128 S.E.2d 144, 146 (1962) (quoting 17 C.J.S. *Contracts* § 32).

In the subject case, the trial court found that Mr. Pulley represented, "or at least said words from which the Defendant could have reasonably inferred" that he was promising not to sue. We agree. Even a cursory examination of the medical records in this case reveals that Dr. Melnik was not a disinterested third party whose only contribution would be an impartial review of the medical records in the case. Rather, the medical records show that Dr. Melnik had been

directly involved with Justin's care and could potentially provide information which would lead to liability.

An attorney has an ethical obligation to be honest and forthright in his dealings with all those involved in the case he is investigating. Because a layperson could reasonably be expected to rely upon an attorney's assurances, he must not, by words or actions, deceive those with whom he comes in contact. Whatever Mr. Pulley's intention may have been with regard to his assurance to Dr. Melnik that she was not being considered as a defendant in the case, Dr. Melnik could reasonably interpret his actions as a promise not to sue.

When finding consideration, this Court has held that "there is consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." *Bank v. Insurance Co.*, 42 N.C. App. 616, 621, 257 S.E.2d 453, 456 (1979). The trial court found, based on the uncontroverted facts that:

> [T]here was consideration given in the information and opinions provided by Dr. Melnik to the Plaintiffs' counsel, which reason and common sense dictate would not have been provided had she had any idea she would be sued. And, that she was, in fact paid for her involvement and participation in the preparation of the case for Plaintiffs, although the Court believes that the payment was purely and completely for the time expended by Dr. Melnik in her evaluation and review of the records. Nevertheless, the Court believes that sufficient consideration was present to establish a contract.

After examining the record, we agree with the trial court that Dr. Melnik provided plaintiffs with valuable information in reliance on Mr. Pulley's assurance that she would not be sued. Since the uncontroverted facts support a finding of mutual assent and consideration sufficient to warrant the conclusion that an implied contract was formed, and the plaintiffs breached that contract by bringing suit against the defendant, we hold that the trial court appropriately granted summary judgment for defendant.

II. Equitable Estoppel

[2] Plaintiffs also contend the trial court erred in granting summary judgment for defendant on the grounds of equitable estoppel. We disagree.

Our Supreme Court has stated that equitable estoppel arises when:

> [O]ne by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relied and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Bank v. Winder, 198 N.C. 18, 20, 150 S.E. 489, 491 (1929). Equitable estoppel is a question of law to be decided by the court where only one inference may be drawn from the undisputed facts of the case. *Fireman's Fund Ins. Co. v. Williams Oil Co.*, 70 N.C. App. 484, 487, 319 S.E.2d 679, 680 (1984).

An examination of the record in this case reveals that there is no dispute that Mr. Pulley initially represented to Dr. Melnik that he "didn't know of any reason for her to be a defendant in this action." Dr. Melnik apparently relied upon that representation and provided assistance interpreting the medical records and other information which made it possible for the plaintiffs to maintain a successful suit against the hospital and other defendants. Clearly, Dr. Melnik would be prejudiced if plaintiffs are allowed to maintain the present suit after initially representing, at least by implication, that she would not be sued. Accordingly, we conclude that the trial court properly granted summary judgment for defendant on the basis of equitable estoppel.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

Judge LEWIS concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority's opinion which affirms the trial court's grant of summary judgment for defendant on the basis of breach of contract and equitable estoppel.

I find that there is a genuine issue of material fact as to whether a reasonable person could and should assume that they are shielded from exposure to potential liability in a medical malpractice action. In this action, more than one inference may be drawn from the facts. Moreover, the facts are disputed as to whether it was reasonable for Dr. Melnik to assume that Mr. Pulley's statements could be considered as an implicit contract not to hold her liable. Accordingly, "[i]f the evidence in a particular case raises a permissible inference that the elements of equitable estoppel are present, but other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury." *Miller v. Talton*, 112 N.C. App. 484, 488, 435 S.E.2d 793, 797 (1993). Therefore, I vote to reverse and remand the case for trial.

G. DALE RICHARDSON, D/B/A EMERYWOOD SERVICES, INC., PLAINTIFF-APPELLANT V. BP OIL COMPANY, M.M. FOWLER, INC., BP DOES' 1-50, MARVIN L. BARNES, LEE BARNES AND TOM LINDLEY, DEFENDANT-APPELLEES

No. COA96-247

(Filed 19 November 1996)

1. Gas and Oil § 7 (NCI4th); Sales § 13 (NCI4th)— assignment of fuel supply agreement—no violation of Petroleum Marketing Practices Act

Plaintiff service station franchisee failed to show that his fuel supply agreement with the franchisor was breached and therefore constructively terminated under the Petroleum Marketing Practices Act, 15 U.S.C.A. § 2801 *et seq.*, by the franchisor's assignment of its interest in the agreement to defendant assignee on the ground that the assignee is charging plaintiff higher prices for gasoline than he would have been charged by the franchisor where the exhibits in the record failed to show that plaintiff was paying more for gasoline to the assignee than he would have been paying to the franchisor if the assignment had not been made. N.C.G.S. §§ 25-2-210(1), (2).

Am Jur 2d, Sales §§ 375 et seq.

2. Gas and Oil § 7 (NCI4th); Landlord and Tenant § 20 (NCI4th)— sale of service station—assignment of lease—Petroleum Marketing Practices Act—no constructive termination of franchise

Plaintiff service station franchisee's lease of a service station from the franchisor (BP) was not constructively terminated under the Petroleum Marketing Practices Act by the franchisor's sale of the service station and assignment of the lease because the lease included language that plaintiff "desires to lease a facility owned or leased by BP" and BP no longer owns the service station, since the lease agreement did not require BP to own or lease the service station during the time plaintiff was to occupy the premises, and no provision precluded BP from selling or subleasing the service station during the term of the lease.

Am Jur 2d, Landlord and Tenant §§ 1081, 1176 et seq.

Liability of lessee who assigns lease for rent accruing subsequently to extension or renewal of term. 10 ALR3d 818.

3. Gas and Oil § 7 (NCI4th)— service station franchise—assignee's change of terms upon renewal—good faith—no prohibited "nonrenewal"

There was no "nonrenewal" of a service station franchise agreement prohibited by the Petroleum Marketing Practices Act because, as a condition for the renewal of that agreement by the franchisor's assignee after the expiration of the original term of the agreement, the minimum gasoline sales requirements and the monthly rent amount were increased, where there was no evidence that the assignee breached its duty to use good faith when negotiating a renewal of the agreement and changing the terms of the agreement upon renewal.

Am Jur 2d, Franchises § 21.

4. Appeal and Error § 447 (NCI4th)— theory first raised on appeal

Plaintiff service station franchisee could not argue on appeal that a purchase of the service station by the franchisor's assignee constituted an unfair or deceptive practice in violation of N.C.G.S. § 75-1.1 where this argument was not made in the trial court.

Am Jur 2d, Appellate Review §§ 690 et seq.

Appeal by plaintiff from judgment entered 14 November 1995 in Wake County Superior Court by Judge Henry W. Hight, Jr. Heard in the Court of Appeals 30 October 1996.

Blanchard, Jenkins & Miller, P.A., by Charles F. Blanchard and Robert O. Jenkins, Hafer, McNamara, Caldwell, Carraway, Layton, McElroy & Cutler, P.A., by Edmond W. Caldwell, Jr., and The Daskal Law Group, by Dimitri G. Daskal, for plaintiff-appellant.

Petree Stockton, L.L.P., by F. Joseph Treacy, Jr. and Keith J. Merritt, for defendant-appellee BP Oil Company.

Hutson Hughes & Powell, P.A., by James H. Hughes, for defendant-appellees M.M. Fowler, Inc., Marvin Barnes, Lee Barnes and Tom Lindley.

GREENE, Judge.

G. Dale Richardson (Richardson), doing business as Emerywood Services, Inc. (plaintiff), appeals summary judgment for BP Oil Company (BP), M.M. Fowler, Inc. (Fowler), BP Does' 1-50, Marvin L. Barnes, Lee Barnes, and Tom Lindley (collectively defendants).

The undisputed evidence is that James Clepper (Clepper), president of Emerywood signed a "Dealer Lease and Supply Agreement" (BP Agreement) with BP to operate a BP service station in High Point, North Carolina. The BP Agreement covered a period of time from 2 June 1992 through 1 June 1995. Pursuant to the BP Agreement, plaintiff leased the service station and agreed to sell BP branded products to plaintiff's customers. BP agreed to supply the BP branded products. The BP Agreement provided in part that "[p]rices for all products purchased by [plaintiff] from BP shall be BP's price in effect at the time and place of delivery for franchised dealers. Prices for all products shall be subject to change without notice to [plaintiff]."

In January 1994, BP transferred its interest in the service station to Fowler and assigned the BP Agreement to Fowler. On 2 June 1995, one day after the expiration of the BP Agreement, Fowler offered another Dealer Lease and Supply Agreement to plaintiff, which was accepted and signed by Clepper and plaintiff. Directly below his signature, plaintiff wrote, "All rights reserved. No release, novation, or waiver of any kind."

Under the new agreement, plaintiff continues to be a BP service station, selling BP products to its customers. Plaintiff, however,

alleges that under this new agreement, plaintiff is being charged a higher price for BP fuel than he would have paid under the BP Agreement, has higher minimum gasoline sales requirements and pays an increased monthly rent.

Plaintiff's complaint alleges that the sale and assignment to Fowler was in violation of 15 U.S.C.A. § 2801 through 2806 (1982), the Petroleum Marketing Practices Act (Act), and constituted unfair or deceptive practices pursuant to N.C. Gen. Stat. § 75-1.1 (1994). The trial court granted defendants' separate motions for summary judgment.

The issues are whether (I) the sale/assignment to Fowler violates the Act because it constitutes a constructive termination of the BP Agreement in that (A) Fowler charges prices for fuel which are higher than those charged by BP, (B) it includes language that plaintiff "desires" to lease a facility "owned or leased by BP"; (II) Fowler's renewal of the BP Agreement constituted a "nonrenewal" within the meaning of the Act because the rent and minimum sales requirements were increased; and (III) the purchase by Fowler of the service station constitutes an unfair or deceptive practice.

The Act "establishes minimum federal standards governing the termination and nonrenewal of motor fuel marketing franchises." *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989). Specifically, the Act provides in pertinent part:

> (a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—
>
> (1) terminate any franchise . . . prior to the conclusion of the term, or the expiration date, stated in the franchise; or
>
> (2) fail to renew any franchise relationship . . . .

15 U.S.C.A. § 2802(a). A constructive termination exists upon a showing:

> (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises), and thus, violated the [Act]; or (2) that the franchisor made the assignment in violation of state law . . . .

May-Som Gulf, 869 F.2d at 922.

Although the Act prohibits termination and nonrenewals except in certain defined situations, the Act does not prohibit assignments if "authorized by the provisions of such franchise or by any applicable provision of State law." 15 U.S.C.A. § 2806(b). In North Carolina assignments for the sale of goods are permitted:

> (1) . . . unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. . . . [or]
>
> (2) Unless . . . the assignment would . . . increase materially the burden or risk imposed on [the other party] by his contract, or impair materially his chance of obtaining return performance. . . .

N.C.G.S. § 25-2-210(1), (2) (1995).

I

Termination

A

[1] Plaintiff first argues that the fuel contract has been breached, and therefore the BP Agreement was constructively terminated, because Fowler is charging him higher prices for fuel than he would have been charged by BP. Defendants contend that because the BP Agreement expressly states that "[p]rice for all products shall be subject to change without notice to [plaintiff]," "B.P.'s price" can be read to mean "seller's price" and because Fowler is now the "seller," BP's price is irrelevant.

Assuming without deciding that the BP Agreement must be read to mean "B.P.'s price," the plaintiff has failed to show that BP's price for fuel was more than the price Fowler was charging him for fuel. The plaintiff points to a chart, contained in his brief to this Court, which shows that Fowler was charging the plaintiff more for fuel than BP was charging its similarly situated customers for fuel at various times since the date of the assignment. This chart, although apparently presented to the trial court, is not included in the record before this Court, and therefore cannot be considered by this Court as evidence. *Civil Service Bd. v. Page*, 2 N.C. App. 34, 40, 162 S.E.2d 644, 648 (1968) (brief is not part of the record). Furthermore, we are unable to discern from our review of the exhibits in the record that plaintiff was paying more for fuel to Fowler than he would have been paying to BP had the assignment not been made. Accordingly, there is no evidence of constructive termination on this basis.

B

[2] Plaintiff also argues that the lease contract was breached, and therefore the BP Agreement was constructively terminated, because after the sale of the property to Fowler, BP no longer owned the service station and the BP Agreement states that plaintiff "desires to lease a facility owned or leased by BP."

We do not read the BP Agreement as requiring that BP continue to own or lease the premises on which the service station is located. There is no language requiring BP to own or lease the service station during the entire period of time the plaintiff was to occupy the premises. Furthermore, there is no provision precluding BP from selling or subleasing the service station during the term of the BP Agreement. Accordingly, we reject this argument of the plaintiff. *See Clark v. BP Oil Co.*, 930 F. Supp. 1196, 1204 (E.D. Tenn. 1996); 51C C.J.S. *Landlord & Tenant* § 31, at 75 (lessor may assign his entire interest in the lease in the absence of a provision to the contrary).

II

Nonrenewal

[3] Plaintiff contends that BP's assignment to Fowler is in violation of North Carolina law and therefore a constructive termination. Specifically, plaintiff argues that after the expiration of the original term of the BP Agreement and as a condition for the renewal of that Agreement, the minimum gasoline sales requirements were increased and the monthly rent amount was increased.

We reject the plaintiff's argument that increases in rent and minimum gasoline sales requirements, imposed after the expiration of the original BP Agreement, constitute a constructive termination. The question instead is whether the terms and conditions of the renewal agreement, negotiated after the expiration of its original term, were made in "good faith." 15 U.S.C.A. § 2802(b)(3)(A)(i). If not made in good faith, the renewal is tantamount to a "nonrenewal" within the meaning of the Act (not a constructive termination) and is therefore prohibited. *See* 15 U.S.C.A. § 2802(a)(2). There is no obligation of the franchisor to renew a franchise under the same terms and conditions, and in fact the Act anticipates that the terms of the franchise agreement may be changed upon renewal. *See Clarke*, 930 F. Supp. at 1206; 15 U.S.C.A. § 2802(b)(3).

In this case, the plaintiff makes no argument that Fowler negotiated a renewal of the BP Agreement in bad faith and our review of the

record reveals no evidence that Fowler breached his duty to use good faith when changing the terms of the BP Agreement upon renewal. Accordingly, there has been no "nonrenewal" within the meaning of the Act.

III

[4] Plaintiff finally argues that Fowler's purchase of the service station constitutes an unfair or deceptive practice in violation of N.C. Gen. Stat. § 75-1.1 (1994). The record does not reflect that this argument was made in the trial court and it therefore cannot be made for the first time in this Court. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 131, 388 S.E.2d 538, 556 (1990) (failure to argue a theory of recovery below prohibits its assertion on appeal). It is not sufficient that another distinctive ground for support of its Chapter 75 claim ("conspiracy . . . to engage in resale price maintenance, as well as vertical price fixing") was argued in the trial court.

The trial court's grant of summary judgment for the defendants is therefore

Affirmed.

Judges LEWIS and WYNN concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, PETITIONER v. GLENN I. HODGE, JR., RESPONDENT

No. COA95-1329

(Filed 19 November 1996)

1. **Public Officers and Employees § 41 (NCI4th)— Personnel Commission—designation of job as exempt—constitutional standards not raised by either party**

The State Personnel Commission erred in an action arising from the designation of a state job as policymaking exempt by applying federal constitutional standards under the First Amendment and by determining that the legal question was whether party affiliation is an appropriate requirement for the position. The constitutional issue was not raised by either party and N.C.G.S. § 126-5 only requires the Commission to determine

whether the position is one "delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." The Commission should have limited its review to the issues presented by the parties.

Am Jur 2d, Civil Service §§ 13, 15.

2. Public Officers and Employees § 43 (NCI4th)— exempt position—DOT Internal Audit Section—not a division

The State Personnel Commission erred in an action arising from the designation of the Chief Auditor of DOT as a policymaking exempt position by determining that the Internal Audit Section of DOT was a division of a principal State department. All of the evidence shows that the Internal Audit Section remained a section and was not denominated a division even after a departmental reorganization. The record evidence also does not show that this section functioned as a principal subunit of a principal State department so as to qualify as a division pursuant to N.C.G.S. § 143B-3.

Am Jur 2d, Civil Service § 15.

3. Public Officers and Employees § 43 (NCI4th)— chief DOT auditor—designation as policymaking exempt

The trial court erred by affirming the State Personnel Commission's decision to reverse the designation of respondent's state government position as policymaking exempt where respondent was Chief of the Internal Audit Section at DOT; the Commission found that respondent supervised other auditors, decided who, what, when, how, and why to audit within the Department and was free to contact the State Bureau of Investigation concerning his findings; respondent made recommendations for change in policies and practices within the audited departmental unit; and, although the supervisor of the audited unit decided whether to implement any recommended changes, the audit recommendations were distributed to the Deputy Secretary, the State Auditor's office, and in some cases to the Federal Highway Administration. In N.C.G.S. § 126-5(b), a policymaking position is defined as a position delegated with the authority to impose the final decision as to a settled course of conduct to be followed within a department, agency, or division. Respondent had that authority; almost everyone in the DOT is

supervised by someone (even the Secretary must ultimately answer to the Governor) and it is illogical to construe N.C.G.S. § 126-5(b) as requiring that persons in policymaking positions have absolute decision-making autonomy. The Commission's findings, as supported by substantial record evidence, can only support the legal conclusion that respondent's position was properly designated as policymaking exempt.

Am Jur 2d, Civil Service § 15.

Appeal by petitioner from order entered 6 September 1995 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 9 September 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson G. Kelley, Associate Attorney General Robert O. Crawford, III, and Associate Attorney General Melanie Lewis Vtipil, for petitioner-appellant.

John C. Hunter for respondent-appellee.

LEWIS, Judge.

Both this case and a companion case, *Betsy Johnson Powell v. North Carolina Department of Transportation* (COA95-1320) (opinions filed simultaneously), raise the issue of whether the Governor properly designated certain State employee positions as "policymaking" under N.C. Gen. Stat. section 126-5.

Beginning on 1 January 1992, Glenn I. Hodge, Jr. was employed by the N.C. Department of Transportation ("DOT") as an internal auditor. On 23 May 1992, he was promoted to Chief of the Internal Audit Section. On 3 May 1993, the Secretary of the DOT notified Hodge that his position would be designated "policymaking exempt" effective 17 May 1993. On 30 November 1993, the Secretary of the DOT notified Hodge that he would be fired from his position effective 3 December 1993.

Hodge filed a petition for a contested case hearing in the Office of Administrative Hearings ("OAH") challenging the designation of his position as policymaking exempt. After hearing, Senior Administrative Law Judge ("ALJ") Fred G. Morrison, Jr. recommended that the designation be reversed. In a Decision and Order dated 22 November 1994, the State Personnel Commission ("Commission") agreed and reversed the designation of Hodge's posi-

tion as policymaking exempt. The DOT petitioned for judicial review. On 6 September 1995, Judge Donald W. Stephens affirmed the Commission's Decision and Order. The DOT appeals.

The DOT contends that Judge Stephens erred by affirming the Commission's decision. We agree.

The State Personnel Act permits the Governor to designate as exempt "policymaking positions" in certain departments, including the DOT. *See* N.C. Gen. Stat. § 126-5(d)(1) (1995). Designation of a State position as policymaking exempt deprives the employee holding the position of certain protections otherwise afforded to State employees. *See* G.S. § 126-5(c)(3). In N.C. Gen. Stat. section 126-5(b), a "policymaking position" is defined as "a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." G.S. § 126-5(b) (1995).

[1] By adopting the findings and conclusions of the ALJ, the Commission applied federal constitutional law standards under the First Amendment to determine whether Hodge's position was properly designated policymaking exempt. In particular, the Commission determined that the legal question presented was "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

Application of this principle was legal error. The constitutional issue was not raised by either party. In fact, in the prehearing order, the parties stipulated that the issue was whether the position was correctly designated "policymaking" in accordance with G.S. section 126-5. Hodge also raised an additional issue but did not raise a constitutional challenge to the designation. The Commission should have limited its review to the issues presented by the parties.

Furthermore, G.S. section 126-5 does not require the Commission to determine whether party affiliation is an appropriate requirement for the position. Rather, it only requires the Commission to decide whether the position is one "delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." G.S. § 126-5(b). The Commission erred by applying the incorrect legal standard, and the trial court, in turn, erred by concluding that the Commission's Decision and Order was not affected by an error of law.

[2] When an issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. *Brooks, Com'r of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). After review of the findings of fact made by the Commission and the evidence of record, we conclude that the Commission erred by determining that Hodge's position was not properly designated as policymaking exempt.

The DOT asserts that at the time Hodge's position was designated as policymaking, the Internal Audit Section was a "division" of the DOT, a principal state department under G.S. section 143B-6. The term "division" is not defined in the State Personnel Act. However, it is defined in the Executive Organization Act, N.C. Gen. Stat. section 143B-1 *et. seq.*, as "the principal subunit of a principal State department." G.S. § 143B-3 (1993).

Contrary to the DOT's assertions, the record does not show that, as Chief Internal Auditor, Hodge headed a division within the DOT. Rather, all of the evidence shows that, even after a departmental reorganization in February 1993, the Internal Audit "Section" remained a "section" and was not denominated a "division." The record evidence also does not show that this section functioned as a "principal subunit of a principal State department" so as to qualify as a division pursuant to G.S. section 143B-3.

[3] However, the record evidence does show and the Commission's finding number 3 supports the conclusion that Hodge, as Chief of the Internal Audit Section, was delegated with the authority to impose the final decision as to a settled course of action to be followed within the DOT and within divisions of the DOT. The Commission found:

> 3. As Chief of the Internal Audit Section, the Petitioner exercised broad flexibility and independence. In addition to supervising other auditors, he could decide who, what, when, how, and why to audit within the Department. While he could not order implementation of any recommendations, he was free to contact the State Bureau of Investigation concerning his findings.

The DOT objects to this finding on the grounds that it is incomplete. Although we agree that this finding is incomplete in that it does not show the extent of the impact of Hodge's decisions on the entire DOT, we find it adequate to support a conclusion that his position was properly designated policymaking exempt.

In addition, the undisputed record evidence supports our conclusion that the position was properly designated "policymaking." The record evidence shows that, as Chief of the Internal Audit Section, Hodge determined which audits would be performed throughout the DOT, including the Office of the Secretary, and made recommendations for change in policies and practices within the audited departmental unit. Although the persons supervising the audited unit decided whether to implement any recommended changes, the audit recommendations of Hodge were distributed to the Deputy Secretary, the State Auditor's office, and in some cases, but not all, to the Federal Highway Administration. As the Commission found, Hodge had the authority to report his findings to the State Bureau of Investigation when required by law.

Finding number 3 and the other record evidence demonstrate that he had authority to impose the final decision on a settled course of action within the DOT and within divisions of the DOT. This is true even though others higher in the departmental hierarchy ultimately decided whether the DOT would implement audit recommendations. Almost everyone in the DOT is supervised by someone. Even the Secretary of the DOT must ultimately answer to the Governor. It would be illogical to construe G.S. section 126-5(b) as requiring that persons in policymaking positions have absolute decisionmaking autonomy.

An appellate court may reverse or modify a final agency decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are, inter alia, affected by error of law. N.C. Gen. Stat. § 150B-51(b)(4) (1995); *Professional Food Services Mgmt. v. N.C. Dept. of Admin.*, 109 N.C. App. 265, 268, 426 S.E.2d 447, 449 (1993). We hold that the Commission's findings, as supported by substantial record evidence, can only support the legal conclusion that Hodge's position was properly designated as policymaking exempt, and that substantial rights of petitioner DOT have been prejudiced by legal error in the Commission's Decision and Order.

Since the trial court erred by affirming the contrary conclusion reached by the Commission, we reverse the trial court's order and the Commission's Decision and Order. The case is remanded with the mandate that the position of Chief of the Internal Audit Section be designated policymaking exempt.

Judges JOHNSON and WYNN concur.

FORREST L. BARTLETT, PLAINTIFF v. ELLIOTT W. JACOBS, JR., A/K/A RUSTY JACOBS, DEFENDANT

No. COA96-127

(Filed 19 November 1996)

1. Appeal and Error § 122 (NCI4th)— summary judgment—accounting negligence claim—counterclaim for unpaid fees—appeal of summary judgment not interlocutory

Plaintiff's appeal of a summary judgment for defendant in a negligence action against an accountant arising from personal income tax preparation was not premature where the trial court certified that there was no just reason for delay and plaintiff's claim for professional negligence and defendant's counterclaim for unpaid fees are sufficiently intertwined so that a fair adjudication of one claim cannot be had without a contemporaneous presentment of the other. Plaintiff is entitled to immediate appellate review because the possibility of inconsistent verdicts from two trials on the same issue exists.

Am Jur 2d, Appellate Review §§ 169, 170.

Tax preparer's liability to taxpayer in connection with preparation of tax returns. 81 ALR3d 119.

2. Accountants § 19 (NCI4th)— income tax preparation—failure to verify information—summary judgment for defendant improper

Summary judgment for defendant in a negligence action arising from personal income tax preparation was improper where plaintiff alleged that defendant breached the standard of care owed by an accountant to a client by failing to verify the information regarding plaintiff's bank accounts and offered affidavits from those experienced in accounting that plaintiff had breached the standard of care. Additionally, defendant has not demonstrated that an essential element of plaintiff's claim is nonexistent.

Am Jur 2d, Attorneys at Law §§ 56, 76, 108, 111; State and Local Taxation § 592.

Accountant's malpractice liability to client. 92 ALR3d 396.

3. Accountants § 19 (NCI4th)— negligent income tax preparation—failure of client to read return—summary judgment on contributory negligence—improper

Summary judgment for defendant on a contributory negligence claim in a negligence action arising from personal income tax preparation was improper where plaintiff's affidavits raised an issue of fact in that he alleged that he would not have been able to understand the tax returns even if he had read them. Furthermore, defendant has not demonstrated that plaintiff will be unable to surmount the affirmative defense of contributory negligence.

Am Jur 2d, Attorneys at Law §§ 56, 76, 108, 111; State and Local Taxation § 592.

Accountant's malpractice liability to client. 92 ALR3d 396.

Appeal by plaintiff from order entered 5 January 1996 by Judge William C. Griffin in Camden County Superior Court. Heard in the Court of Appeals 9 October 1996.

D. Keith Teague, P.A., by D. Keith Teague and Danny Glover, Jr., for plaintiff-appellant.

Twiford, Morrison, O'Neal, Vincent & Williams, L.L.P., by John S. Morrison, for defendant-appellee.

WALKER, Judge.

Plaintiff filed this action against defendant for professional negligence arising out of defendant's preparation of plaintiff's personal income tax returns. Defendant answered alleging plaintiff's contributory negligence as an affirmative defense and counterclaimed for fees owed for the preparation of the returns. The trial court granted defendant's motion for summary judgment on the professional negligence claim; however, defendant's counterclaim remains pending.

Defendant is an accountant who owns a tax preparation business. Prior to opening his private practice, he was employed by the IRS as an individual tax auditor. Plaintiff has various business interests in horse racing, construction, real estate rentals and sales. Plaintiff alleges that because of his lack of knowledge of accounting or income tax preparation, he hired defendant to prepare his federal and state income tax returns from 1977 to 1991. Each year plaintiff

provided defendant with the financial information necessary for the preparation of the returns. When the returns were completed, defendant notified plaintiff who would then sign the tax forms.

The dispute in this case involves the failure to include some $900,000.00 of income in plaintiff's tax returns for the tax years 1988, 1989 and 1990. Due to these omissions, plaintiff was audited by the IRS and assessed with back taxes, interest and penalties in the amount of $211,389.47. During the years in question, plaintiff had two bank accounts: an operating account and a money market account. Defendant alleges he was informed by plaintiff that all of the income had been run through the operating account before being deposited in the money market account. Instead, defendant claims that large sums of money were deposited directly into the money market account without his knowledge. Each year after completing plaintiff's returns, defendant requested that plaintiff review the returns with him so that he could answer any questions plaintiff may have. According to defendant, plaintiff never reviewed these returns with defendant before signing them. Defendant claims that if plaintiff had reviewed the returns with him, plaintiff would have noticed the substantial omissions of income.

On the other hand, plaintiff alleges that even if he had reviewed the returns, he would not have noticed the omissions of income since he has no knowledge of accounting or income tax preparation. He claims that defendant breached the duty of care owed by an accountant to a client by not verifying the information regarding plaintiff's bank accounts. In opposition to the motion for summary judgment, plaintiff presented three affidavits of persons experienced in accounting and tax preparation, each expressing an opinion that defendant breached the standard of care.

[1] Plaintiff contends that the trial court erred in granting summary judgment because an issue of fact exists as to whether defendant breached the applicable standard of care. Before we address this issue, we must decide whether plaintiff's appeal is interlocutory and subject to dismissal. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). "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). There are two avenues by which an interlocutory judgment or order can be immediately appealed. First, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal. N.C.R. Civ. P. 54(b). Second, an interlocutory order can be immediately appealed under N.C. Gen. Stat. §§ 1-277(a) (1983) and 7A-27(d)(1) (1995) "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Page*, 119 N.C. App. at 734, 460 S.E.2d at 334. A substantial right is affected if " 'there are overlapping factual issues between the claim determined and any claims which have not yet been determined' because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Liggett*, 113 N.C. App. at 24, 437 S.E.2d at 677.

In the present case, the trial court certified pursuant to Rule 54(b) that there was no just reason to delay plaintiff's appeal. In addition, as the trial court noted, plaintiff's claim for professional negligence and defendant's counterclaim for unpaid fees are sufficiently intertwined so that "a fair adjudication of one claim cannot be had without a contemporaneous presentment of the other." (R. at 36). In other words, an adjudication of plaintiff's negligence claim could determine the outcome of defendant's counterclaim for fees. Because the possibility of inconsistent verdicts from two trials on the same issues exists, plaintiff is entitled to immediate appellate review and his appeal is properly before this Court.

[2] Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The burden is on the moving party to demonstrate a lack of any triable issue. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). The moving party can meet its burden "by proving that an essential element of the opposing party's claims is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (citations omitted). Once the moving party meets its burden, the nonmoving party must make a forecast of the evidence demon-

strating the ability to present at least a *prima facie* case at trial. *Id.* "In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Snipes v. Jackson*, 69 N.C. App. 64, 72, 316 S.E.2d 657, 661 (1984). Because summary judgment is a drastic remedy, it should be used with caution. *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). This is especially true in negligence cases, where juries normally apply the reasonable person standard to the facts of each case. *Id.*

In this case, plaintiff alleges that defendant breached the standard of care owed by an accountant to a client by failing to verify the information regarding plaintiff's bank accounts. In support thereof, plaintiff offered the affidavits of Kathryn Blanchard, Ollin B. Sykes and Robert Gray, all of whom are experienced in accounting and familiar with the standard of care owed by an accountant. Each avers that defendant breached the applicable standard of care by failing to verify the information provided to him by plaintiff. Taken in the light most favorable to plaintiff, the evidence presented by plaintiff establishes that an issue of fact exists as to whether defendant breached the applicable standard of care. In addition, defendant has not demonstrated that an essential element of plaintiff's claim is nonexistent. Thus, summary judgment on this issue was improper.

[3] We must also address defendant's contributory negligence claim. In his affidavit, plaintiff states that he has no knowledge of accounting or income tax preparation. He claims that since he would not have been able to understand the tax returns even if he had read them, his failure to read the returns was not the proximate cause of his damages, and he therefore was not contributorily negligent.

Summary judgment is rarely appropriate on claims of contributory negligence. *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 291 (1978). Summary judgment should not be allowed on a contributory negligence claim unless the only conclusion that can be reached from the evidence is that plaintiff was contributorily negligent. *Izard v. Hickory City Schools Board of Education*, 68 N.C. App. 625, 627-28, 315 S.E.2d 756, 758 (1984). Because plaintiff's affidavit disputes defendant's allegation of contributory negligence, an issue of fact exists. Furthermore, defendant has not demonstrated that plaintiff will be unable to surmount the affirmative defense of contributory negligence. Thus, the grant of summary judgment on this issue was also improper.

For the above reasons, we reverse the trial court's entry of summary judgment in favor of defendant.

Reversed and remanded.

Judges LEWIS and MARTIN, Mark D. concur.

ELAINE CAUBLE, ADMINISTRATRIX OF THE ESTATE OF JAMEY B. STATON, DECEASED, PLAINTIFF-APPELLEE v. SOFT-PLAY, INC., EMPLOYER, AND THE HOME INDEMNITY COMPANY, CARRIER, DEFENDANTS-APPELLANTS

No. COA95-1423

(Filed 19 November 1996)

Workers' Compensation § 153 (NCI4th)— employee killed on business trip—returning to motel from dinner and sports bar

The Industrial Commission correctly determined that decedent's death arose out of and in the course of his employment where decedent and his supervisor were assigned as part of a crew to a project in New York; all crew members were given a per diem to be used for any purpose; decedent and his supervisor drove to a restaurant/bar after work, ate dinner, and remained in the sports bar to watch a ball game; an accident occurred as they were returning to their motel; the supervisor was driving; and both were intoxicated. North Carolina adheres to the rule that employees whose work requires travel away from the employer's premises are within the course of their employment continuously during such travel except when there is a distinct departure for a personal errand. Even if remaining at the restaurant to drink and watch a ball game constituted a personal endeavor, sufficient evidence existed to support the finding that decedent had rejoined his course of employment at the time of the accident. The parties do not argue that his intoxication was a cause of his death.

Am Jur 2d, Workers' Compensation § 294.

Appeal by Defendants from Opinion and Award entered 26 September 1995 by the North Carolina Industrial Commission, Coy M. Vance, Commissioner. Heard in the Court of Appeals 24 September 1996.

Wishart, Norris, Henninger & Pittman, P.A., by Daniel C. Marks, for defendants-appellants.

The Law Offices of Cecil Whitley, by Michael S. Adkins, for plaintiff-appellee.

WYNN, Judge.

The parties stipulate to the following summary of the relevant facts in this matter:

Defendant Soft-Play, Inc., a North Carolina corporation, employed Jamey B. Staton and assigned him as part of an equipment installment crew to a project in Erie County, New York. The company gave all crew members a daily per diem of $30.00 to be used for any purpose, including purchasing meals, and paid directly for their lodging.

While on this assignment, Staton and his supervisor, Thomas Shanahan, drove to a restaurant/bar called the Buffalo Brute Club after working a shift. Shanahan had rented the vehicle subject to reimbursement by defendant Soft-Play. They ate dinner and remained at the sports bar to watch a ball game. Tragically, while returning to their motel late that evening, an accident occurred when another vehicle struck their vehicle as Shanahan attempted to turn left at an intersection controlled by a stoplight. Staton died. The accident occurred approximately 100 yards from their motel.

Both Staton and Shanahan were legally intoxicated at the time of the accident. As a result of the accident, Shanahan pled guilty to criminally negligent homicide and driving while impaired.

Following Staton's death, his mother, plaintiff Elaine Cauble, qualified as the administratrix of his estate. She sought death benefits under the Workers' Compensation Act and requested a hearing before the Industrial Commission. The parties, however, waived the hearing and submitted the case to Deputy Commissioner Laura K. Mavretic on stipulated facts and documents. Thereafter, Deputy Commissioner Mavretic awarded compensation benefits to plaintiff on the grounds that decedent's death was by an accident arising out of and in the course of his employment with defendant Soft-Play. Subsequently, the Full Commission affirmed and adopted the Opinion and Award of the deputy commissioner. Defendants appeal from that decision.

On appeal, defendants challenge the Commission's determination that Staton's death arose out of and in the course of employment.

The Commission's determination that an accident *arose out of* and *in the course of* employment is a mixed question of law and fact; thus, this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence. *Williams v. Hydro Print*, 65 N.C. App. 1, 308 S.E.2d 478 (1983), *disc. review denied*, 310 N.C. 156, 311 S.E.2d 297 (1984). "Moreover, it should be noted that our courts construe the Workers' Compensation Act liberally in favor of compensability." *Chandler v. Teer Co.*, 53 N.C. App. 766, 768, 281 S.E.2d 718, 719 (1981), *aff'd*, 305 N.C. 292, 287 S.E.2d 890 (1982) (citations omitted).

North Carolina adheres to the rule that employees whose work requires travel away from the employer's premises are within the course of their employment *continuously* during such travel, except when there is a distinct departure for a personal errand. *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 41, 167 S.E.2d 790, 793 (1969). The rule's rationale is that "an employee on a business trip for his employer must 'eat and sleep in various places in order to further the business of his employer.' " *Id.* at 42, 167 S.E.2d at 794 (quoting *Thornton v. Hartford Acc. & Indemn. Co.*, 198 Ga. 786, 32 S.E.2d 816 (1945)). Therefore, " '[w]hile lodging in a hotel or preparing to eat, or *while going to or returning from a meal*, [a traveling employee] is performing an act incident to his employment.' " *Id.* (Emphasis added).

We note at the outset that defendants did not argue in their brief that the fact that Staton's blood alcohol level was above the legal limit of intoxication was sufficient, in and of itself, to bar workers' compensation benefits. (Indeed, intoxication alone will not work a forfeiture of an employee's benefits under N.C. Gen. Stat. § 97-12(1) (1991); rather, he forfeits his benefits only if the injury was proximately caused by the intoxication. *Gaddy v. Anson Wood Products*, 92 N.C. App. 483, 374 S.E.2d 477 (1988). Moreover, even if the employee's intoxication *is* a proximate cause of his injury, recovery of benefits will not be barred if the intoxicant was "supplied by the employer or his agent in a supervisory capacity to the employee." N.C.G.S. § 97-12(1). In this case, Staton's intoxication was not a cause in fact of the accident which resulted in his death. The accident was caused by Shanahan's negligence. It should also be noted that the alcohol was consumed in the presence and in the company of Staton's

supervisor and in effect may have been provided by his employer, defendant Soft-Play, by means of the per diem which employer paid to Staton.). Instead, defendants contend that by electing to remain at the bar after dinner instead of returning to the hotel, Staton's trip became one of a purely personal and social nature and any causal connection to his employment was terminated for the rest of the evening. We disagree.

It is well-established that a traveling employee will be compensated under the Workers' Compensation Act "for injuries received while returning to his hotel, while going to a restaurant or while returning to work after having made a detour for his own personal pleasure." *Chandler v. Teer*, 53 N.C. App. at 770, 281 S.E.2d at 721 (citing *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E.2d 790 (1969); *Clark v. Burton Lines*, 272 N.C. 433, 158 S.E.2d 569 (1968); *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E.2d 608 (1962); *Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 862 (1957); *Michaux v. Bottling Co.*, 205 N.C. 786, 172 S.E. 406 (1934); *Parrish v. Armour & Co.*, 200 N.C. 654, 158 S.E. 188 (1931); *Williams v. Board of Education*, 1 N.C. App. 89, 160 S.E.2d 102 (1968)).

In *Martin v. Georgia-Pacific Corp.*, an out-of-town employee walked several blocks from his hotel to see yachts on the river. He then proceeded to a restaurant to eat dinner and was struck and killed by a car. This Court concluded that although going to see the yachts was a personal detour, once the employee began to proceed to dinner he "had abandoned this personal sight-seeing mission" and was back within the scope of his employment. 5 N.C. App. at 43, 167 S.E.2d at 794. In *Chandler v. Teer*, this Court reversed the Industrial Commission's determination that an out-of-town employee's death was not compensable because he had made a personal detour to set up a soft-ball game while on his way back to his sleeping quarters from a worksite. Judge Becton, writing for the Court, cited *Martin* and commented: "We do not believe that workers' compensation would have been denied had [the employee in *Martin*] eaten first, gone to the yacht basin second, and then been killed on his trip back to his hotel." 53 N.C. App. at 770, 281 S.E.2d at 721.

In the instant case, Staton traveled to New York, slept in a motel and ate at restaurants in order to further the business of and at the direction of his employer, defendant Soft-Play. At the time of the accident, he was returning to his motel from the place where he had eaten dinner. Moreover, as pointed out earlier, the parties do not argue that

his intoxication was a cause of his death. Based on these facts, we are of the opinion that even if Staton's remaining at the restaurant to drink alcohol and watch a ball game constituted a personal endeavor, sufficient evidence existed to support the Commission's finding that he had rejoined his course of employment at the time of the accident. Accordingly, the Opinion and Award of the Commission is,

Affirmed.

Judges JOHN and McGEE concur.

JERRY R. BULLINS, SHARON KAY BULLINS, AND JOSEPH W. FREEMAN, JR., GUARDIAN AD LITEM FOR SCOTTY R. BULLINS, PLAINTIFFS v. ABITIBI-PRICE CORPORATION, FIREMAN'S FUND INSURANCE COMPANY AND ROGER EDWARDS, DEFENDANTS

No. COA95-1382

(Filed 19 November 1996)

Workers' Compensation § 62 (NCI4th)— employee required to continue working after injury—Woodson claim—no substantial certainty of serious injury

The trial court properly granted summary judgment for defendants on a *Woodson* claim for damages resulting from injuries plaintiff received after being ordered to work while still suffering from a prior work-related injury where plaintiff had received workers' compensation but alleged that defendants had acted intentionally and with reckless indifference to his safety and included claims of bad faith, emotional distress, and loss of consortium. The evidence showed that the job had been performed the same way for many years without injury, involved typical welding hazards, plaintiff was a certified welder, falling was not a significant hazard of this particular job, and no O.S.H.A. violations were established. Plaintiff's forecast of evidence fails to show that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury to plaintiff.

Am Jur 2d, Workers' Compensation §§ 75-79.

Appeal by plaintiffs from order entered 26 September 1995 by Judge Judson D. DeRamus, Jr. in Surry County Superior Court. Heard in the Court of Appeals 11 September 1996.

Franklin Smith for plaintiffs-appellants.

Carruthers & Roth, P.A., by Jack B. Bayliss, Jr., for defendants-appellees.

WALKER, Judge.

Plaintiffs' evidence tended to show that on 24 December 1990, while Jerry R. Bullins (Bullins) was working for his employer, defendant Abitibi-Price Corporation, he slipped and fell injuring the ribs on his left side. Bullins alleged that upon telling his supervisor, defendant Edwards, of his injuries that Edwards instructed him to continue working. Bullins stated that he continued to work with pain associated with the December fall through 15 April 1991.

Bullins claimed that he was out of work on 22 April 1991 pursuant to doctor's orders, due to his rib injury, when Edwards called him and told him to report to work. After reporting to work, Bullins contended that Edwards ordered him to lift heavy objects which exacerbated his pain. The next day, Edwards asked Bullins and another employee to do some build-up welding in the wood digester tower inside the plant. While welding inside the digester, Bullins contended that he leaned back, lost his balance and fell backwards while his right foot remained hooked, injuring his back.

Bullins has received workers' compensation benefits for injuries sustained during the 23 April 1991 accident. In an opinion and award issued by the Industrial Commission, the parties stipulated the following: (1) The plaintiff sustained an injury by accident arising out of and in the course of employment with defendant-employer on 23 April 1991, (2) As a result of the admittedly compensable injury, the parties entered into a Form 21 Agreement for Compensation . . . plaintiff received temporary total disability compensation from 1 May 1991 through 1 May 1992, (3) A Form 24, Application of Employer or Insurance Carrier to Stop Payment of Compensation, was approved by the Industrial Commission on 19 May 1992 and (4) Plaintiff filed a Form 33, Request for Hearing on 10 June 1992. The Industrial Commission then found, as a conclusion of law, that the plaintiff was entitled to receive thirty weeks of permanent partial disability compensation at the rate of $378.63, pursuant to N.C. Gen. Stat. § 97-31(23).

Plaintiffs filed this action against defendants to recover for damages resulting from the injuries he received after being ordered to work while still suffering from a prior work-related injury. Further, Bullins alleged that defendants acted intentionally and with reckless indifference to his safety and the complaint also includes claims of bad faith, emotional distress, and loss of consortium. Each of the defendants moved for summary judgment which was granted.

The Workers' Compensation Act provides in N.C. Gen. Stat. § 97-10.1 (1985):

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

The Act attempts to implement trade-offs between the rights of employees and their employers. It provides for an injured employee's certain recovery without having to prove employer negligence. *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991) (*citing Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). In return, the amount of recovery available for work-related injuries is limited by the Act and the employee's right to pursue larger damage awards in civil actions is removed. *Id.* (*citing Pleasant*, 312 N.C. 712, 325 S.E.2d 246-47).

Our Supreme Court has held that these provisions bar a worker from maintaining a common law negligence action against his employer. *See e.g.*, *Lee v. American Enka Corp.*, 212 N.C. 455, 193 S.E. 809 (1937); *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966). However, it was not the intention of the legislature, in cases of intentional torts resulting in injury or death to employees, to completely relieve employers of civil liability. *Woodson*, 329 N.C. 338-39, 407 S.E.2d 227.

Our Supreme Court in *Woodson*, recognized an exception to the previous holdings when it set a standard that, if met by a plaintiff, would abrogate the exclusivity provisions of the Workers' Compensation Act and allow a plaintiff-employee to bring a civil suit against the employer. In *Woodson*, the Court held that to survive a motion of summary judgment, the plaintiff's evidence must be suffi-

cient to show that there was a genuine issue of material fact as to whether these defendants intentionally engaged in misconduct knowing it was substantially certain to cause serious injury or death to the plaintiff and that the plaintiff was seriously injured or killed by that misconduct. The standard requires conduct tantamount to an intentional tort. *Id.* at 341, 407 S.E.2d at 228.

The Court has recently re-emphasized the *Woodson* "substantial certainty" standard in *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995). In *Mickles*, a Duke Power employee fell to his death when a safety snap on a pole strap disengaged from a D-ring on his body belt (a phenomenon known as "roll-out"). *Id.* at 106, 463 S.E.2d at 208. The industry had been aware of the possibility of "roll-out" for years; however, it was a very rare occurrence. *Id.* A North Carolina Department of Labor investigation, conducted after Mickles' fall, found that defendant had known that "manufacturers of fall protection equipment recommended . . . that body belts and pole straps not be used for fall protection because of the potential incompatibility of belts and straps made by different manufacturers," but merely asked its employees to inspect their own equipment while working. *Id.* at 108, 463 S.E.2d at 210. Additionally, an inspection of Mickles' equipment after his death showed that his safety snaps and D-rings were incompatible and that his equipment was " 'certain to fail under the conditions created using [defendant's] standard work procedures.' " *Id.* at 109, 463 S.E.2d at 210. However, the Court stated:

> The forecast of evidence thus indicates only that defendant was aware of the somewhat remote possibility that Mickles' strap would become twisted, slack would be introduced into the strap, and Mickles would then fail to check the connecting snaps and D-rings before leaning against those connections. It falls short of establishing that defendant knew this was substantially certain to occur.

Id. at 112, 463 S.E.2d at 212.

Like *Mickles*, the evidence in this case does not show that defendants knew Edwards' conduct was "substantially certain" to cause serious injury or death to the plaintiff. The evidence did show that this build-up welding job had been performed the same way for many years without injury, the job involved typical hazards involved with welding, Bullins was a certified welder, falling was not a significant hazard of this particular job, and no O.S.H.A. violations were established with regard to this job. Therefore, plaintiffs' forecast of evi-

dence fails to show that these defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury to Bullins. Thus, the trial court properly granted summary judgment in favor of the defendants on all plaintiffs' claims.

Affirmed.

Judges EAGLES and McGEE concur.

ROBERT DENNIS EIBERGEN, PETITIONER-APPELLEE v. ALEXANDER KILLENS, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT-APPELLANT

No. COA95-1326

(Filed 19 November 1996)

Automobiles and Other Vehicles § 130 (NCI4th)— driver's license suspension—card not turned in—effective date of suspension

In an action involving revocation of a driver's license as a result of driving while impaired, the trial court erred by holding that petitioner's second conviction did not constitute a moving violation during a period of license suspension and ordering that revocation of petitioner's license be permanently enjoined where petitioner was stopped on 25 May 1994 in Orange County; chemical analysis of his breath thereafter established that he had a blood alcohol content of .15; a magistrate then issued an order revoking petitioner's license for ten days; the magistrate marked the box which stated that petitioner was unable to locate his license card and filed an affidavit which constituted surrender of the license, but no affidavit was filed; petitioner was stopped the next morning in Alamance County with a blood alcohol content of .11; he subsequently pled guilty to driving while impaired and the district court found that the magistrate's order had not yet become effective when petitioner was stopped in Alamance County; and petitioner thereafter received notice from respondent that his license was revoked for one year pursuant to N.C.G.S. § 20-28.1(b)(1) for committing a moving violation while his license was revoked. Revocation or suspension is the termination of the privilege to drive; the ten day revocation of petitioner's license in Orange County took effect immediately upon the

issuance of the magistrate's order even though petitioner stated that he did not have his driver's license card with him and even though the magistrate filed no affidavit.

Am Jur 2d, Automobiles and Highway Traffic §§ 115-117.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations. 48 ALR4th 367.

Appeal by respondent from order entered 10 July 1995 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 10 September 1996.

Roberson, Richardson & Deal, by James K. Roberson, for petitioner-appellee.

Attorney General Michael F. Easley, by Associate Attorney General Sondra C. Panico, for respondent-appellant.

WALKER, Judge.

On 25 May 1994, at 10:30 p.m., petitioner was stopped in Orange County and charged with driving while impaired. Petitioner thereafter submitted to a chemical analysis of his breath which established that he had a .15 percent blood alcohol content. Petitioner then appeared before an Orange County magistrate, who issued a "Revocation Order When Person Present," revoking petitioner's driver's license for ten days. The magistrate ordered that petitioner's "license or privilege to drive be revoked, and he is prohibited from operating a motor vehicle on the highways of North Carolina during the period of revocation; and [t]he revocation remains in effect for at least ten days from the date he surrenders his license to the Court . . . ." The time and date of the order was 11:42 p.m., 25 May 1994. Because petitioner stated he did not have his driver's license card with him, the magistrate marked the box on the order which stated that petitioner "was validly licensed but unable to locate his license card and filed an affidavit which constituted surrender of the driver's license." No affidavit was filed in this case.

The next morning, 26 May 1994, at 8:20 a.m., petitioner was stopped in Alamance County and charged with driving while impaired, driving while license revoked, and speeding. At this time, however, petitioner had his driver's license card with him. A chemical

analysis was conducted on his breath, which indicated that he had a .11 blood alcohol content. On 22 November 1994, petitioner pled guilty in Alamance County to driving while impaired, and the other charges were dismissed. The district court found the magistrate's order in Orange County had not yet become effective when petitioner was stopped in Alamance County because his "driver's license was not in fact revoked . . . ." Thereafter, petitioner received notice from respondent that his driver's license was revoked for one year for having committed a moving violation during a period when his driver's license was revoked pursuant to N.C. Gen. Stat. § 20-28.1(b)(1) (1993). The moving violation referred to in the notice was the Alamance County charge.

On 10 February 1995, petitioner filed a petition in Alamance County Superior Court seeking to have respondent enjoined from revoking his license for one year. A hearing was held on 10 July 1995, and the superior court found that petitioner had not surrendered his driver's license in Orange County because petitioner had his driver's license in his possession when he was stopped in Alamance County. The court held petitioner's conviction in Alamance County did not constitute a moving violation during a period of license suspension and ordered the revocation of petitioner's license permanently enjoined.

Because the facts of this case are not in dispute, we need only address whether the evidence in the record supports respondent's revocation of petitioner's license pursuant to N.C. Gen. Stat. § 20-28.1(b)(1) for the commission of a moving violation during a period of driver's license suspension. The dispositive issue in this case is whether the Orange County magistrate's ten day revocation order immediately revoked petitioner's driver's license. Respondent contends that the magistrate's order immediately revoked petitioner's driver's license, and that petitioner committed a moving violation during a period of revocation by operating a motor vehicle the next day in Alamance County.

The Orange County magistrate had the authority to order a ten day revocation of petitioner's driver's license under N.C. Gen. Stat § 20-16.5(b)(4)(b) (1993), which states that a person's driver's license is subject to immediate revocation if the person "[h]as an alcohol concentration of .08 or more within a relevant time after the driving . . . ." Because petitioner was found to have a blood alcohol content of .15 when he was arrested in Orange County, his driver's

license was subject to immediate revocation. Nevertheless, petitioner contends that because he did not have his driver's license card with him at the time and because no affidavit in this regard was filed by the magistrate, his driver's license was not validly revoked on 25 May 1994. We disagree. The ten day revocation of petitioner's license took effect immediately upon the issuance of the magistrate's order, even though petitioner stated he did not have his driver's license card with him and even though the magistrate filed no affidavit.

N.C. Gen. Stat. § 20-4.01(17) (1993) defines "license" as

> Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including: (a) Any temporary license or learner's permit; (b) **The privilege of any person to drive a motor vehicle whether or not such person holds a valid license**; and (c) Any nonresident's operating privilege.

(Emphasis added). The term "license" encompasses more than the license card itself; it includes the privilege to operate a motor vehicle in this State. In addition, "revocation or suspension" is defined in N.C. Gen. Stat. § 20-4.01(36) (1993) as "[t]ermination of a licensee's or permittee's privilege to drive . . . ." Thus, when a person's driver's license is suspended or revoked, it is the surrendering of the privilege to drive, not the license card itself, that is of significance. If revocation could become effective only when a licensee elected to turn in his or her driver's license card, the intent of the legislature and the purpose of the statute would be frustrated.

Finally, according to N.C. Gen. Stat. § 20-16.5(e) (1993), if the revocation report is filed with the judicial official when the person is present, "[u]nless the person is not currently licensed, the revocation under this subsection begins at the time the revocation order **is issued** and continues until the person's license has been suspended for ten days and the person has paid the applicable costs." (Emphasis added). Therefore, petitioner's license was revoked at the time he was operating a motor vehicle in Alamance County on 26 May 1994, and the Alamance County charge constituted a moving violation during a period of license suspension.

The evidence in the record before us supports respondent's revocation of petitioner's license pursuant to N.C. Gen. Stat. § 20-28.1(b)(1) *for the commission of a moving violation during a period* when his driver's license was revoked. The judgment of the Alamance

County Superior Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges EAGLES and McGEE concur.

BAGWELL & BAGWELL, INCORPORATED, PETITIONER-APPELLANT v. PATRICIA C. BLANTON AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. COA95-1393

(Filed 19 November 1996)

Labor and Employment § 173 (NCI4th)— unemployment benefits—findings of Employment Security Commission—conflicting

An appeal to the Court of Appeals of a Superior Court judgment affirming a decision by the Employment Security Commission was remanded to the Commission where the findings of the Commission were in conflict and thus could not support its conclusion.

Am Jur 2d, Unemployment Compensation §§ 43, 215.

Appeal by petitioner from judgment filed 22 March 1995 in Wake County Superior Court by Judge Wiley F. Bowen. Heard in the Court of Appeals 18 September 1996.

Randolph L. Worth for petitioner-appellant.

Chief Counsel Thomas S. Whitaker, by Thelma M. Hill, for respondent-appellees.

Greene, Judge.

Bagwell and Bagwell Inc. (employer) appeals from a judgment of the superior court affirming a decision of the Employment Security Commission of North Carolina (the Commission) which determined that Patricia C. Blanton (employee) was "not disqualified for unemployment benefits."

The appeal from the superior court to this Court requires that we review the order of the Commission "in the same manner as the superior court must review that order." *Housecalls Nursing Servs. v. Lynch*, 118 N.C. App. 275, 278, 454 S.E.2d 836, 838 (1995). Thus, we accept as conclusive the findings of fact made by the Commission "if there is any competent evidence to support them." *Id.*

The Commission made the following pertinent findings of fact:

> 3. *The [employee] was discharged from this job for insubordination.*
>
> 4. The [employee] was hired on September 20, 1993. The [employee] was given a starting salary of $20,000.00. She was promised a review and possible raise in six and twelve months.
>
> 5. The [employee] gave the secretary/treasurer a letter on May 17, 1994 that requested a $5,000.00 a year raise. She presented the employer with the letter because she had been working for eight months and had not received an evaluation. The employer did not understand the content of the letter and asked if it was a letter of resignation, if the raise request was not granted. The [employee] said that it was not a resignation letter. The employer informed her that she was not going to receive a raise and considered it a resignation letter. *The employer then informed her that she was terminated.* The [employee] asked the employer to reconsider, became excited and began crying. The employer asked her to leave the premises or he would call the police and have her removed from the premises.
>
> 6. The [employee] left the office and slammed the door on her way out. The [employee] then began cleaning out her desk. The employer watched as she was cleaning out the desk. . . . The [employee] left the premises. The employer asked for her office key as she was leaving, but she did not have it with her.
>
> 7. The [employee's] husband met her in the parking lot. The husband talked to the employer about the circumstances surrounding his wife's discharge. *The employer said she had not been discharged but had been sent home with pay for the day.* The parties then left. The [employee] informed the employer that she was planning to sue him as a result of the discharge.

> 8. On May 18, 1994, the employer's attorney informed the [employee], once again, that she had been discharged. *The [employee] had not been insubordinate to the employer prior to the discharge.*

(Emphases added.)

The Commission then concluded that the employee was not "discharged from the job for substantial fault or misconduct connected with the work."

The evidence before the Commission is conflicting as to when the employee was actually discharged. There is no dispute that she was officially notified by the employer's attorney on 18 May 1994 that she "had been discharged." The employer's evidence could support a finding that the employee was discharged for insubordinate behavior occurring on 17 May 1994. The employee's evidence could support a finding that the employee was discharged because she asked for a raise and that any insubordination occurred only after she was notified that she had been "terminated." The evidence is not in conflict that on 17 May 1994 after being told by the employer that she "was not going to receive a raise," that she "became excited and began crying." She "left the office [of the employer] and slammed the door on her way out." As the employer watched her clean out her desk "she told him to leave her damn office or she would throw something at him."

The issue is whether the Commission resolved the conflict in the evidence with regard to the time of the employee's discharge.

There is a presumption that an employee is entitled to benefits under the Unemployment Compensation Act. *In re Miller v. Guilford County Schools*, 62 N.C. App. 729, 731, 303 S.E.2d 411, 412, *disc. rev. denied*, 309 N.C. 321, 307 S.E.2d 165 (1983). "The employer bears the burden of rebutting this presumption by showing circumstances which disqualify the [employee]." *Williams v. Davie County*, 120 N.C. App. 160, 164, 461 S.E.2d 25, 28 (1995). Section 96-14 enumerates a number of instances when an employee will be disqualified. One such disqualifying circumstance is "because [the employee] was discharged for misconduct connected with his work." Section 96-14(2) defines "misconduct" as:

> conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to

> expect of his employee . . . or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

N.C.G.S. § 96-14(2) (1995).

In this case the parties dispute whether the employee's conduct constitutes misconduct, and if so, whether the misconduct was the cause of the discharge. It was the responsibility of the Commission to resolve these disputes and our review of the record indicates that it failed in its duty.

The Commission appears to assume that the employee's conduct constitutes misconduct and then determines that because this conduct occurred after she was discharged, it did not disqualify her from benefits. The problem with this approach, however, is that the findings of the Commission are in conflict as to when the discharge actually occurred and thus cannot support its conclusion. In finding of fact number 3, the Commission finds that the employee "was discharged from [her] job for insubordination." Finding of fact number 8, on the other hand, states that she "had not been insubordinate . . . prior to the discharge." Finding of fact number 5 states that on 17 May 1994 she was told that "she was terminated." On the other hand, finding of fact number 7 states that "she had not been discharged but had been sent home with pay."

Because the Commission has failed in its duty to resolve the conflict in the evidence, we are required to remand this matter to the Commission. On remand, if the Commission resolves the conflict and determines that conduct (alleged to constitute misconduct) occurred after the discharge, the employee will not be disqualified from benefits. If, however, the Commission determines that the conduct occurred prior to the discharge, the Commission must then determine whether the conduct constitutes misconduct within the meaning of section 96-14(2) and further whether the discharge was caused by that misconduct.

Remanded.

Chief Judge ARNOLD and Judge JOHNSON concur.

BETSY JOHNSON POWELL, PETITIONER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. COA95-1320

(Filed 19 November 1996)

1. Public Officers and Employees § 42 (NCI4th)— policymaking exempt position—Highway Beautification Director—not a division of DOT

The State Personnel Commission erred in an action arising from the designation of petitioner's job as Director of the Highway Beautification Program as policymaking exempt by determining that the Highway Beautification Program was a division of DOT. The Highway Beautification Program was listed as a "section and unit" of the institution/division headed by the Assistant Secretary for Administration prior to a departmental reorganization, and afterwards the Director reported directly to the Deputy Secretary of Highways. However, the record does not show that the program was a division of DOT and an organization chart does not list the program as a division. The evidence also does not show that the program functioned as a principal subunit of a department as specified in N.C.G.S. § 143B-3(6).

Am Jur 2d, Public Officers and Employees §§ 15, 20.

2. Public Officers and Employees § 43 (NCI4th)— policymaking exempt position—Director of Highway Beautification Program—decision-making authority

The State Personnel Commission erred in an action arising from the designation of petitioner's job as Director of the Highway Beautification Program as policymaking exempt where there was no substantial evidence to support the conclusion that petitioner had decision-making authority of such scope as would enable her to make or impact policies on a department-wide, agency-wide, or division-wide level at DOT. Petitioner's primary function was to oversee litter prevention programs and to make decisions regarding these programs only.

Am Jur 2d, Public Officers and Employees § 19.

Appeal by respondent from order entered 6 September 1995 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 9 September 1996.

Broughton, Wilkins, Webb & Sugg, P.A., by R. Palmer Sugg, for petitioner-appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Grayson G. Kelley, Associate Attorney General Robert O. Crawford, III, and Associate Attorney General Melanie Lewis Vtipil, for respondent-appellant.

LEWIS, Judge.

Both this case and a companion case, *North Carolina Department of Transportation v. Glenn I. Hodge, Jr.* (COA95-1329) (opinions filed simultaneously), raise the issue of whether the Governor properly designated certain State employee positions as "policymaking" under N.C. Gen. Stat. section 126-5.

Beginning in August 1989, Betsy Johnson Powell was employed by the N.C. Department of Transportation ("DOT") as the Director of the Highway Beautification Program ("HBP"). On 3 May 1993, then Secretary of the DOT, Sam Hunt, notified Powell that her position would be designated policymaking exempt effective 17 May 1993. On 21 May 1993, the Secretary of the DOT notified Powell that she was fired from her position effective 28 May 1993.

On 25 May 1993, Powell filed a petition for a contested case hearing in the Office of Administrative Hearings challenging the designation of her position as policymaking exempt. After the hearing, Senior Administrative Law Judge Fred G. Morrison, Jr. recommended that the designation be upheld. On 20 September 1994, the State Personnel Commission ("Commission") agreed and upheld the designation of Powell's position as policymaking exempt. Powell petitioned for judicial review. On 6 September 1995, Judge Donald W. Stephens reversed the Commission's decision. The DOT appeals.

The DOT contends that Judge Stephens erred by reversing the Commission's decision on the grounds that Powell's position was properly designated as policymaking exempt. Judge Stephens ruled that there was no competent evidence to support the Commission's conclusion that her position was vested with the authority to impose the final decision on any department-wide, agency-wide, or division-wide course of action. We agree.

N.C. Gen. Stat. section 126-5(d)(1) of the State Personnel Act permits the Governor to designate as exempt "policymaking positions"

in certain departments, including the DOT. When a position is so designated, the employee holding the position is not afforded certain protections otherwise provided to state employees in Chapter 126 of the General Statutes. *See* G.S. § 126-5(c)(3). N.C. Gen. Stat. section 126-5(b) defines a "policymaking position" as "a position delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division." G.S. § 126-5(b) (1995).

[1] A key issue here is whether, at the time Powell's position was designated as policymaking, the HBP was a "division" of the DOT, a principal state department under N.C. Gen. Stat. section 143B-6. The term "division" is not defined in the State Personnel Act. However, it is defined in the Executive Organization Act, N.C. Gen. Stat. section 143B-1 *et. seq.*, as "the principal subunit of a principal State department." G.S. § 143B-3(6) (1993).

The Commission determined that, after February 1993, the HBP was a division of the DOT. After review, we conclude that Powell preserved her objection to this determination and that it is not supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530-31, 372 S.E.2d 887, 889-90 (1988).

Prior to February 1993, the HBP was listed as a "section and unit" of the institution/division headed by the Assistant Secretary for Administration. The record shows that, in March 1993 after a departmental reorganization, the Director of the HBP reported directly to the Deputy Secretary of Highways. However, it does not show that the HBP was a division of the DOT. An organizational chart in effect in March 1993 identifies the "Division of Highways" and the "Division of Motor Vehicles" but does not list the HBP as a "division." The record evidence also does not show that the HBP functioned as a "principal subunit" of a department as specified in the G.S. section 143B-3(6) definition of "division." *See* G.S. § 143B-3(6).

[2] A second key issue is whether there is substantial record evidence to support the Commission's conclusion that Powell, as Director of the HBP, had the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division as is required for designation of her position as "policymaking." We conclude that there is not.

Since Powell's position was designated policymaking exempt in May 1993, we examine the characteristics of the position as of that time. The record shows that, as of May 1993, Powell's primary function as Director of the HWP was to oversee the litter prevention programs including the Adopt-A-Highway Program and to make decisions regarding these programs only. There is no substantial evidence to support the conclusion that she had decision-making authority of such scope as would enable her to make or impact policies on a department-wide, agency-wide, or division-wide level at the DOT. Accordingly, the trial court did not err by reversing the Commission's decision.

Given our disposition of this issue, we need not address Powell's First Amendment argument or her cross-assignment of error.

Affirmed.

Judges JOHNSON and WYNN concur.

DORIS HUMPHRIES, ADMINISTRATOR OF THE ESTATE OF STACEY HUMPHRIES, DECEASED; AND TYRONE HUMPHRIES, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANT

No. COA96-224

(Filed 19 November 1996)

Sheriffs, Police, and Other Law Enforcement Officers § 20 (NCI4th)— murder and assault by prisoner on probation—evasion of house arrest—public duty doctrine—Department of Correction not liable

The Industrial Commission erred by finding the Department of Correction negligent where one Miller was on probation and house arrest for various drug charges, with prior convictions for drug dealing, assault inflicting serious injury, and other offenses; he frequently reported to his probation officer that the leg bands necessary for his electronic house arrest were getting broken at work; the leg bands when broken could be left near the transmitter in his residence, allowing him to evade house arrest; Miller had, in fact, been fired, but his probation officer failed to contact his employer, and he assaulted plaintiff and murdered plaintiff's

decedent while evading electronic house arrest. Under the public duty doctrine, law enforcement officials and agencies are deemed to act for the benefit of the general public rather than specific individuals, with two exceptions; a special relationship between the injured party and the agency, and when the agency creates a special duty by promising protection to the agency. Nothing here indicates a special relationship and there is no indication of any promise of protection given to the plaintiffs by the probation officer or DOC.

Am Jur 2d, Escape § 24.

Liability of public officer or body for harm done by prisoner permitted to escape. 44 ALR3d 899.

Appeal by defendant from a Decision and Order entered 28 November 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 October 1996.

Judith G. Behar, for plaintiffs-appellees.

Michael F. Easley, Attorney General, by Don Wright, Assistant Attorney General, for the State.

WYNN, Judge.

While on probation and under electronic house arrest Kenneth Lee McKenneth Miller shot and killed Stacey Humphries and seriously injured Tyrone Humphries. Both Tyrone Humphries and the estate of Stacey Humphries brought actions against the North Carolina Department of Corrections (DOC) under the State Tort Claims Act alleging that its probation officer negligently supervised Miller.

The record indicates that Miller, on probation and under electronic house arrest for various drug charges, had prior convictions for drug dealing, assault inflicting serious injury and larceny of a firearm, and was suspected of federal firearms violations. He frequently reported to his probation officer that the leg bands necessary to monitor him under electronic house arrest were getting broken at work. In fact, Miller had been fired from his employment, but the probation officer failed to contact his employer to determine his employment status.

When broken, the leg bands could be left near the transmitter in his residence allowing him to evade the restrictions of electronic

house arrest. On one such occasion, Miller assaulted Tyrone Humphries and killed Stacey Humphries.

The plaintiffs' actions were heard before Deputy Commissioner Scott M. Taylor who issued a decision finding that the probation officer had breached his duty to exercise ordinary care in the supervision of Miller by failing to contact Miller's employer, and that the breach proximately caused the injuries suffered by Stacey and Tyrone Humphries. Agreeing with Deputy Commissioner Scott, the Full Commission affirmed. DOC appeals from that order.

The deciding issue on appeal is whether the public duty doctrine bars plaintiffs' claim in negligence against DOC. For the reasons given in our recent opinion of *Hedrick v. Rains*, 121 N.C. App. 466, 466 S.E.2d 281, *disc. review allowed*, 343 N.C. 511, 472 S.E.2d 8 (1996), we hold that it does and therefore reverse the decision of the Full Commission.

In that case, we noted that "[a]s a general rule of common law, specifically adopted in North Carolina, known as the 'public duty doctrine,' law enforcement officials and agencies are deemed to act for the benefit of the general public rather than specific individuals." *Id.* at 469, 466 S.E.2d at 283. The public duty doctrine, adopted by our Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), has two well recognized exceptions:

> [f]irst, where there is a *special relationship* between the injured party and the [agency], and second, where the "[agency] . . . creates a *special duty* by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise is causally related to the injury suffered."

Hedrick, 121 N.C. App. at 470, 466 S.E.2d at 284 (quoting *Sinning v. Clark*, 119 N.C. App. 515, 519, 459 S.E.2d 71, 74, *disc. review denied*, 342 N.C. 194, 463 S.E.2d 242 (1995) (citations omitted)) (emphasis added). These two exceptions have been very narrowly applied in this state. *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 404, 442 S.E.2d 75, 78, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994).

Nothing in the record of the case *sub judice* indicates a special relationship between Stacey and Tyrone Humphries and the DOC. Moreover, to make out a *prima facie* case under the special duty exception, "plaintiff must show that an actual promise was made by

the police to create a special duty, that this promise was reasonably relied upon by the plaintiff, and that this reliance was causally related to the injury ultimately suffered by plaintiff." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. There is no indication of any promise of protection given to Tyrone or Stacey Humphries by Mr. Miller's probation officer or the DOC.

Since neither exception to the public duty doctrine applies in this case, the general rule dictates that the probation officer and the DOC owed a duty to the general public at large, and not to Tyrone and Stacey Humphries specifically. Where, as here, there is no duty owed to the injured party, there can be no negligence. Accordingly, we hold that the Industrial Commission erred in finding DOC negligent.

Reversed.

Judges JOHN and McGEE concur.

PETER M. BICKET, RICHARD L. VON TACKY, WILLIAM T. BURGESS, R. J. RICHARDSON, ROY C. HACKLEY, JR., COLEMAN ROMAIN, LOUIS G. CREVELING, WILLIAM E. GENTNER, ELMER L. NICHOLSON, RICHARD A. PETTY, TOM BROOKS, AND WARREN I. KNOUFF, PLAINTIFFS v. McLEAN SECURITIES, INC., PURCELL CO., INC., (FORMERLY DIAMONDHEAD CORPORATION), PINEHURST, INCORPORATED, PINEHURST COUNTRY CLUB, INC., VICTOR PALMIERI AND COMPANY INCORPORATED, HOWARD C. MORGAN, TRUSTEE, STEVEN K. BAKER, TRUSTEE, B. CHARLES MILNER, TRUSTEE, CITIBANK, N.A., CHASE MANHATTAN BANK, N.A., THE FIRST NATIONAL BANK OF CHICAGO, FIRST PENNSYLVANIA BANK, N.A., FIRST NATIONAL STATE BANK OF NEW JERSEY, WELLS FARGO BANK, N.A., CROCKER NATIONAL BANK, AND WACHOVIA BANK AND TRUST COMPANY, N.A., DEFENDANTS

Nos. COA95-441, COA95-889

(Filed 3 December 1996)

1. Judgments § 132 (NCI4th)— consent judgment—country club—maintenance and golf tournaments—erroneous interpretation

The terms "maintenance" and "golf tournaments" in a 1980 consent judgment between the original owner and the members of a country club were used in their generic sense and unambiguous; therefore, the trial court was not authorized to consider

parol evidence and exceeded its authority by specifically limiting the meaning of "golf tournaments" and by placing qualifications on the scheduling of golf course closures due to maintenance.

Am Jur 2d, Judgments §§ 207-227.

2. Judgments § 132 (NCI4th)— consent judgment—golf starting times—applicable golf courses

A provision of a consent judgment giving country club members a right to use all existing golf courses and to reserve starting times ahead of resort guests applied only to golf courses in existence at the time of entry of the consent judgment, and the trial court erred by expanding this provision to include golf courses not in existence at that time.

Am Jur 2d, Judgments §§ 207-227.

3. Judgments § 132 (NCI4th)— consent judgment—use of country club facilities—continued existence of facilities

A provision of a consent judgment which gives members the right to use enumerated country club facilities and properties so long as they are maintained by defendants was improperly interpreted by the trial court to require defendants to ensure the continued existence of those facilities and properties.

Am Jur 2d, Judgments §§ 207-227.

4. Judgments § 132 (NCI4th)— consent judgment—use of clubhouse—required services

The trial court properly found that a consent judgment giving country club members exclusive use of a clubhouse would forbid the country club owner from leasing the clubhouse to a proprietary, commercial or political entity, but the trial court erred by finding that the parties intended that all services provided in the clubhouse at the time the consent judgment was entered should continue to be provided.

Am Jur 2d, Judgments §§ 207-227.

5. Judgments § 132 (NCI4th)— consent judgment—country club membership—transfer fees—ambiguous provision—parol evidence

The cessation of the existence of the original corporate owner of a country club rendered ambiguous a provision of a consent judgment relating membership transfer fees to the "cur-

rent initiation fee" being charged to purchasers of property from the corporation, and the trial court was authorized to consider parol evidence to determine the intention of the parties as to the meaning of this provision.

Am Jur 2d, Judgments §§ 207-227.

6. Judgments § 132 (NCI4th)— consent judgment—country club—membership transfer—membership categories—Village of Pinehurst—private golf carts—protected members—erroneous interpretations

The trial court erred in its interpretations of a 1980 consent judgment by placing limitations on the right of a country club's board of directors to approve the transfer or upgrade of membership, by restricting the country club owner's right to create new categories of membership, by ruling that the "Village of Pinehurst" included areas developed after entry of the consent judgment, by extending the consent judgment's protections with respect to the use of privately-owned golf carts to members not parties to the consent judgment, and by concluding that members who joined the country club after entry of the consent judgment are protected by that judgment.

Am Jur 2d, Judgments §§ 207-227.

7. Judgments § 132 (NCI4th)— consent judgment—country club—increase in dues and fees—existing golf courses—resort guest

The trial court did not err in concluding that the formula currently used by a country club's owner to calculate permissible annual increases in membership dues and fees pursuant to the Consumer Price Index complies with the provisions of a 1980 consent judgment; nor did the trial court err by interpreting the phrase "all existing golf courses" in the consent judgment to mean only courses in existence at the time of entry of the consent judgment. However, the trial court erred in its interpretation of "Resort guest" because that term is ambiguous in the context in which it was used, the trial court should have considered parol evidence to determine the intention of the parties to the consent judgment, and the trial court failed to make the necessary findings so as to provide a sufficient basis for appellate review.

Am Jur 2d, Judgments §§ 207-227.

8. Judgments § 133 (NCI4th)— consent judgment—interpretation of provisions—when parol evidence considered

When the provisions of a consent judgment are unambiguous, the trial court is limited to an interpretation in keeping with the express language of the document and without consideration of parol evidence. However, the trial court is required to interpret ambiguous provisions of a consent judgment consistent with the intention of the parties to the judgment and by considering parol evidence if necessary.

Am Jur 2d, Judgments §§ 219-220.

Appeal by plaintiffs and defendants from order entered 28 December 1994 by Judge F. Fetzer Mills in Moore County Superior Court. Heard in the Court of Appeals 26 January 1996. Reassigned to a differently constituted panel for decision by order dated 14 October 1996.

Kitchin, Neal, Webb & Futrell, P.A. by Henry L. Kitchin and Stephan R. Futrell, for plaintiffs.

Van Camp, West, Hayes & Meacham, P.A. by James R. Van Camp and Michael J. Newman, for defendants.

WYNN, Judge.

Throughout the 1970s, Diamondhead Corporation ("Diamondhead") developed and sold lots and memberships in the Pinehurst Country Club. Diamondhead owned Pinehurst, Inc., which in turn owned Pinehurst Country Club, Inc. which operated the Pinehurst Country Club. Diamondhead also owned and operated Pinehurst Hotel and Country Club (later called Pinehurst Resort and Country Club), a large public resort consisting of a hotel, villas, condominiums, and a conference center.

In the late 1970s, a dispute arose between Diamondhead and members of the Pinehurst Country Club concerning the nature and extent of the members' privileges. In January 1980, a group of Pinehurst Country Club members filed a class action lawsuit seeking a declaration of their rights. They contended that the defendants had made certain representations to induce them to purchase property in Pinehurst and to become members of the Pinehurst Country Club. That suit ended in the Final Consent Judgment which is at issue in the present case.

In 1984, Resorts of Pinehurst, Inc. ("Resorts") purchased the Pinehurst Country Club and succeeded to the interests of the original owner-defendants. Around 1990, a dispute arose between Resorts and members of the Pinehurst Country Club over certain provisions of the Final Consent Judgment, *inter alia* the allocation of starting times on certain golf courses, the creation of additional classes of membership, the increase in initiation fees, the provision of certain amenities at the Pinehurst Country Club and the applicability of the provisions in the Final Consent Judgment to members who joined the Pinehurst Country Club after the entry of that judgment. In July 1991, several members of the Pinehurst Country Club filed a motion in the cause seeking to hold Resorts in contempt alleging violation of some of the provisions of the Final Consent Judgment. They subsequently withdrew that motion and, as agreed upon by the parties, filed an action for a declaratory judgment asking the court to "interpret, construe and clarify certain provisions of the said 1980 Final Consent Judgment." After a hearing on the matter, the court rendered its judgment and both parties appeal certain provisions in that order. This Court consolidated those appeals.

Plaintiffs and defendants each make several assignments of error which essentially present to this Court one issue: Whether the trial court impermissibly modified the Final Consent Judgment.

Recently, in *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996), our Supreme Court reaffirmed that "[a] consent judgment is a court-approved contract subject to the rules of contract interpretation." The primary focus in interpreting a contract is the original intention of the parties. *Jefferson-Pilot Life Ins. Co. v. Smith Helms Mulliss & Moore*, 110 N.C. App. 78, 82, 429 S.E.2d 183, 186 (1993).

"If the plain language of a contract is clear, the [original] intention of the parties is inferred from the words of the contract." *Walton*, 342 N.C. at 881, 467 S.E.2d at 411. The trial court's determination of original intent is a question of fact. Issues of fact resolved by the trial court in a declaratory judgment action are "conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary." *Miesch v. Ocean Dunes Homeowners Assn.*, 120 N.C. App. 559, 561, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996).

On the other hand, where an ambiguity exists, the court may step in and consider parol evidence of the parties' intent in forming the

contract. *Lattimore v. Fisher's Food Shoppe, Inc.*, 313 N.C. 467, 474, 329 S.E.2d 346, 350 (1985). "An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). The trial court's determination of whether the language of a contract is ambiguous is a question of law; accordingly, our review of that determination is de novo. *See* 17A Am. Jur. 2d *Contracts* § 339 (1991); *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

In the case before us both parties contend that the trial court erred in interpreting certain provisions of the Final Consent Judgment either by construing an unambiguous provision in conflict with its express language or by construing an ambiguous provision in a manner inconsistent with the intention of the original parties.

I. Defendants' Appeal

A. Final Consent Judgment—Paragraph 7

Defendants first assign as error the trial court's interpretation in the Declaratory Judgment of several provisions in paragraph 7 of the Final Consent Judgment which provides:

> 7. In addition to the foregoing rights applicable to each separate subclass of members of the principal class, each member of the principal class had obtained certain other rights in and to the use of the facilities and properties of Pinehurst, Incorporated, and its subsidiaries, so long as said properties and facilities are operated and maintained by Pinehurst, Incorporated, its parent corporations, subsidiary corporations, successors, or assigns, which rights are not subject to change by the defendants and which rights include the following:
>
> (a) The use of all existing golf courses;
>
> (b) The use of the existing golf course driving ranges;
>
> (c) The use of the existing tennis club and tennis courts;
>
> (d) The use of the riding club including lounge, tack room, stables and trails;
>
> (e) The use of the Gun Club including skeet and trap ranges;
>
> (f) The use of the archery range including field and bow hunter ranges;

> (g) The use of the Pinehills (Colonial Pines) Recreational and Swim Club and the existing neighborhood recreation centers and swimming pools in Units 1 and 4;
>
> (h) The use of the Members Private Clubhouse, which use shall be exclusively by present and future members of Pinehurst Country Club, Inc., and officers and managerial employees of the defendants and their bona fide guests;
>
> (i) The use of Lake Pinehurst;
>
> (j) The use of the Lake Pinehurst Marina;
>
> (k) The right to reserve one full day ahead of Resort guests up to 50% of the available starting times on any given day. Any of such starting times not so reserved by a member shall thereafter be available to both members and Resort guests without preference. The remaining 50% of the available daily starting times are reserved for Resort guests; provided, any of such starting times not utilized by Resort guests shall be available on the day of play to both members of Pinehurst Country Club, Inc. and Resort guests without preference (Nothing in this subparagraph shall preclude the closing of one or more courses for maintenance, golf tournaments and other such purposes.);
>
> (l) The right to join the Walking Club, which entitles the member to play golf using a carry bag daily after 4:00 p.m. Eastern Standard Time or 5:00 p.m. Eastern Daylight Time, whichever is applicable, subject to course availability and, as to Active and Inactive Resident Members, subject to the payment of the green fees provided for in subparagraph 6(e) and (f), respectively.

In addition to any and all fees provided for in paragraph 6, above, fees are imposed for the use of the Driving Range, Gun Club, Archery Range, Riding Club, and boats on Lake Pinehurst and may be imposed for the use of facilities hereafter constructed. Such fees (other than dues) are subject to change at any time, in the discretion of the defendant Pinehurst, Incorporated.

The use of the above facilities and properties [excluding the use of the Members Private Clubhouse except as set out in subparagraph (h) above] may be extended by Pinehurst, Incorporated to future purchasers of property from or through

Pinehurst, Incorporated, its subsidiaries and affiliates, future members of Pinehurst Country Club, Inc. and Resort and other guests of Pinehurst, Incorporated, or its affiliates and subsidiaries, upon such terms and conditions as Pinehurst, Incorporated shall determine. Any membership hereafter purchased directly from Pinehurst Country Club, Inc. shall provide for an initiation fee of at least $1,000 and, monthly dues and other fees equal to or greater than the dues and fees paid by the then Inactive Resident members.

Use of the above facilities and properties shall be subject to and in accordance with reasonable rules and regulations imposed by Pinehurst, Incorporated or its affiliates and subsidiaries.

[1] Defendants argue that the trial court exceeded its authority in interpreting the terms "maintenance" and "golf tournaments" as used in paragraph 7 of the Final Consent Judgment. The trial court stated:

(c) The term "tournament," as used in the parenthetical of paragraph 7(k), is limited to those traditional tournaments of national or regional scope which have from time to time been held at the Pinehurst Country Club golf course, and are limited to the following tournaments:

North-South Men's Amateur; North-South Women's Amateur; North-South Senior Men's Amateur; North-South Senior Women's Amateur; North-South Junior Boys'; Donald Ross Junior Boys' and Girls'; and any event conducted at the national or regional level by USGA, PGA, Carolinas Golf Association, Carolinas PGA, and which for entry requires qualification on a nation or regional level.

(d) The term "maintenance" shall include scheduled and unscheduled maintenance which is for legitimate course maintenance and such express limitations as shall be dictated by weather and seasonal conditions then prevailing. Any such closure for maintenance shall be scheduled in such a way as to give maximum notice to the membership under the conditions then existing, and shall further be scheduled in such a way as to minimize the loss of available starting times.

We find that the terms "maintenance" and "golf tournaments" as used in the Final Consent Judgment are unambiguous. Both terms were used in their generic sense and the express language of the pro-

visions in which those terms are found contain none of the words of limitation that the trial court attributed to the terms. Since those terms are unambiguous, the trial court was not empowered to consider parol evidence. Thus, the trial court exceeded its authority by specifically limiting the meaning of "golf tournaments" and by placing qualifications on the scheduling of course closures due to maintenance. We therefore remand this issue to the trial court for modification of the Declaratory Judgment consistent with this opinion.

[2] Defendants also argue that the trial court erred in its interpretation of the starting times provision of paragraph 7(k) which states that members of the principal class have "[t]he right to reserve one full day ahead of Resort guests up to 50% of the available starting times on any given day." The trial court found this provision to mean that "the members of Pinehurst Country Club shall have the right to reserve one full day ahead of a resort guest up to fifty per cent of all available starting times." We find this portion of the trial court's interpretation of that provision to be consistent with the express, unambiguous language of the Final Consent Judgment. However, the trial court went on to add that this provision applied to "each and every golf course." In so doing, the trial court expanded the number of golf courses that members were entitled to use under the plain language of paragraph 7(a). Under that paragraph members have the right to use "all existing golf courses," which at the time of entry of the Final Consent Judgment were courses one through six. Therefore, the preferential starting times provision of paragraph 7(k), when read in conjunction with paragraph 7(a), entitles class members to reserve one full day ahead of a resort guest up to fifty per cent of all available starting times *on courses one through six.* Accordingly, we remand for modification of the Declaratory Judgment to limit the preferential starting times provision to courses one through six.

[3] Defendants next argue that the trial court erred in requiring Resorts to maintain, in perpetuity, each of the properties and facilities set forth in paragraph 7(a)-(j) of the Final Consent Judgment. The trial court stated:

> The term "which rights include the following," as it appears in the beginning paragraph of paragraph 7 of the Final Consent Judgment, is intended to mean certain specific rights of usage that are included within the general classification of rights of usage which are those matters designated as (a) through (l) in paragraph 7 of the Final Consent Judgment. Nothing herein shall

> allow the owner and operator of the Resort selectively to eliminate any listed amenity or the use thereof without the consent of the protected class.
>
> The term "as long as said facilities and properties are operated and maintained by the Respondents" means that the Respondents are not required to operate and maintain the Resort complex as a whole, but it is not intended to allow the Respondents to selectively eliminate specific portions thereof that are enumerated in paragraph 7 of the Final Consent Judgment.

We agree with the defendants that this interpretation is unnecessary because the beginning provisions of paragraph 7 of the Final Consent Judgment are unambiguous. The plain language of that provision gives class members the right to use the facilities and properties enumerated so long as those facilities are maintained by defendants. Class members' right to use those facilities and properties *so long as they are maintained by defendants* is not subject to change. The trial court's interpretation requiring defendants to insure the continued existence of the amenities listed is inconsistent with the express, unambiguous language of the provision and is therefore erroneous. Accordingly, we remand this issue to the trial court for modification of the Declaratory Judgment consistent with this opinion.

[4] Defendants next assign as error the trial court's interpretation of paragraph 7(h) concerning members' exclusive use of the Members Private Clubhouse. The trial court found that "the parties intended that the reservation of the exclusive use to members would forbid the owner of Pinehurst Country Club and Resort Properties from leasing said clubhouse or any part thereof to proprietary, commercial, or political entities." Such an interpretation is consistent with the unambiguous language of the provision at issue. However, the trial court went on to add that "the parties also intended that the services provided in the Members' Private Clubhouse at the time the Final Consent Judgment was entered, including (but not limited to) the health spa, the dining room, and locker rooms, should continue to be provided." Nothing in the express and unambiguous language of paragraph 7(h) would allow such an interpretation. Thus, the trial court erred in adding this additional qualification to its interpretation of the provision in question. We remand this issue to the trial court for modification of the Declaratory Judgment by deleting the words: "The

Court further interprets that the parties also intended that the services provided in the Members' Private Clubhouse at the time the Final Consent Judgment was entered, including (but not limited to) the health spa, the dining room, and locker rooms, should continue to be provided."

B. Final Consent Judgment—Paragraph 6

[5] Defendants next assign as error the trial court's interpretation in the Declaratory Judgment of several provisions in paragraph 6 of the Final Consent Judgment which outlines the rights of each class of membership. For those classes of membership which are transferable paragraph 6 provides: "Membership is transferable with the approval of the Board of Directors of Pinehurst Country Club, Inc. and upon the payment of a transfer fee." In addition, "the transfer fee shall not exceed thirty percent of the then current initiation fee for the applicable class of membership transferred. (In the case of a Resident membership, 'current initiation fee' refers to the amount then being charged to property purchasers from Pinehurst, Incorporated.)" Paragraph 6 of the Final Consent Judgment concludes:

> The above stated rights are appurtenant only to the existing memberships and nothing in this Judgment shall preclude Pinehurst Country Club, Inc. and its successors from hereafter establishing (i) additional classes of membership in Pinehurst Country Club, Inc.; or (ii) different rights for persons whose class of membership is purchased directly from Pinehurst Country Club, Inc., after this date. Any such future memberships shall provide for an initiation fee of at least $1,000 and monthly dues and other fees equal to or greater than the dues and fees charged to or paid by the then Inactive Resident members of Pinehurst Country Club, Inc.
>
> As used herein, Village of Pinehurst refers to and includes all property in Old Town as shown on the attached map together with all lots in the Units developed and sold by Pinehurst, Incorporated.

Defendants assign as error the trial court's interpretation of "current initiation fee" as it applies to the transfer fee allowed for Resident Members. Since Pinehurst, Incorporated ceased doing business in 1982, the trial court fixed the initiation fee from which allowable transfer fees are determined at the amount of the initiation fee charged to the last purchaser from Pinehurst, Incorporated.

We hold that the cessation of Pinehurst, Incorporated has rendered the provision in question ambiguous. The trial court was thus authorized to consider parol evidence to determine the original parties' intention as to the meaning of this provision. After hearing evidence, a trial court must make findings of fact as to the original parties' intent and those findings must support its ultimate judgment. However, the trial court in the subject case failed to make any findings of fact as to the original parties' intent, instead basing its conclusions "upon the language . . . of the Final Consent Judgment, and in consideration of the evidence presented." By so doing, the trial court has failed to provide this Court with a sufficient basis upon which to review the propriety of its judgment. Therefore, we must remand to the trial court for appropriate findings of fact on this issue.

[6] Defendants next assign as error the trial court's interpretation of the provisions requiring the approval of the Board of Directors upon transfer or upgrade of membership. The trial court concluded:

> [T]he term "with the approval of the Board of Directors" means that the Board of Directors of Pinehurst Country Club, Inc. shall have the right to approve or disapprove individual requests for membership in each of the subclasses of membership set out in paragraph 6 of the Final Consent Judgment. Such requests for membership shall be by application resulting from the direct sale of a "new" property in the Village of Pinehurst or by transfer of an existing membership. This approval or disapproval of the Board of Directors shall be based on the standards of reputation, good moral standards, and creditworthiness previously established in the Rules and Regulations of Pinehurst Country Club, Inc., and shall not be based on arbitrary considerations or policy decisions forestalling an individual membership application, or acceptance, or precluding, or denying approval as to any subclass as a group.

Unlike the trial court's interpretation, the express and unambiguous language of the Final Consent Judgment contains no limitation on the Board's approval or disapproval. Thus, the trial court's interpretation of this provision went beyond the express language used by the original parties and qualified the accepted basis for granting or withholding the Board's approval when such a qualification was not included originally. Accordingly, we remand this issue to the trial court for modification of the Declaratory Judgment to delete the limitation on the Board's approval or disapproval of individual requests

for membership in each of the subclasses of membership set out in paragraph 6 of the Final Consent Judgment.

Defendants next argue that the trial court erred in restricting Resorts' right to create new categories of membership as provided in paragraph 6(k) of the Final Consent Judgment. The trial court concluded that "the owners of Pinehurst Country Club may in their discretion create additional classes of memberships or different rights for persons whose class of membership is purchased directly from Pinehurst Country Club, Inc." This interpretation is clearly consistent with the unambiguous language of the Final Consent Judgment. However, the trial court went on to conclude that the "Tier Two" category of membership created in 1985 did not comply with the Final Consent Judgment because the new membership class did not have "substantially different rights and privileges and obligations from those classes of memberhsip set forth in paragraph 6 of the Final Consent Judgment." It then outlined procedures for the subsequent reinstatement of memberships which had been terminated, and added requirements that members of any new category of membership must reside in the Village of Pinehurst and that Resorts notify existing members prior to creating a new class. These qualifications are beyond the scope of the express and unambiguous language of the provision in question. We therefore remand this issue for modification of the Declaratory Judgment to delete the restrictions that new classes of membership must have substantially different rights, privileges and obligations from those set out in paragraph 6 of the Final Consent Judgment and that members of any new category of membership must reside in the Village of Pinehurst. We remand for further modification of the Declaratory Judgment to omit the procedures for subsequent reinstatement of memberships which had been terminated and to eliminate the requirement that all classes of membership affected by the creation of a new class be notified in writing prior to its creation.

Defendants next argue that the trial court erred by restricting membership in the Pinehurst Country Club to lots in units or planning districts platted or developed as of the date of the Declaratory Judgment. Paragraph 6 of the Final Consent Judgment which outlines the rights of each class of membership provides that to qualify for some classes of membership, the member must own property in the Village of Pinehurst, while others need not. Following that provision, the Final Consent Judgment defines "Village of Pinehurst" as it is used in that section. The trial court ordered:

> [I]n addition to the primary definition set forth in the Final Consent Judgment all lots in the units or planning districts shown on the Master Use Plan which have been developed and platted up to the date of this Declaratory Judgment shall be considered to be part of the "Village of Pinehurst" as that term is used in the Final Consent Judgment.

The definition of "Village of Pinehurst" in the Final Consent Judgment is an unambiguous description of the boundaries of that area as it pertains to the membership requirements for the various classes of membership described in paragraph 6 and whose rights were determined by the 1980 Final Consent Judgment. As such, it has no application beyond the parties to the 1980 agreement and the trial court's interpretation of "Village of Pinehurst" to include areas developed after the entry of the Final Consent Judgment and up to the entry of the Declaratory Judgment is erroneous. We therefore remand this issue for modification of the Declaratory Judgment to limit the definition of "Village of Pinehurst" to areas platted or developed as of the entry of the Final Consent Judgment.

C. Final Consent Judgment—Paragraph 8

Defendants next assign as error the trial court's interpretation of paragraph 8 of the Final Consent Judgment which provides that certain specifically enumerated classes of membership "have the personal, nontransferable and nonassignable right for his or her lifetime to own and operate a golf cart upon the trailways of Pinehurst Country Club, Inc., for an annual fee." In addition, "[i]ndividuals not within one of the categories described above may not operate a privately-owned golf cart on the trailways of Pinehurst Country Club, Inc., pending further action by the Board of Directors of Pinehurst, Incorporated and a public announcement by the Board of a change in such policy."

The trial court found "that this policy of prohibiting use of privately owned carts was changed in 1985 so that additional members were allowed to own and operate a golf cart on the trailways of Pinehurst Country Club, Inc." Since this finding of fact is supported by competent evidence in the record, it is conclusive on appeal. *See Miesch v. Ocean Dunes Homeowners Assn.*, 120 N.C. App. 559, 561, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996). However, this finding does not support the trial court's ultimate conclusion that "those members allowed to own and operate golf carts [under the new policy] are entitled to the same protections

of the Final Consent Judgment as were the original cart owners." The plain and unambiguous language of the Final Consent Judgment contains no such entitlement. "[I]t is not the province of the courts to construe contracts broader than the parties have elected to make them, or to award benefits where none were intended." *Carter v. Insurance Co.*, 208 N.C. 665, 668, 182 S.E. 106, 107 (1935). Thus, the trial court erred by extending the Final Consent Judgment's protections with respect to the use of privately-owned golf carts to members not parties to the 1980 agreement. We remand this issue for modification of the Declaratory Judgment to delete the conclusion that the additional members allowed to own and operate golf carts under the new policy are entitled to the protections of the Final Consent Judgment.

D. Final Consent Judgment—Protected Class

Defendants finally assign as error the trial court's conclusion that members who joined the Pinehurst Country Club after the entry of the Final Consent Judgment are within the class protected by that agreement. The Final Consent Judgment states:

> This action is certified as a class action pursuant to the provisions of Rule 23 of the North Carolina Rules of Civil Procedure in which the class represented by the named plaintiffs is defined as the entire membership of Pinehurst Country Club, Inc (other than those on the President's List) as of the 1st day of October, 1980.

The plain, unambiguous language of this provision limits the class to those holding membership as of 1 October 1980. The trial court, however, extended the protections of the Final Consent Judgment not only to those within the classes of membership as of the entry of that judgment, but also to those memberships which have come into existence since the Final Consent Judgment. Such an interpretation exceeds the trial court's authority to interpret the Final Consent Judgment consistent with its express, unambiguous terms and is therefore erroneous. We remand this issue for modification of the Declaratory Judgment to limit the protections of the Final Consent Judgment to only those holding membership as of 1 October 1980.

II. Plaintiffs' Appeal

A. Increase in Dues and Fees

[7] Plaintiffs first contend that the trial court erred in failing to clarify the Final Consent Judgment's provision limiting annual increases

in dues and fees. They argue that it was error for the trial court to declare as a matter of law that "the formula currently employed by Resorts of Pinehurst, Incorporated, for calculating permissible annual increases in membership dues and fees pursuant to the Consumer Price Index is both mathematically correct and complies with the provisions of the Final Consent Judgment."

The Final Consent Judgment provides:

> 10. All membership dues and the annual fees charged for use of a privately-owned golf cart are fixed as of January 1, 1980 (base fees and base dues) and shall not be increased more than once in any calendar year subsequent to 1980; provided, however, on the effective date of any such increase, the total percentage increase in such dues and fees since January 1, 1980 shall not exceed the percentage increase in the Consumer Price Index since December 31, 1979.

The record indicates that the formula currently being employed to calculate the present year's dues is:

$$\frac{\text{Last Year's CPI—Dec. '79 CPI}}{\text{Dec. '79 CPI}} = \text{Rate Increase}$$

Rate Increase x 1980 Dues = Current Year's Permissible Dues

We find that this formula complies with the express language of the Final Consent Judgment and the trial court did not err in so stating. By concluding that the formula currently employed by Resorts is consistent with the requirements of the Final Consent Judgment, the trial court effectively clarified and interpreted the provision at issue and plaintiffs' argument to the contrary is without merit.

B. "All Existing Golf Courses"

Plaintiffs next contend that the trial court erred in interpreting the phrase "all existing golf courses" as used in paragraph 7(a) of the Final Consent Judgment to mean only courses one through six at Pinehurst Country Club. The phrase at issue unambiguously refers to all golf courses in existence as of the entry of the Final Consent Judgment in 1980. The record indicates that only courses one through six were completed and in existence at that time. Thus, the trial court's interpretation is consistent with the plain meaning of the phrase as it is used in the Final Consent Judgment.

C. "Resort Guest"

Plaintiffs next take issue with the trial court's interpretation of the term "Resort guest" as used in paragraph 7(k) of the Final Consent Judgment. The trial court stated that "the term 'resort guest,' as used in paragraph 7(k), was intended to mean any guest of the owner of the Pinehurst Country Club regardless of whether that guest is a paying customer at the Pinehurst Hotel." This interpretation is consistent with defendants' argument that the term "Resort guest" should be interpreted as "any guest of the Resort, whether staying in the Hotel, Villas, or anywhere else."

Plaintiffs, however, contend that the trial court impermissibly modified the Final Consent Judgment by expanding the definition of "Resort guest" to include any paying customer of Resorts, whether or not that customer is staying at the Pinehurst Hotel or Resorts' condominiums or villas. We hold that the term in question is ambiguous in the context in which it is used. The trial court was thus authorized to consider parol evidence as to the original parties' intention. However, in this case the trial court failed to make the necessary findings of fact so as to provide this Court with a sufficient basis for review. In light of this deficiency, we must remand to the trial court for appropriate findings of fact on this issue.

III. Conclusion

[8] In rendering its Declaratory Judgment the trial court was authorized first and foremost to determine whether the various provisions of the Final Consent Judgment were ambiguous. Where the provisions were unambiguous, the trial court was limited to an interpretation in keeping with the express language of the document and without considering parol evidence. "The court cannot under the guise of interpretation rewrite the contract for the parties." *Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 120, 344 S.E.2d 97, 100 (1986).

Where the provisions were ambiguous, the trial court was required to interpret the provisions in question, considering parol evidence if necessary, consistent with the intention of the original parties to the Final Consent Judgment in 1980. "The courts' province is to construe, not make contracts for parties, and courts cannot relieve a party from a contract because it is a hard one." *Belk's Department Store v. Insurance Co.*, 208 N.C. 267, 270, 180 S.E. 63, 65 (1935).

We conclude that the trial court impermissibly modified certain provisions of the Final Consent Judgment and failed to make sufficient findings of fact to support its interpretation of other provisions. Thus, for the reasons set forth in this opinion, we affirm in part, reverse in part and remand in part for findings of fact and entry of judgment consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Chief Judge ARNOLD and Judge SMITH concur.

STATE OF NORTH CAROLINA v. BOBBY LEE SMITH

No. COA95-1003

(Filed 3 December 1996)

1. Searches and Seizures §§ 118, 85 (NCI4th)— anticipatory search warrants—requirements

The trial court erred in a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine by denying defendant's motion to suppress evidence obtained through an anticipatory search warrant. Although anticipatory warrants are constitutionally permissible under both the North Carolina and federal constitutions, this warrant is defective under the North Carolina Constitution because the ultimate locus of the contraband could have been anywhere; there were no conditions governing execution of the warrant, so that the investigators rather than the issuing judge totally controlled the events giving rise to probable cause; the warrant was overly broad in that it did not ensure that the cocaine was on a sure course to the enumerated premises; and the warrant draws no nexus between the criminal activity, the circumstances of the intended seizure, and the premises. Anticipatory warrants must set out on their face explicit, clear, and narrowly drawn triggering events which must occur before execution may take place; those triggering events must be ascertainable and preordained (meaning that the property is on a sure and irreversible course to its destination); and no search may occur unless and until the property does in fact arrive at that destination. N.C. Const. art. I, § 20.

Am Jur 2d, Searches and Seizures § 119.

2. Searches and Seizures § 1 (NCI4th)— invalid warrant—North Carolina Constitution—no good faith exception

Under North Carolina's Constitution, no good faith exception exists which might "save" the fruits of a search made pursuant to an invalidated warrant. Even if this case were decided on federal Fourth Amendment grounds, the good faith exception would not apply; where, as here, the State knew the plot, carefully developing the controlled drug delivery from start to finish, there is no excuse for not making the full script of events fully known to the magistrate through the affidavits presented to justify the warrant.

Am Jur 2d, Searches and Seizures § 3.

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

3. Searches and Seizures § 28 (NCI4th)— controlled drug sale—no exigent circumstances

No exigent circumstances were argued, nor should have been, in a prosecution for conspiracy and trafficking in cocaine, given that investigators exercised near absolute control over the contraband, conducted extensive human and electronic surveillance over the transaction, and received constant reports from an informant.

Am Jur 2d, Searches and Seizures § 76.

Appeal by defendant from orders entered 27 January 1994 and 14 April 1994 by Judge Robert L. Farmer in Wake County Superior Court, and judgments entered 30 September 1994 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 14 May 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General John H. Watters, for the State.

Fisher Law Firm, P.A., by C. Douglas Fisher, for defendant appellant.

SMITH, Judge.

Defendant appellant Bobby Lee Smith was convicted of conspiracy to traffic in cocaine and trafficking in cocaine by possession and received active terms to be served consecutively. Defendant appeals,

contending the trial court erred in denying his motions to suppress evidence obtained pursuant to execution of an anticipatory search warrant. We conclude that although the North Carolina Constitution does not preclude the use of anticipatory search warrants, the warrant here was constitutionally infirm. On this basis we reverse.

In the fall of 1991, investigators from the State Bureau of Investigation (SBI) and the Wake County Sheriff's Department (collectively, the investigators) targeted defendant and William Patrick Parra (Parra) as subjects of an undercover drug investigation. The investigators suspected defendant and Parra were confederates engaged in the distribution of cocaine. Over time, the investigators were successful in gathering evidence against David Lloyd Thompson (Thompson), who would at various times purchase cocaine from, and sell cocaine to, defendant and Parra.

The investigators confronted Thompson with evidence against him, and asked him to cooperate with their investigation against defendant and Parra. Thompson agreed and began a series of contacts with Parra, during which he would wear a body transmitter (a "wire"). On 22 January 1993, Thompson went to Parra's residence, at which time Parra expressed his desire to obtain a kilogram of cocaine for resale. To facilitate the drug transaction, the investigators obtained a kilogram of cocaine from the evidence locker of the SBI and initiated plans for a "supply and buy" transaction between Thompson and Parra.

Once the arrangements for the cocaine were in place, Thompson called Parra (under supervision of the investigators) and told him that delivery could take place at a time and place of Parra's choosing. Parra decided to take delivery on 29 January 1993. However, this delivery date was aborted by the investigators because they were unprepared to react so quickly. Since Parra was to choose the delivery site, the investigators developed four separate contingency plans for places they believed the transaction might occur.

With the contingency plans in place, Thompson returned to Parra's residence to make plans for delivery. On 12 February 1993, Thompson phoned Parra to indicate his readiness to deliver the cocaine. On 14 February 1993, Thompson phoned Parra to arrange an initial meeting location, and plans were made to conduct the purchase the next day (15 February 1993) at Wilsonville Crossroads near the border between Wake and Chatham Counties.

At 8:00 p.m. on 14 February 1993, Wake County Sheriff's Detective T.A. Coleman (Coleman) and Rebecca A. Waters (Waters), a Wake County Assistant District Attorney, went to the home of Donald W. Stephens, Superior Court Judge. Coleman and Waters applied for, and Judge Stephens issued, a search warrant. The affidavit for the warrant included, in pertinent part, the following statement dealing with probable cause:

> 10. *On February 15, 1993, I received information from a confidential informant who, within the past seventy-two hours had observed a quantity of cocaine located in the residence of BOBBY "BOB" LEE SMITH* located on Old Lystra Road, Orange County, North Carolina. . . . Based on my training, experience and evidence gathered through this investigation, I have the opinion that this informant's information is correct and accurate.

(Emphasis added.)

The warrant authorized the investigators to search appellant's residence for, *inter alia*, records of drug sales, drugs and drug paraphernalia, currency, and documents related to the ownership and use of his home. The affidavit was written in the present or past tense, and in no way expresses that it is "contingent," or in "anticipation" of future events.

On the morning of 15 February 1993, the investigators positioned surveillance teams at the Wilsonville Crossroads area in the woods surrounding the homes of defendant and Parra, and in the air via an SBI airplane. The investigators also established an elaborate set of signals for the informant Thompson to use at various points of the intended transaction. For instance, once the transaction occurred, Thompson was to remove his cap and turn on the headlights of his car. And, using the body transmitter, Thompson was to inform the investigators of any last minute information or changes in plans.

Thompson, followed by the investigators, met Parra at the Wilsonville Crossroads. Thompson pulled beside Parra's vehicle, and they remained there and conversed for three to five minutes. Parra then left the crossroads, and Thompson followed. While under constant surveillance, Parra led Thompson to defendant's residence in Orange County. Defendant was outside when Thompson and Parra arrived, and defendant welcomed them into a fenced-in area on defendant's property.

Parra, Thompson and defendant then entered a shop on defendant's premises, whereupon Thompson produced the cocaine, and money was exchanged for the drugs. Parra provided Thompson with one thousand dollars, and defendant provided ten thousand dollars. Once Thompson left the shop, he took off his hat—per the prearranged signal—and alerted the investigators (via the body microphone) that no one else was present in the building, and that he had seen no weapons. On Thompson's signal, the investigators entered the shop, searched it, recovered the cocaine and numerous other items, and placed Smith under arrest.

Defendant was indicted on three drug-related counts. Defendant's pretrial motions to suppress (pursuant to N.C. Gen. Stat. § 15A-971 (1988)), on state and federal constitutional grounds, and statutory grounds, were denied. At trial, the items seized, including the cocaine, were used as evidence to convict defendant for conspiracy to traffic in cocaine and trafficking in cocaine by possession. From these convictions, defendant appeals.

A. Analysis

[1] Both the State and defendant agree that the warrant at issue was "anticipatory," meaning it was "issued in advance of the receipt of particular property at the premises designated in the warrant . . . ." *U.S. v. Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993). However, the parties part company on the issue of whether the anticipatory warrant issued by Judge Stephens passes constitutional muster. Seeing that no North Carolina precedent exists defining and explicating the use of anticipatory warrants, we turn to the federal circuit courts for guidance. Based on our review of the existing federal law regarding anticipatory warrants, we find the law on the subject reasonably settled, and reverse the trial court's denial of defendant's motion to suppress. Accordingly, we reverse defendant's convictions.

I. Anticipatory Search Warrants.

Our research reveals that the issue of anticipatory search warrants has been visited but once by a North Carolina court, in *State v. Rosario*, 93 N.C. App. 627, 633, 379 S.E.2d 434, 437, *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989). There, this Court noted in dicta that " 'anticipatory' warrants . . . have almost universally been upheld." *Id.* Our review of the federal circuits accords with the conclusion of the *Rosario* Court, that there is no Fourth Amendment infirmity "indigenous to anticipatory search warrants—although such

warrants must, of course, be issued under proper circumstances, upon a proper showing, and with proper safeguards." *Ricciardelli*, 998 F.2d at 11 (reviewing the general approval of such warrants by seven other federal circuits); and *see U.S. v. Garcia*, 882 F.2d 699, 702-03 (1989) (surveying state and federal jurisdictional rulings on anticipatory warrants), *cert. denied*, 493 U.S. 943, 107 L.Ed.2d 336 (1989).

Defendant's constitutional challenge to the instant anticipatory warrant proceeds under the Fourth and Fourteenth Amendments to the federal constitution, and article I, section 20 of the North Carolina Constitution. Because we decide this case on adequate and independent state grounds, and because in this instance our state constitution affords a greater protection to defendant, we decline to apply our analysis to the rights prescribed by the federal constitution. *See State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988). Although our courts have not always agreed about the relationship between our constitution's article I, section 20 provision and its federal counterpart the Fourth Amendment, the *Carter* Court made it clear that the two provisions are not substantively identical—nor are they perfectly parallel as to the rights they bestow. "The framers of our constitution sought to check the tendency of government to overreach by placing a constitutional mantle around the right to privacy in one's person, home and effects." *Carter*, 322 N.C. at 718, 370 S.E.2d at 558. Thus, federal cases cited or discussed in this opinion only serve as points of reference, and in no way compel or control the result we reach. *Id.*; and *see Michigan v. Long*, 463 U.S. 1032, 1041, 77 L.Ed.2d 1201, 1214 (1983).

In general, the standard for a court reviewing the issuance of a search warrant is " 'whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.' " *State v. Ledbetter*, 120 N.C. App. 117, 121, 461 S.E.2d 341, 343 (1995) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L.Ed.2d 721, 724 (1984)). The judicial official's decision pivots on whether the affidavits submitted to her supply probable cause that the illegal item[s] or evidence sought will be at the premises described *when the search warrant is executed. State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citing *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976)); *United States v. Dornhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005, 104 L.Ed.2d 155 (1989). Our statutes restrict the information a magistrate may utilize in making the probable cause determination. No "information other than that

contained in the affidavit may . . . be considered . . . unless the information is either recorded or contemporaneously summarized in the record [of the court] or on the face of the warrant by the issuing official." N.C. Gen. Stat. § 15A-245(a) (1988).

The problem presented by an anticipatory warrant is that it is not based on present probable cause, but on the expectancy that, at some point in the future probable cause will exist. The probable cause component of the North Carolina Constitution reads:

> General warrants, whereby any officer or other person may be commanded to search suspected places *without evidence of the act committed*, or to seize any person or persons not named, *whose offense is not particularly described* and supported by evidence, are dangerous to liberty and shall not be granted.

N.C. Const. art. I, § 20 (emphasis added). Despite the above statement, our constitution does not require that the objects of the search be in the place searched at the time a warrant issues. Instead, there need only be "probable cause to believe that a crime has been [or is being] committed and that evidence of it can likely be found at the described locus *at the time of the search.*" *Ricciardelli*, 998 F.2d at 10; and *see Illinois v. Gates*, 462 U.S. 213, 238, 76 L.Ed.2d 527, 548 (1983) (mandating "a fair probability that contraband . . . will be found in a particular place".)

In addition, we note N.C. Gen. Stat. § 15A-231 (1988) provides:

> Constitutionally permissible searches and seizures which are not regulated by the General Statutes of North Carolina are not prohibited.

The official commentary to § 15A-231 further states "[t]his Article makes clear that common-law search powers not regulated by the General Statutes are not thereby prohibited . . . [e.g.,] searches incident to arrest, frisks incident to lawful confrontation and emergency searches."

Now, then, the real issue is not whether a forward-looking warrant may properly issue, for we know that it may. Rather, we must ascertain how such a warrant may issue while maintaining the constitutional role of the neutral and detached magistrate "as a buffer between a citizen's privacy rights and potential government overreaching . . . ." *Ricciardelli*, 998 F.2d at 10. It is upon this neutral and detached magistrate that we impose the responsibility of making the call of probable cause—for this authority may not be delegated to the

very law enforcement officials seeking the right to search. *See Garcia*, 882 F.2d at 703. The implicit concern with anticipatory warrants is the fact "that any warrant conditioned on what may occur in the future presents some potential for abuse." *Id.*

The crucial constitutional concern here is one of discretion. A generally drawn anticipatory warrant amplifies the discretion of the searching officer while minimizing that of the magistrate. If the party seeking the search may create the circumstances which create the probable cause, which then justify the warrant itself, the magistrate is removed (by this logic) from his constitutionally mandated role. *See United States v. Hendricks*, 743 F.2d 653, 654 n.1 (9th Cir. 1984) ("The fact that the agents created the probable cause (if any) to search the house is analogous to a situation where police create exigent circumstances and then use the existence of those exigencies to justify a search"), *cert. denied*, 470 U.S. 1006, 84 L.Ed.2d 382 (1986). Not surprisingly, the circuits which have allowed anticipatory warrants have done so only within carefully circumscribed constraints. *Ricciardelli*, 998 F.2d at 12-13; *Garcia*, 882 F.2d at 702-03. With these concerns in mind, we establish the following rules regarding anticipatory warrants.

While the United States Supreme Court has yet to visit the anticipatory warrant issue, the vast majority of the federal circuits have. Among those there appears a general agreement as to what constitutes a constitutionally sound anticipatory warrant. *Garcia*, 882 F.2d at 703. An anticipatory warrant must set out, on its face, conditions that are " 'explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by government agents.' " *Ricciardelli*, 998 F.2d at 12 (quoting *Garcia*, 882 F.2d at 703-04). The magistrate must ensure that the "triggering events"—those events which form the basis for probable cause—are "both ascertainable and preordained." *Ricciardelli*, 998 F.2d at 12.

The warrant must minimize the officer's discretion in deciding whether or not the "triggering event" has occurred to "almost ministerial proportions." *Id.* This means the events which trigger probable cause must be specified in the warrant to a point "similar to a search party's discretion in locating the place to be searched." *Id.* Next, we adopt the standard which has become nearly universal among the federal circuits, which is the "sure and irreversible course to destination" rule. *Ricciardelli*, 998 F.2d at 12-13. Under this rule, the contraband must be on a sure, irreversible course to the situs of the intended search, and any future search "of the destination must be

made *expressly* contingent upon the contraband's arrival there." *Id.* at 12 (emphasis added).

The sure course rule is a stand-in for the actual presence of the illegal item at the locus to be searched. *Garcia*, 882 F.2d at 703. This proxy for actual presence ensures that no undue delegation of the power to find probable cause passes from magistrate to government agent. Only by way of the sure course standard can we ensure that the contraband, though not yet at the location of the intended search, will almost certainly be there at the time of the search. *Id.*; *Ricciardelli*, 998 F.2d at 13; and *see United States v. Hale*, 784 F.2d 1465, 1468 (9th Cir.) (finding a warrant for child pornography that was to be mailed to defendant at his home to be "on a sure course to its destination" and, hence, valid), *cert. denied*, 479 U.S. 829, 93 L.Ed.2d 59 (1986).

The important privacy interests served by article I, § 20 create the imperative of a nexus between the criminal act itself, the evidence to be seized, and the identity of the place to be searched—and there must exist a temporal confluence of all three of these factors. *See Ricciardelli*, 998 F.2d at 13; *State v. Ellington*, 284 N.C. 198, 203, 200 S.E.2d 177, 180-81 (1973) (warrants must be premised on enough reliable information to ensure that no "fishing expedition[s]" will occur). "This means that affidavits supporting the application for an anticipatory warrant must show [on their face], not only that the agent believes a delivery of contraband is going to occur, but also *how* he has obtained this belief, how reliable his sources are, and what part government agents will play in the delivery." *Garcia*, 882 F.2d at 703. Then, the magistrate must list, on the face of the warrant, the explicit conditions which must occur before execution of the warrant may take place. *Id.* at 703-04.

The instant warrant falls woefully short of the above standards in nearly every material way. The most glaring deficiency of this warrant is the absolute lack of language denoting it as "anticipatory." Without going outside the four corners of the warrant (which, as we have stated, we cannot), there is no way a reviewing court could determine that this was anything more than a run-of-the-mill warrant. The State seems to concede this point, by directing us to Detective T.A. Coleman's suppression hearing testimony, where the detective stated that the "search warrant was an anticipatory warrant based upon an expected delivery of one kilogram of cocaine to the residence of the defendant on February 15th." One wonders why this

statement cannot be found in the affidavits. The 15 February date in the affidavit has significance, the State argues, because the warrant was actually authorized on the evening of 14 February. In fact, the State's entire case appears to revolve around this clerical bulwark.

Judge Robert L. Farmer, while denying the motion to suppress, nonetheless apparently had significant reservations about the warrant's lack of markers denoting its anticipatory nature. The trial court, ruling on the motion, in part stated:

> (4) This Court specifically finds and concludes that *although the affidavit could have been worded in such a way as to make it clear that Detective Coleman* anticipated that a confidential informant would provide him with information on February 15, 1993, concerning the presence of cocaine at the defendant's residence and *why he expected to receive this information*, the wording of paragraph 10 of the affidavit was in no way an attempt to mislead or provide false information to a judicial official either willfully or otherwise.

(Emphasis added and in original.) Point for point, this finding and conclusion contradicts the ruling of the *Garcia* court. *Garcia*, 882 F.2d at 703-04. Quite simply, the affidavits do not so much as hint that a controlled delivery, or reverse sale, was to occur. The affidavits do not mention how the delivery would occur, that delivery to defendant was but an expectation (to take place, hopefully, on 15 February) or that the "sting" was an operation run and wholly controlled by the State. *Id.*

Equally troublesome is the statement in the affidavit that "within the past seventy-two hours [the informant] had observed a quantity of cocaine in the residence of Bobby 'Bob' Lee Smith . . . ." The investigators knew, at the time the warrant was applied for, that these events (if they occurred) would happen within the *next* 24 hours—not within the past 72 from the date of 15 February. Manifestly, there is nothing "explicit, clear, [or] narrowly drawn so as to avoid misunderstanding" about this warrant. *Ricciardelli*, 998 F.2d at 12. On the basis of the instant affidavits, it would have been impossible for the judge issuing the warrant to "ensure that the triggering event[s] [were] both ascertainable and preordained." *Ricciardelli*, 998 F.2d at 12.

The instant warrant, on its face, shows that it is unconditional—as it overlooks (*inter alia*) the "need for establishing a nexus

between the triggering event and the place to be searched." *Id.* at 13; and *see United States v. Goff*, 681 F.2d 1238, 1240 (9th Cir. 1982) (finding the requirement for a nexus met where defendant boarded an airplane and agents then procured a warrant to search him at the flight's *terminus)*. The Ninth Circuit encountered a similar nexus problem in *Hendricks*, 743 F.2d at 654-55. In *Hendricks*, a package containing contraband was shipped from Brazil to a Los Angeles airport in a manner requiring defendant Hendricks to pick it up personally (the package was addressed to Hendricks). *Id.* at 653. A customs officer inspecting the package found several pounds of cocaine in a suitcase within the package.

The *Hendricks* warrant read as follows:

> "[O]n the premises known as 2835 N. Sidney . . . *there is now being concealed* . . . a . . . cardboard box [containing cocaine]" . . . "this search warrant is to be executed only upon the condition that the above described box *is brought* to the aforesaid premises . . . ."

Id. at 654 (emphasis in original). The *Hendricks* Court found this information insufficient to forge the requisite link between the described premises and the illegal activity, based on the following syllogistic logic. *Id.* at 654, 655; and *see Ricciardelli*, 998 F.2d at 13 (analyzing, and agreeing with, the *Hendricks* decision). The *Hendricks* Court instructs:

> If the suitcase had been in the house [of the defendant], or if probable cause existed to believe it was there, issuance of the warrant would have been proper. However, at the time the warrant was issued, the magistrate *knew* the suitcase was in the possession of the agents, not at the house. The agents, by calling Hendricks to come for the suitcase tried to ensure that the condition subsequent inserted into the warrant would happen. *However, at the time the warrant issued and, in fact, until the suitcase was actually brought to the house, there was no certainty that it would ever be brought there.*

Hendricks, 743 F.2d at 654 (emphasis added). The upshot of the *Hendricks* analysis is that, although the warrant there denominated a certain location to be searched, once the suitcase was retrieved (presumably by Hendricks) "any number of circumstances might intervene to snuff out a future connection between it and the premises." *Ricciardelli*, 998 F.2d at 13-14.

In many respects, the instant case is parallel to *Hendricks*. Here, as in *Hendricks*, the ultimate locus of the contraband could have been anywhere. Since Parra was to make the decision as to where the drug transaction would occur, the State admits in its brief that the investigators could only guess as to where they might end up. In *Hendricks*, the conditions governing execution of the warrant were too broadly drawn; here there were no conditions whatsoever. Thus the investigators totally controlled the events giving rise to probable cause—not the issuing judge. Here, like *Hendricks*, the warrant was overly broad in that it did not ensure that the cocaine was on a sure course to the enumerated premises. And finally, the warrant draws no nexus between the criminal activity, the circumstances of the intended seizure, and the premises. Seeing no meaningful distinction between this case and *Hendricks*, it follows that this warrant is invalid.

II. The Good Faith Exception and Exigent Circumstances.

[2] The State has not argued that, in the event the warrant was invalidated upon review, the evidence should not be excluded because the search was made pursuant to a good faith execution of the warrant, or alternatively, because exigent circumstances justified a warrantless search (even though Judge Farmer referred to such matters in his findings and conclusions in his rulings on the motions to suppress). Quite possibly, the absence of such arguments is due to the fact that neither are applicable to these facts or the North Carolina constitutional law applied herein. *Carter*, 322 N.C. at 714-16, 370 S.E.2d at 556-57.

The holding of the *Carter* Court mandates exclusion of evidence obtained via an invalid warrant. *See Carter*, 322 N.C. at 723-24, 370 S.E.2d at 561-62. Moreover, under North Carolina's Constitution, no good faith exception exists which might "save" the fruits of a search made pursuant to an invalidated warrant. *Carter*, 322 N.C. at 724, 370 S.E.2d at 562. Even if this case were decided on federal Fourth Amendment grounds, the good faith exception would not apply. *See State v. Welch*, 316 N.C. 578, 588-89, 342 S.E.2d 789, 794-95 (1986). As the *Ricciardelli* Court noted, failure of the investigators to request explicit conditions within the warrant and "to recognize the consequences of [their] omission constitute[s] objectively unreasonable conduct." *Ricciardelli*, 998 F.2d at 16. The *Ricciardelli* Court found that a "search warrant bereft of . . . limiting condition[s] [falls] 'outside the range of professional competence expected' " of government

agents. *Ricciardelli*, 998 F.2d at 16 (quoting *Malley v. Briggs*, 475 U.S. 335, 346 n.9, 89 L.Ed.2d 271, 281 n.9 (1986)). Indeed, where, as here, the State knew the plot, carefully developing the controlled delivery from start to finish, there is no excuse for not making the full script of events fully known to the magistrate through the affidavits presented to justify the warrant.

[3] As for exigent circumstances, none are argued, and none should be. *See, e.g., Carter*, 322 N.C. at 714, 370 S.E.2d at 556. Given that the investigators exercised near absolute control over the contraband here, conducted extensive human and electronic surveillance over the transaction, and received constant reports from informant Thompson, this argument would not survive.

III. Conclusion.

Although anticipatory warrants are constitutionally permissible under both the North Carolina and federal constitutions, the instant warrant is fatally defective under N.C. Const. art. I, § 20. Nothing in either the constitution or the statutes of this state precludes the issuance of an anticipatory search warrant—so long as there is probable cause to believe that contraband presently in transit will be at the place to be searched at the time of the execution of the warrant. However, this type of warrant presents an acute possibility of abuse because it is conditioned on the occurrence of a future event, and thus potentially opens the door for the exercise of discretion by those executing the warrant. *See Ricciardelli*, 998 F.2d at 12. Therefore, we wish to reemphasize that anticipatory warrants are subject to the following important restrictions.

The magistrate who issues an anticipatory search warrant must take particular care to eliminate the opportunity for government agents to exercise unfettered discretion in the execution of the warrant. Such vigilance is achieved by observing the following three requirements: (1) The anticipatory warrant must set out, on its face, explicit, clear, and narrowly drawn triggering events which must occur before execution may take place; (2) Those triggering events, from which probable cause arises, must be (a) ascertainable, and (b) preordained, meaning that the property is on a sure and irreversible course to its destination; and finally, (3) No search may occur unless and until the property does, in fact, arrive at that destination. These conditions ensure that the required nexus between the criminal act, the evidence to be seized, and the identity of the place to be searched is achieved. Only where the magistrate has crafted the anticipatory

search warrant with "explicit, clear, and narrowly drawn conditions governing its execution" are the constitutionally protected privacy interests safeguarded. *Id.* at 12.

Furthermore, under our state constitutional analysis, no good faith exception applies. *Carter*, 322 N.C. at 724, 370 S.E.2d at 562. Accordingly, defendant's motion to suppress the fruits of the search should have been granted. We remind those who find the price of our constitutional exclusionary rule too high that, "North Carolina . . . justifies its exclusionary rule not only on deterrence but upon the preservation of the integrity of the judicial branch of government and its tradition[s] . . . [and] the expressed public policy of the state." *Carter*, 322 N.C. at 723, 370 S.E.2d at 561.

The record in the instant case reveals sufficient evidence apart from that seized in the illegal search upon which a jury could convict defendant of the offenses charged. However, we must reverse defendant's convictions. On remand, the evidence seized pursuant to the search warrant must be suppressed.

New trial.

Judges EAGLES and WYNN concur.

CITY OF ROANOKE RAPIDS, TOWN OF WELDON, TOWN OF ENFIELD, TOWN OF SCOTLAND NECK, TOWN OF HOBGOOD, JERRY HAMILL, BETH WORKMAN, AND HALIFAX HOUSE CORPORATION D/B/A HARVEST HOUSE, PLAINTIFFS v. C. DOUGLAS PEEDIN, JR., IN HIS CAPACITY AS CHAIRMAN AND MEMBER OF THE HALIFAX COUNTY BOARD OF HEALTH; W.K. CRAIG, MAURICE DAVIS, JACK J. EDWARDS, W.B. HUX, PAULETTE INGRAM, SUE LIVERMON, JOE McDOWELL, GEORGE C. PARRISH, ELKTON RICHARDSON, AND B.R. RICKS, IN THEIR CAPACITIES AS MEMBERS OF THE HALIFAX COUNTY BOARD OF HEALTH; AND FRANK L. BRADHAM, IN HIS CAPACITY AS THE DIRECTOR OF THE HALIFAX COUNTY HEALTH DEPARTMENT; AND HALIFAX COUNTY, DEFENDANTS

No. COA95-461

(Filed 3 December 1996)

1. Health § 27.1 (NCI4th)— board of health—smoking rules—rule making authority

Summary judgment should not have been granted for defendants, and should have been granted for plaintiffs, in an action for a declaratory judgment challenging the validity of the Halifax

County Smoking Control Rules (HCSCR). A board of health acts within its rule making powers when it enacts a regulation which is related to the promotion or protection of health, is reasonable in light of the health risk addressed, is not violative of any law or constitutional provision, is not discriminatory, and does not make distinctions based upon policy concerns traditionally reserved for legislative bodies. Assuming that N.C.G.S. § 130A-139 and other relevant sections may be read to have authorized the Board of Health to regulate smoking in public, HCSCR is invalid as representing distinctions reserved to legislative policy-making in that such distinctions involve the balancing of factors other than health, such as economic hardship and difficulty of enforcement.

Am Jur 2d, Administrative Law §§ 225, 228.

2. Administrative Law and Procedure § 10 (NCI4th)— smoking rule—severability clause—ineffective

A severability clause set out in the Halifax County Smoking Control Rules was not given effect where the rules were invalid as making distinctions reserved for the legislature. Administrative rules rather than a statute or an ordinance is involved and the result of attempting to excise particular provisions would be a regulatory scheme crafted by the judicial branch of government.

Am Jur 2d, Constitutional Law § 261.

Appeal by plaintiffs from order and judgment entered 14 February 1995 by Judge James E. Ragan in Halifax County Superior Court. Heard in the Court of Appeals 31 January 1996.

Womble Carlyle Sandridge & Rice, PLLC, by Keith W. Vaughan, Marilyn R. Forbes, Johnny M. Loper, Susan S. McFarlane, and Alexander P. Sands III; Hux, Livermon and Armstrong, by James S. Livermon, Jr.; and Parker and Parker, by Rom B. Parker, Jr., for plaintiff-appellants.

W. Turner Stephenson, III, Halifax County Attorney, for defendant-appellees.

JOHN, Judge.

In this declaratory judgment action, plaintiffs are the City of Roanoke Rapids, the Towns of Weldon, Enfield, Hobgood, and

Scotland Neck, all located within Halifax County, and Jerry Hamill and Beth Workman, Halifax County residents and taxpayers (plaintiffs). The individual defendants are members of the Halifax County Board of Health (the Board), sued only in their capacities as members of the Board. The remaining defendants are Frank L. Bradham (Bradham), Halifax County Health Director at the time the complaint was brought, and Halifax County.

Plaintiffs appeal the trial court's grant of summary judgment to defendants, effectively dismissing plaintiffs' multiple challenges to the validity of the Board's 12 October 1993 enactment of the Halifax County Smoking Control Rules (HCSCR). We reverse the trial court and remand for entry of summary judgment in favor of plaintiffs.

For purposes of this action, plaintiffs and defendants have stipulated to the following pertinent factual and procedural information: Bradham published a Notice of Public Hearing in the *Roanoke Rapids Daily and Sunday Herald* on 30 September, 3 October, 6 October, and 10 October 1993 stating:

> The Halifax County Board of Health announces a Public Hearing will be held on Tuesday, October 12, 1993 at 7:30 p.m. in the Superior Courtroom of the Historic Courthouse in Halifax, N.C. for the purpose of hearing public opinions and recommendations regarding the proposal to adopt a county ordinance governing smoking regulations in Halifax County. The ordinance would be effective immediately upon adoption. A copy of the proposed ordinance may be viewed at the Halifax County Health Department or the Halifax County Manager's Office prior to the meeting.
>
> For further information or to submit written comments for consideration, please contact the Health Director at Halifax County Health Department . . . .

The Board met pursuant to this notice and conducted a public hearing. Immediately thereafter, the Board adopted the HCSCR and defendants have stipulated to their intent to enforce the HCSCR as enacted.

Relevant sections of the HCSCR are as follows:

> Section II: Findings and Purpose
>
> WHEREAS, exposure to environmental tobacco smoke (ETS) is a hazard to the public health; and scientific and medical evidence

exists which documents this hazard including the 1992 report of the US Environmental Protection Agency on "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders" which classified ETS as a Class A carcinogen and as one of the few agents known to cause cancer in man; and the 1986 report by the U.S. Surgeon General and the National Research Council demonstrating that exposure to ETS can cause lung cancer; and the declaration of June 1991 by National Institute of Occupational Safety and Health that ETS meets Occupational Safety and Health Administration (OSHA) for classification as a potential occupational carcinogen; and

WHEREAS, studies have found that breathing ETS is a cause of disease, including lung cancer, in healthy nonsmokers. At special risk are children, elderly people, individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease; and

WHEREAS, the purpose of these rules are [sic] to protect and promote the public health and welfare by regulating smoking in public places, restaurants, and places of employment to minimize the public's exposure to ETS. In fulfilling this purpose, this HCSCR recognizes that where individual needs conflict, the need to breathe smoke-free air shall have priority.

NOW, THEREFORE, THE HALIFAX COUNTY BOARD OF HEALTH ADOPTS THE FOLLOWING RULES:

Section III. Definitions

. . . .

2. "Bar" means an area comprising fifteen (15) feet or less from the perimeter of a permanent counter which is primarily devoted to serving alcoholic beverages and within which the serving of food is only incidental to the consumption of such beverages. Although a restaurant may contain a bar, the term "bar" shall not include the restaurant/dining area. The Board of Health may extend the fifteen (15) foot limitation to encompass a larger area upon a demonstration by the owner of the establishment that such an area is primarily devoted to the serving of alcoholic beverages. The area of a fifteen (15) feet perimeter rule shall not apply to an enclosed area separate from the area of a facility which meets the restaurant definition of these rules if such bar, cocktail lounge or simi-

lar room is primarily devoted to serving of alcoholic beverages and the serving of food is only incidental to the consumption of alcoholic beverages.

. . . .

6. "Dining area" means any enclosed area containing a counter or tables upon which meals are served.

. . . .

17. "Public Place" means the following enclosed areas in which the public is permitted:

    . . . .

    (c) Child Care Facilities;

    (d) Enclosed Shopping Malls;

    (e) Elevators;

    (f) Grocery stores;

    . . . .

    (i) Public areas of retail businesses;

    (j) Service lines;

    (k) Public forms of transportation, including . . . buses, vans, and taxicabs;

    (l) [G]alleries, libraries, and museums when open to the public;

    (m) Any building . . . primarily used for exhibiting any motion picture, stage drama . . . or similar performance . . . .

    (n) Enclosed sports arenas and convention halls . . . .

    . . . .

18. "Restaurant" means an establishment open to the public which is engaged in the business of regularly and customarily selling food, primarily to be eaten on the premises . . . . [T]he term "restaurant" shall not include a cocktail lounge or tavern if such cocktail lounge or tavern is a "bar" as defined in paragraph (2) of this section.

. . . .

Section IV: Prohibition of Smoking in Public Places

A. Except as otherwise provided by these rules, smoking shall be prohibited in public places.

. . . .

Section V. Rules of Smoking in Places of Employment

A. Employers shall make reasonable provisions for smoke-free air in enclosed areas for nonsmoking employees. Each employer shall have the right to designate any place of employment as a nonsmoking place of employment.

. . . .

Section VI. Rules of Smoking in Restaurants

All restaurants with a seating capacity of thirty (30) or more patrons shall designate nonsmoking areas.

A. Restaurants with a seating capacity of thirty (30) or more shall have posted a conspicuous sign or signs clearly stating that a nonsmoking area is available in accordance with Section VIII of these HCSCR.

B. The nonsmoking area shall be separate and contiguous, containing at all times one-third (1/3) (33%) or more of the seating capacity of the dining area. Effective July 1, 1995, the nonsmoking area shall contain one-half (1/2) (50%) or more of the seating capacity of the dining area. Effective July 1, 1996, the nonsmoking area shall contain four-fifths (4/5) (80%) or more of the seating capacity of the dining area.

C. Notwithstanding any other provision of these rules, any owner, operator, manager or other person who controls any restaurant described in these rules may declare the entire restaurant as a nonsmoking restaurant at any time.

Section VII. Regulation of Smoking in Bars and Small Restaurants

All bars and restaurants which have a seating capacity of less than thirty (30) shall post one of the following signs at every entrance notifying patrons of their smoking policy: "We Do Not Provide A Nonsmoking Section," "Nonsmoking Section Available," or "No Smoking."

Section VIII. Exclusions

A. The following areas shall not be subject to the smoking restrictions of these rules:

1. Private Residences and Private Clubs.

2. State and Federal facilities

B. Restaurants (or any separate room or section), hotel rooms, conference or meeting rooms, and public transportation vehicles while they are being rented for private functions.

. . . .

Prior to the 12 October 1993 meeting, the Halifax County Board of Commissioners, as well as the municipalities designated as plaintiffs herein, communicated to the Board either by letter or by resolution a desire that regulation of smoking of tobacco products be left to the elected governing bodies of the individual governmental units. Also prior to adoption of the HCSCR, the City Council of Roanoke Rapids had passed "An Ordinance Regulating Smoking in Municipal Buildings," and the Board of Town Commissioners of the Town of Weldon had adopted a policy governing smoking within its Town Hall and Police Department.

Plaintiffs filed the present declaratory judgment action 14 January 1994. Plaintiffs' complaint alleged that: (1) the Board failed to adhere to procedural notice requirements for enacting health rules; (2) in enacting the HCSCR, the Board exceeded its statutory authority; (3) any purported statutory grant of authority to enact the HCSCR was an unconstitutional delegation of legislative powers; (4) the Board's action deprived plaintiffs of property interests in the form of lost business and profits without due process of law; and (5) the express terms and provisions of the HCSCR establish discriminatory distinctions between similar businesses.

The parties also stipulated that

> [p]laintiffs in this action are challenging the authority of the Halifax County Health Board to enact and/or enforce their Smoking Control Rules, and not the scientific or public health basis of those Rules. Therefore, and for the limited purposes of this action, the parties agree that plaintiffs are not challenging the scientific or public health basis of the Halifax County Board of Health's Smoking Control Rules.

Plaintiffs filed a Motion for Summary Judgment pursuant to N.C.G.S. § 1A-1, Rule 56 on 5 October 1994. At the hearing conducted 23 January 1995 on plaintiffs' motion, defendants likewise moved for summary judgment. On 16 February 1995, the trial court entered an Order and Judgment denying plaintiffs' motion and granting that of defendants. Plaintiffs filed Notice of Appeal to this Court 10 March 1995.

Prior to discussing plaintiffs' arguments, it is appropriate that we enunciate the role of this Court in resolving the instant appeal. In the words of the Court of Appeals of New York when confronting a similar matter:

> we stress that this case presents no question concerning the wisdom of the challenged regulations, . . . or the right of government in general to promulgate restrictions on the use of tobacco in public places. The degree of scientific support for the regulations and their unquestionable value in protecting those who choose not to smoke are, likewise, not pertinent, except as background information. Finally, there has been no argument made concerning the personal freedoms of smokers or their [alleged] "right" to pursue in public a habit that may inflict serious harm on others who must breathe the same air.

Boreali v. Axelrod, 517 N.E.2d 1350, 1353 (N.Y. 1987). The only issues before us involve the authority of the Board to enact the HCSCR and whether the regulations enacted comprised a valid exercise of such authority. "Accordingly, we address no other issue[s] in this appeal." *Id.*

[1] Plaintiffs challenge the Board's adoption of the HCSCR, *inter alia*, as being in excess of its statutory authority. The relevant statutes provide:

> (a) A county shall provide public health services.
>
> (b) A county shall operate a county health department . . . .

N.C.G.S. § 130A-34 (1995).

> A county board of health shall be the policy-making, rule-making and adjudicatory body for a county health department.

G.S. § 130A-35(a) (1995).

> (a) A local board of health shall have the responsibility to protect and promote the public health. The board shall have the authority to adopt rules necessary for that purpose.

> (b) A local board of health may adopt a more stringent rule in an area regulated by the Commission for Health Services or the Environmental Management Commission where, in the opinion of the local board of health, a more stringent rule is required to protect the public health; otherwise, the rules of the Commission for Health Services or the rules of the Environmental Management Commission shall prevail over local board of health rules . . . .

G.S. § 130A-39 (1995).

Plaintiffs maintain the statutory rule making authority of the Board is limited to areas regulated by the Commission for Health Services or the Environmental Management Commission. A review of legislation concerning these two agencies reveals that neither have expressly been delegated the authority to regulate smoking or the use of tobacco products.

Plaintiffs also rely on the principle enunciated in Dillon's Rule:

> [a] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

Homebuilders Assn. of Charlotte v. City of Charlotte, 336 N.C. 37, 42, 442 S.E.2d 45, 49 (1994) (citing Dillon, *Commentaries on the Law of Municipal Corporations*, § 237 (5th ed. 1911)).

Defendants respond that broad rule making authority to preserve public health is necessary, citing the rationale of the court in *Cookie's Diner, Inc. v. Columbus Bd. of Health*, 640 N.E.2d 1231 (Ohio Mun. Ct. 1994):

> "the nature of the problem" (the problem being the protection of public heath) is such that it is impossible to lay down precise standards to define what unheard-of or newly discovered public health hazards or diseases might be on the next horizon . . . .

Id. at 1236. Thus, "[r]ule-making bodies must be allowed a wide discretion . . . ." *Id.* (citation omitted). Defendants also maintain the application of Dillon's Rule has been abolished with respect to municipal governments, citing the *Homebuilders* decision of our Supreme Court. *See, Homebuilders Assn.*, 336 N.C. at 44, 442 S.E.2d at 50.

We note in passing at this juncture that our General Assembly has enacted "An Act to Regulate Smoking in Public Places and to Establish Standards for Local Governments Electing to Regulate Smoking." 1993 N.C. Sess. Laws ch. 367; N.C.G.S. §§ 143-595 *et seq.* (1996). This legislation specifically prohibits local governments after 15 October 1993 from enacting regulations more stringent than those contained within the Act. G.S. § 143-601. Because the HCSCR were passed prior to 15 October 1993, we are not called upon to determine whether the Board's action was violative of this statute.

In any event, it is unnecessary for purposes of our opinion to resolve the parties' dispute as to whether the statutory sections set out above empowered the Board to adopt the HCSCR. Assuming *arguendo* the Board was accorded statutory authority to establish rules regulating public smoking, we hold enactment of the HCSCR exceeded the general limitations imposed upon rule making powers of boards of health.

Our courts have not previously specifically enunciated restrictions on the legislative grant of rule making authority to boards of health. However, based upon previous holdings in related areas, as well as the holdings of courts in other jurisdictions, we conclude a board of health acts within its rule making powers when it enacts a regulation which (1) is related to the promotion or protection of health, (2) is reasonable in light of the health risk addressed, (3) is not violative of any law or constitutional provision, (4) is not discriminatory, and (5) does not make distinctions based upon policy concerns traditionally reserved for legislative bodies. *See, e.g., State v. Curtis*, 230 N.C. 169, 171, 52 S.E.2d 364, 365 (1949) (health board not delegated power to pass laws); *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 229, 134 S.E.2d 364, 369 (1964) (enactment of Sunday regulations generally legitimate exercise of police power and "will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare, and safety"); *see also Cookie's Diner*, 640 N.E.2d at 1236 (health boards' "regulations designed to promote the general policy of the General Assembly to protect the public health, and [which] are reasonable, nondiscriminatory, and not contrary to constitutional rights and to legislation, . . . would be valid"); *Weber v. Board of Health*, 74 N.E.2d 331, 336 (Ohio 1947) ("[administrative] bodies must not legislate or make rules which are unreasonable, discriminatory or contrary to constitutional rights"); *Boreali*, 517 N.E.2d

at 1353 ("Even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives."); and *Matter of Council for Owner Occupied Housing v. Abrams*, 511 N.Y.S.2d 966, 969 (N.Y. App. Div. 1987) ("Administrative officers may not act 'solely on their own ideas of sound public policy, no matter how excellent such ideas might be.' "); *see also generally* 39A C.J.S. Health & Environment 14 (1976).

Whatever the statutory authority of the Board to enact regulations governing public smoking, we believe the HCSCR to be invalid as representing distinctions reserved to legislative policy-making, and thus do not discuss the remaining factors. *See Cookie's Diner*, 640 N.E.2d at 1240-41 (smoking regulations invalid which discriminated among restaurants and businesses on bases of enforceability and economics). Our decision

> is particularly compelling here, where the focus is on administratively created exemptions rather than on rules that promote the legislatively expressed [public health] goals, since exemptions ordinarily run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values.

Boreali, 517 N.E.2d at 1355.

One stated purpose of the HCSCR is to "protect and promote the public welfare by regulating smoking in public places, restaurants, and places of employment to minimize the public's exposure to ETS [environmental tobacco smoke]." For this purpose to be achieved in a manner which does not infringe upon the General Assembly's legislative power to make policy-based distinctions, the HCSCR must, for example, treat similarly situated patrons and employees of all restaurants equally. *Compare Boreali*, 517 N.E.2d at 1355, *with Fagan v. Axelrod*, 550 N.Y.S.2d 552, 559 (N.Y. Sup. Ct., Albany County 1990) (substantially similar regulatory scheme struck down in former case when enacted by executive agency, but upheld in latter when passed by legislature which court stated had authority to accommodate competing health, economic and social concerns). To act otherwise would expose some employees and patrons to a health risk that other similarly situated employees and patrons do not face. Without dispute, such distinctions involve the balancing of factors other than health.

Sections VI and VII of the HCSCR differentiate between the regulation of smoking in restaurants seating fewer than thirty patrons

(small restaurants) and those seating thirty or more patrons (large restaurants). Large restaurants must provide a nonsmoking area that will eventually comprise 80% of the restaurant's seating capacity. Section VII, on the other hand, allows small restaurants to establish a nonsmoking area, or to post a sign indicating the restaurant is entirely smoking or entirely nonsmoking. Thus, workers and patrons may be exposed to ETS in some restaurants, while being protected from it in others.

Moreover, greater protection from ETS is afforded under Section IV to those businesses defined as "public places" in Section III (17) than to those places which are excluded from the rules in Section VIII (B) (restaurants as well as conference and meeting rooms).

In addition, "bars" as defined in the HCSCR are neither included within the definition of "public place" nor "restaurant," and are regulated solely with small restaurants under the provisions of Section VII. Bars are thus allowed to provide no non-smoking section whatsoever.

Finally, the Board under Section III (2) may extend the fifteen foot spatial requirement defining a "bar" so that unrestricted smoking is permitted in a retail business "primarily devoted to the serving of alcoholic beverages," whatever its size or seating capacity.

Having designated as the purpose of the HCSCR the protection and promotion of the public health and welfare by minimizing the public's exposure to environmental tobacco smoke, and having emphasized "that where individual needs conflict, the need to breathe smoke-free air shall have priority," the Board nonetheless created numerous exceptions within the HCSCR. Neither the HCSCR nor the record contain any explanation as to why these distinctions exist, nor indeed do we discern any health-related explanation for such disparate treatment in defendants' appellate brief. Such classifications—for example, that allowing unconfined smoking so long as the primary focus of a business is the dispensation of alcoholic beverages—cannot be said to have their "foundation in considerations of public health," *Boreali*, 517 N.E.2d at 1355, but rather in concerns regarding economic hardship and difficulty of enforcement.

Assuming *arguendo*, as we have, that G.S. § 130A-139 and other relevant sections may be read to have authorized the Board to regulate smoking in public, the statutes cannot be held to permit the Board to consider factors other than health in promulgating its rules. While a legislative body arguably may direct that distinctions be

based on factors other than public health when authorizing the promulgation of rules by health boards, such factors may not be considered *sua sponte*. *See Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978) ("important policy choices" should be made by elected officials); *see also Boreali*, 517 N.E.2d at 1356 ("Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.").

In two recent cases invalidating smoking control regulations, courts in other jurisdictions have found that the health board impermissibly considered non-health related factors in crafting the regulations. *See Boreali*, 517 N.E.2d at 1355 (enacting anti-smoking regulations "laden with exceptions based solely upon economic and social concerns" impinged upon legislative function to strike proper balance among health concerns, costs, and privacy interests), and *Cookie's Diner* 640 N.E.2d at 1241-42 (allowing bars to choose between "smoking" and "nonsmoking" because of difficulty in enforcing regulations, and permitting some businesses to obtain variances because of practical difficulties or other special conditions, "represent[s] classic public policymaking—the balancing of competing interests to arrive at a result that will be accepted by the majority").

At the hearing below, plaintiffs bore the burden of demonstrating the invalidity of the HCSCR. 39 Am. Jur. 2d Health 21 at 359 (1968); *see also Miles City v. Board of Health*, 102 P. 696, 698 (Mont. 1909). Plaintiffs having shown the HCSCR were invalid as providing exceptions unattributable to health-related factors, the burden shifted to defendants to meet plaintiffs' showing. *First Citizens Bank v. Holland*, 51 N.C. App. 529, 531-32, 277 S.E.2d 108, 110 (1981). None of the materials offered by defendants raised an issue of fact as to any health-related basis for the disparate treatment of similarly situated commercial establishments. Allowance of defendants' summary judgment motion was thus improper and summary judgment should have been entered in favor of plaintiffs.

[2] Prior to concluding, however, we consider the effect of the severability clause set out in Section XIV of the HCSCR which provides:

> If any portion of this HCSCR or the application thereof shall be held invalid, such invalidity shall not affect the other provisions

> of this HCSCR and, to this end, the provisions of this HCSCR are declared to be severable.

It is well-established that when a provision of a statute or ordinance is held to be invalid, the constitutional provisions will be given effect if separable from the unconstitutional provision and if the legislative intent is for the remaining provisions to stand. *Commissioners v. Boring*, 175 N.C. 105, 111, 95 S.E. 43, 46 (1918). We observe, however, that neither a statute nor an ordinance is involved herein, but rather administrative rules.

Further,

> [i]t would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder of the [administrative agency's] antismoking code intact . . . .

Boreali, 517 N.E.2d at 1356-57. The result would itself constitute a regulatory scheme crafted by "the judicial branch of government [acting] as part of the legislative branch of government." *Cookie's Diner*, 640 N.E.2d at 1244. Like the New York and Ohio courts, we therefore decline under the circumstances *sub judice* to give effect to the severability clause in the HCSCR. As we have thus determined the HCSCR invalid, it is unnecessary to consider plaintiffs' remaining arguments.

In sum, the trial court's grant of defendants' summary judgment motion is reversed, and this case remanded for entry of summary judgment in favor of plaintiffs.

Reversed and remanded with directions.

Judges JOHNSON and LEWIS concur.

C. DUPREE SMITH AND WIFE, MAE L. SMITH, PLAINTIFFS v. J. MATTHEW MARTIN, DEFENDANT AND THIRD PARTY PLAINTIFF v. ROBERT HASSELL, THIRD-PARTY DEFENDANT

No. COA95-551

(Filed 3 December 1996)

1. Mortgages and Deeds of Trust § 60 (NCI4th)— unauthorized cancellation of deed of trust—liability of trustee

A trustee under a deed of trust is liable as a matter of law when he cancels the deed of trust without authorization of the principal or without determining that the underlying obligation has been satisfied. The trustee is bound to inquire whether an underlying debt has been satisfied before cancelling a deed of trust and may not rely upon the bare representations of others; furthermore, the trustee is restricted to the powers given by the deed of trust unless given the express permission to act by the principal or unless the power to act may be inferred from special facts and circumstances.

Am Jur 2d, Mortgages § 467.

Duty and liability under mortgage, deed of trust, or other trust instrument of trustee to holders of obligations secured thereby. 90 ALR2d 501.

2. Mortgages and Deeds of Trust § 60 (NCI4th)— unauthorized cancellation of deed of trust—liability of trustee

Defendant trustee had no power to cancel a deed of trust and is liable as a matter of law for the principals' damages flowing from the unauthorized cancellation where the deed of trust authorized its cancellation by the trustee "[i]f the grantor shall pay the note secured hereby," and defendant cancelled the deed of trust without the principals' permission and without the underlying note being paid.

Am Jur 2d, Mortgages § 467.

Duty and liability under mortgage, deed of trust, or other trust instrument of trustee to holders of obligations secured thereby. 90 ALR2d 501.

3. Mortgages and Deeds of Trust § 19 (NCI4th)— subordination agreements—future loans—statement of maximum amount and interest rate

Subordination agreements and clauses which subordinate loan obligations secured by a deed of trust to future loans must, at a minimum, include terms which state the maximum amount of the future loan and the maximum rate of interest permitted on the loan. Therefore, a deed of subordination was unenforceable as a matter of law where it failed to state the maximum amount and the interest rate of the future loan.

Am Jur 2d, Specific Performance § 44.

4. Damages § 51 (NCI4th)— wrongful cancellation of deed of trust—damages—mitigation expenses—attorney fees in bankruptcy court action

Actions taken by plaintiff deed of trust creditors to mitigate their damages resulting from defendant trustee's wrongful cancellation were reasonable as a matter of law where plaintiffs filed an adversary proceeding in the debtor's bankruptcy proceeding in which they sought secured creditor status and lien priority over another deed of trust; plaintiffs advised defendant and his insurance carrier of these mitigation efforts; and defendant stipulated in a letter and acknowledged by his inaction that plaintiffs' mitigation actions were reasonable. Therefore, plaintiffs were entitled to recover as damages for defendant's wrongful cancellation of their deed of trust the reasonable attorney fees and expenses they incurred in pursuing their action in bankruptcy court in an attempt to mitigate their damages.

Am Jur 2d, Bankruptcy §§ 923, 1552, 2816.

Duty and liability under mortgage, deed of trust, or other trust instrument of trustee to holders of obligations secured thereby. 90 ALR2d 501.

Appeal by defendant from judgment filed 4 November 1994 by Judge B. Craig Ellis in Orange County Superior Court. Heard in the Court of Appeals 20 February 1996.

This is an action to recover for the wrongful cancellation of a deed of trust. On 20 May 1988, plaintiffs C. Dupree Smith and Mae L. Smith sold a commercial property (the property) located in Hillsborough to Edward Latta. Latta paid $5,500 in cash and he and

his wife borrowed the balance of the purchase price by obtaining a $50,000 loan from Hillsborough Savings & Loan Association and a $35,000 loan from the Smiths. As collateral for the loans, Hillsborough Savings & Loan Association received a first lien on the property and the Smiths received a second lien. Both liens were properly recorded. Defendant J. Matthew Martin, a Hillsborough attorney, handled the closing and was named as trustee on both deeds of trust.

Three days after the sale, the Smiths loaned the Lattas an additional $20,000 to renovate the property. These additional funds were secured by a new $55,000 deed of trust prepared by the defendant, and which named defendant as trustee. This second deed of trust was intended to replace the Smith's original $35,000 deed of trust, and when the Lattas executed the second deed of trust, the Smiths marked the $35,000 deed of trust "paid in full." However, when defendant recorded the $55,000 deed of trust, he failed to cancel the $35,000 deed of trust.

In early 1990, the Lattas began borrowing money from United Carolina Bank (UCB) in order to make further improvements on the property. UCB made a series of loans to the Lattas, some of which were unsecured. In April and May 1990, the Lattas and UCB discussed consolidating all of the loans into a larger loan which would provide the Lattas with additional capital for renovations and give UCB adequate security. While researching the title in anticipation of the consolidated loan, Ms. Latta discovered the Smiths' $35,000 deed of trust had not been cancelled. Ms. Latta contacted defendant, and after receiving an affidavit from the Smiths confirming that the $35,000 debt had been paid, defendant cancelled the $35,000 deed of trust on 27 April 1990.

On 1 June 1990, UCB issued a commitment to the Lattas to provide a consolidation loan for $245,433. The commitment required the Lattas to provide UCB with a first lien on the property as collateral. Third-party defendant Robert Hassell, a Hillsborough attorney, was hired to serve as the closing attorney. Hassell hired another attorney, Barbara Baker, to perform the title work. Ms. Baker then hired a paralegal, Donna Ragan, as an independent contractor to perform the title research in order that Baker could give a title opinion.

As part of her research, Ragan discovered the $55,000 deed of trust in favor of the Smiths. Ragan then contacted Ms. Latta to discuss the outstanding deed of trust. There is a factual dispute regard-

ing the substance of that discussion. Ragan testified in her deposition that Ms. Latta told her the wrong deed of trust had been cancelled, and that the $55,000 lien had been paid off and should be cancelled. Ms. Latta testified in her deposition that she told Ragan she would find a mistake in the record of title, and the $35,000 deed of trust should have been cancelled at the time the $55,000 deed of trust was filed. Ragan reported the conversation to Hassell, and then called defendant to notify him that she believed the $55,000 deed of trust should be cancelled. Defendant contacted Hàssell, who allegedly stated his understanding that the lien should be cancelled.

On 7 June 1990, defendant cancelled the $55,000 deed of trust without consulting the Smiths. At the time of the cancellation, the Lattas had not satisfied their debt to the Smiths. The next day, defendant sent a letter to Hassell, with a copy to the Lattas, confirming that he had cancelled the deed of trust "as per" Hassell's instructions. However, defendant did not inform the Smiths that he had cancelled the deed of trust. After defendant cancelled the Smiths' lien, UCB and the Lattas closed the $245,433 loan. Some of the proceeds of the loan were used to pay off the $50,000 Hillsborough Savings & Loan Association note which, in conjunction with the cancellation of the Smiths' deed of trust, apparently gave UCB a first lien on the property.

The Lattas filed for relief under Chapter 13 of the Bankruptcy Code on 26 September 1991. They listed the debt to the Smiths as unsecured. Because the Lattas had continued to make payments to the Smiths under the note, the Smiths did not know their deed of trust had been cancelled until after the Lattas filed their bankruptcy petition. The Smiths filed an adversary proceeding in bankruptcy court seeking secured creditor status and a determination of their rights as against UCB's claim. In a decision affirmed by the Fourth Circuit Court of Appeals, the federal district court held the Smiths were secured creditors, but that their claim was subordinated to UCB's claim. In April 1993, a foreclosure sale of the property was held. UCB was the highest bidder at $245,000. On 24 May 1993, the Lattas' Chapter 13 proceeding was converted to a Chapter 7 proceeding because it was a no asset case.

The Smiths filed this action 4 June 1993 alleging breach of trustee's duty, breach of fiduciary duty, negligence, and professional malpractice. Defendant answered and filed a third-party complaint seeking indemnification from Robert Hassell. After a hearing on 24

October 1994, the trial court granted summary judgment for the Smiths and ordered defendant to pay them the principal sum of $112,397.75 plus interest from the date of judgment. From this order and judgment, defendant appeals.

Brown & Bunch, by Charles Gordon Brown and Scott D. Zimmerman, for plaintiff-appellees.

Bryant, Patterson, Covington & Idol, P.A., by Lee A. Patterson, II, for defendant-appellant.

McGEE, Judge.

Defendant argues summary judgment for the Smiths was inappropriate because: 1) there were genuine issues of material fact as to what duty the defendant owed the Smiths; 2) the Smiths suffered no damages from any actions by the defendant because of an agreement to subordinate their loan to the UCB loan; and 3) there were genuine issues of material fact regarding the reasonableness of the damages awarded. Upon review of the record and briefs, we do not agree with defendant's contentions and affirm the order and judgment of the trial court.

I.

Defendant first contends the trial court erred in granting summary judgment for the Smiths because there were genuine issues of material fact concerning the defendant's duty to the Smiths under each of their four causes of action. We disagree. Because we hold that defendant breached his duty as trustee under the deed of trust as a matter of law, defendant is liable to the Smiths for damages caused by his breach. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (summary judgment upheld on appeal if it can be sustained on any grounds).

In this case, defendant cancelled the deed of trust without contacting the Smiths or otherwise verifying that the underlying debt had been paid. "The trustee, at his peril, is bound to know that the indebtedness is paid before he executes a release of the security, and, where he unwarrantably releases the lien of his trust deed, is liable to his principal for the damages which necessarily flow from his wrongful act." Annotation, *Duty and Liability of Trustee Under Mortgage or Deed of Trust to Holders of Bonds, or Other Obligations Secured Thereby*, 57 A.L.R. 477 (1928).

> [I]n the absence of authorization by the bondholders, a trustee in a deed of trust in the nature of a mortgage has authority to release the mortgaged property without receipt of payment of the debt secured, only when it is conferred on him by the deed of trust. . . . In any event, the trustee is liable to the creditors for the damages which proximately result from his wrongful act, and the fact that the trustee believed that he acted for the best interests of all concerned does not constitute justification therefor.

55 Am. Jur. 2d *Mortgages* § 467 (1971).

[1] Our case law also supports the position that a trustee on a deed of trust is liable as a matter of law when he cancels the deed of trust without authorization of the principal and/or without determining that the underlying obligation has been satisfied. In *Davenport v. Vaughn*, 193 N.C. 646, 137 S.E. 714 (1927), the defendant Vaughn served as trustee on a deed of trust securing eight promissory notes. The plaintiff in that case was the holder in due course of one of the eight notes. Upon a default on the notes, Mr. Simmons, the holder of the other seven notes, advertised and sold the land secured by the deed of trust in the name of the trustee, Vaughn. Simmons then prepared a deed in Vaughn's name and presented the deed to him for execution. Vaughn refused to sign when Simmons presented only seven of the eight notes, claiming he had "misplaced or lost" the other note. Simmons later returned with a forged note, saying he found the missing note in his files. Vaughn then executed the deed.

In affirming the trial court's judgment for the plaintiff, our Supreme Court held the trustee "was bound to inquire for the debts made payable" out of the proceeds of the sale of the property, *Davenport*, 193 N.C. at 649, 137 S.E. at 716, and where "through haste, imprudence, or want of diligence his conduct was such as to advance the interest of one person to the injury of another, he became personally liable to the injured party." *Id.* at 650, 137 S.E. at 716. The court further held that where the trustee relied upon Simmons' "bare representation" that he held all eight notes although the trustee had "occasion to doubt and reason to scrutinize" the transaction, "the facts exhibit a degree of negligence and want of prudence which fully justify the referee and the judge in their conclusions of law." *Id.* Therefore, a trustee is "bound to inquire" whether an underlying debt has been satisfied before cancelling a deed of trust and may not rely upon the "bare representations" of others. Further, our case law holds that a trustee is restricted to the powers given by the deed of

trust unless given express permission to act by the principal or unless the power to act may be inferred from special facts and circumstances. *Wynn v. Grant*, 166 N.C. 39, 46, 81 S.E.2d 949, 953 (1914); *Gregg v. Williamson*, 246 N.C. 356, 360, 98 S.E.2d 481, 485 (1957).

[2] In this case, the deed of trust authorized the trustee to cancel the deed of trust "[i]f the grantor shall pay the note secured hereby." Although defendant did not cancel the $35,000 deed of trust until receiving an affidavit from the Smiths stating the underlying debt had been paid, it is undisputed that he cancelled the $55,000 deed of trust without the Smiths' permission and without the underlying note being paid. Therefore, defendant had no power to cancel the $55,000 deed of trust and is liable as a matter of law to the Smiths for their damages flowing from its unauthorized cancellation. This assignment of error is overruled.

II.

Defendant also contends the trial court erred in granting summary judgment for the Smiths because the cancellation of the deed of trust was not a proximate cause of the Smiths' damages. Defendant argues that since the Smiths signed an agreement on 19 April 1990 purporting to subordinate their loan to the UCB loan, they suffered no damages by his actions. Again, we disagree.

We first note the record creates much doubt as to whether the "Deed of Subordination" signed by the Smiths on 19 April 1990 was ever intended to subordinate their deed of trust to UCB's $245,433 deed of trust. The Smiths signed the deed of subordination contemporaneously with the Lattas' receipt of a $58,064 loan from UCB partially secured by a deed of trust on the property. The Lattas later obtained two more unsecured loans from UCB before obtaining the $245,433 consolidation loan. Robert Hassell, who prepared the deed of subordination, testified at his deposition that the deed of subordination "had nothing to do" with the $245,433 loan. Further, the parties never recorded the instrument and there would have been no need to cancel the Smiths' deed of trust if the parties believed the deed of subordination gave UCB a first priority lien on the property for the $245,433 loan. However, regardless of the intentions of the parties, we hold the deed of subordination is unenforceable as a matter of law.

[3] The typical subordination agreement involves property sold subject to a purchase money mortgage. The buyer is authorized to sub-

ject the land to a subsequent mortgage, which is given priority over the purchase money mortgage, in order to obtain funds for construction or development of the property. *MCB Limited v. McGowan*, 86 N.C. App. 607, 609, 359 S.E.2d 50, 52 (1987). The issue of the necessary specificity of terms required in a subordination agreement has been addressed by our courts in the case of *MCB Limited v. McGowan, supra.* In *McGowan*, this Court reviewed the development of cases dealing with enforcement of subordination agreements in California, the only jurisdiction that has dealt extensively with the issue. Although not a basis for the ultimate decision, *McGowan* favorably cites the California Court of Appeals' decision in *Stockwell v. Lindeman*, 40 Cal. Rptr. 555 (1964), for the proposition that, where all of the details of future loans are not known to the parties, "a subordination clause must state the matters which most directly affect the security of the seller's purchase money mortgage—the maximum amount of the proposed loan and the maximum rate of interest permitted on the future obligation." *McGowan*, 86 N.C. App. at 610, 359 S.E.2d at 52. Because of the unique risks involved in subordination agreements, these terms are necessary to " 'define and minimize the risk that the subordinating liens will impair or destroy the seller's security.' " *Id., quoting Handy v. Gordon*, 55 Cal. Rptr. 769, 770-71 (1967). We agree with this reasoning. Therefore, we hold that subordination agreements and clauses which subordinate loan obligations secured by a deed of trust to future loans must, at a minimum, include terms which state the maximum amount of the future loan and the maximum rate of interest permitted on the loan. This requirement serves to protect the security interest of the holder of the prior deed of trust.

In this case, had the subordination agreement contained the required terms, it would have eliminated much of the confusion between the parties as to which UCB loan the Smiths had agreed to subordinate their interest. The Smiths argue, and Robert Hassell's deposition supports their position, that they believed the agreement only subordinated their deed of trust to the $58,064 UCB loan. It seems unlikely the Smiths would have agreed to subordinate their lien to a secured loan large enough to destroy their security interest. Because the deed of subordination failed to state the maximum amount and interest rate of the future loan from UCB, it failed to adequately protect the Smiths by defining and minimizing the risk to their security interest. Therefore, the deed of subordination was unenforceable as a matter of law. Since the subordination agreement was unenforceable, the Smiths would have had a first priority lien

over UCB's interest if defendant had not wrongfully cancelled the Smiths' deed of trust. The cancellation of the deed of trust was a proximate cause of the Smiths' damages and this assignment of error is overruled.

III.

[4] Lastly, defendant argues the trial court erred in granting summary judgment for the Smiths because there were genuine issues of material fact regarding the reasonableness of the mitigation expenses incurred by the Smiths. Defendant has not assigned as error nor argued in his brief that the trial court erred in awarding the amount of the principal ($50,834.67) and interest ($20,250.31) due under the note or attorney's fees pursuant to N.C. Gen. Stat. § 6-21.2 ($10,662.74). Therefore, the amount in dispute is the $30,135.74 the Smiths incurred in attorneys fees and expenses pursuing their action in bankruptcy court in an attempt to mitigate damages. Neither party has raised the issue of whether attorney's fees are properly recoverable as mitigation expenses. Defendant simply contends that only a jury could determine whether the amount of legal activity and the fees charged by the Smiths' attorneys in pursuing mitigation were reasonable. Again, we disagree.

A plaintiff has the duty to avoid or minimize the consequences of the defendant's wrong. *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968). Generally, the reasonableness of mitigation efforts depends upon the facts and circumstances of the particular case and is a jury question except in the clearest of cases. *See, eg., Radford v. Norris*, 63 N.C. App. 501, 503, 305 S.E.2d 64, 65 (1983). Although most of the cases dealing with the reasonableness of mitigation efforts involve defendants who claim plaintiffs have not done enough to mitigate their damages, the principles are the same where, as here, the defendant accuses the plaintiff of doing too much. In this case, the reasonableness of the Smiths' pursuit of mitigation is clear.

From the beginning, the Smiths notified defendant and his insurance carrier that they were taking steps to mitigate their damages, including filing an adversary proceeding in bankruptcy court. In March 1992, the Smiths requested defendant and his insurance carrier either fund the costs of mitigation, take over the bankruptcy case, or release the Smiths from their duty to mitigate. Defendant and his insurance carrier took no further action until after the federal district court issued its opinion in June 1994. Thereafter, defendant agreed to reimburse the Smiths for the cost of pursuing their appeal

in the Fourth Circuit. On 6 July 1994, the Smiths sent defendant a letter updating their damages claims, including the $30,135.74 in mitigation expenses incurred from 9 January 1992 through 30 June 1994 for preparation, consultation, travel, deposing eight witnesses, and other charges related to conducting two hearings in the bankruptcy and federal district courts. Defendant stipulated in a letter dated 15 July 1994 that the Smiths had "fulfilled all mitigation obligations which could reasonably be expected of them." Defendant presented no evidence the Smiths' efforts to mitigate their damages were unreasonable. Under these facts, we hold the Smiths' actions in seeking to mitigate their damages were reasonable as a matter of law.

Nor do we find the trial court erred in determining the amount of the expenses was reasonable. Since defendant both stipulated and acknowledged by his inaction that the Smiths' actions in mitigation were reasonable, the only question remaining is whether the costs of such mitigation were reasonable. Here, the costs of mitigation consisted of the attorneys' fees and court costs, detailed in the 6 July 1994 letter and account statement, incurred in pursuing the action in bankruptcy court. Although the Smiths did not seek recovery of attorneys' fees *per se*, but instead sought recovery for costs spent in mitigation of their damages, the analysis for determining the reasonableness of attorneys' fees is instructive.

In *Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff'd in part, rev'd in part on other grounds*, 326 N.C. 470, 389 S.E.2d 803 (1990), this Court held the evidence and findings of fact were sufficient to support the reasonableness of an award of attorney's fees where the award was supported by: 1) an affidavit of the plaintiff's attorney and billing statements showing the actual work performed and the hourly rates charged; 2) a finding of fact as to the reasonable amount of time required for the services performed; and 3) a finding of fact as to the reasonableness of the hourly rates charged. *Id.* at 544, 378 S.E.2d at 571. In this case, the record contains an affidavit from the Smiths' attorney and an attached nineteen page statement of account detailing each charge from January 1992 to July 1994. Defendant does not argue and has not assigned as error that any of these charges are inappropriate or incorrect and has stipulated that the Smiths' efforts at mitigation were reasonable. Therefore, no finding of fact to determine the reasonableness of the amount of time required to perform the services was required. As a result, defendant's only challenge is to the reasonableness of the hourly rates charged by the Smiths' attorneys.

In his affidavit, the Smiths' lead attorney testified billing was based upon actual time expended multiplied by the attorney's hourly rate. The attorney further testified he charged $150 per hour, and the other attorneys from his firm who worked on this case charged $125 per hour and $90 per hour. The only evidence presented in opposition to the reasonableness of the fees charged was defendant's affidavit and the affidavit of another attorney stating that "[i]n [their] opinion, one hundred twenty-five dollars ($125.00) per hour is the maximum hourly rate ordinarily and customarily [charged] for civil litigation in this Judicial District."

First, defendant's evidence only concerns "civil litigation in this area" and does not bear on the ordinary and customary fee charged for bankruptcy litigation in federal courts. Second, even if this evidence does reflect standard charges for federal litigation, the Smiths' attorneys' overall charges fall below this threshold. Of the 214.9 total hours charged, 114.3 were charged at the rate of $150 per hour, 13.7 hours at $125 per hour, and 86.9 hours at $90 per hour, for a total charge of $26,678.50 in attorney's fees. If the Smiths' attorneys had all charged at the $125 per hour "maximum hourly rate ordinarily and customarily" charged, the total would be $184 more than the total fees actually charged. Therefore, the record contains no genuine issue of material fact regarding the reasonableness of the hourly fees charged by the Smiths' attorneys. The record does contain sufficient evidence to support the trial court's judgment that the attorneys' fees charged, and therefore the Smiths' mitigation expenses, were reasonable as a matter of law.

For the reasons stated, the order and judgment of the trial court is affirmed.

Affirmed.

Judges JOHNSON and MARTIN, John, C. concur.

Judge Johnson participated in this opinion prior to his retirement on 1 December 1996.

[124 N.C. App. 603 (1996)]

PARKWOOD ASSOCIATION, INCORPORATED, OVESTER GRAYS, RONALD L. HAYES, SR., RICHARD & SHERYL RADFERN, JORDAN TIM JONES, JASPER GRAHAM, THOMAS H. MAZE, ERVIN H. HERNDON, GENE & CAROLE DUGAN, PETITIONERS/APPELLANTS v. CITY OF DURHAM, RESPONDENT/APPELLEE

No. COA95-883

(Filed 3 December 1996)

1. Municipal Corporations § 112 (NCI4th)— annexation report—police and fire protection—report sufficient

The trial court did not err in holding that defendant-city had provided sufficient evidence in an annexation report that it would provide the annexed area with a nondiscriminatory level of police and fire protection. The city detailed the police and fire services now available to city residents and committed to provide the same services to the annexed area; the statute and case law require no more. If the city fails to provide the services as promised within the statutory time limits, petitioners may apply for a writ of mandamus to order the city to provide those services.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 58, 61, 64, 65.

Mandamus to compel municipal officials to enforce regulations. 35 ALR2d 1135.

Liability of municipality or other government unit for failure to provide police protection. 46 ALR3d 1084.

2. Municipal Corporations § 110 (NCI4th)— annexation report—water service—gap in lines—same basis as city

There was sufficient evidence in a declaratory judgment action challenging an annexation ordinance for the trial court to find that the annexation report adequately provided for the extension of water mains as required by statute. Although petitioners argue that there is a gap in water lines in the annexation area and that the city is required to connect the water lines in the gap, the report stated that water services exist and are available in the annexed area on substantially the same basis as the rest of the city, there was evidence of a number of existing gaps within the current city limits, and there was testimony that property owners within the gap in the annexed area could have lines

extended in the same manner and under the same policies as property owners along other gaps within the city limits.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 65.

Right to compel municipality to extend its water system. 48 ALR2d 1222.

3. **Municipal Corporations §§ 115, 122 (NCI4th)— annexation report—allegedly inaccurate statements—transportation and finance—beyond scope of judicial review**

The trial court did not err in a declaratory judgment action challenging an annexation ordinance by excluding evidence of allegedly inaccurate statements in the annexation report regarding the proposed costs of the annexation and the extension of bus service. Petitioners' arguments deal with procedures and plans not required by statute; N.C.G.S. § 160A-50(f) limits the reviewing court's consideration to whether the procedures and plans required by law have been followed and adopted and whether the annexed area involved is one that the law approves for annexation. The proper forum for attacking the accuracy of projected costs and other items in the annexation report not required by statute is the hearing before the City Council; the role of the reviewing court is simply to determine whether the city has committed to provide a nondiscriminatory level of major services to the annexed area.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 74.

Proper remedy or procedure for attacking legality of proceedings annexing territory to municipal corporation. 18 ALR2d 1255.

Appeal by petitioners from order entered 4 April 1995 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 16 April 1996.

On 16 May 1994, the Durham City Council adopted a resolution stating its intent to annex an area of approximately 1.86 square miles known as the Parkwood Community (Parkwood). After numerous objections by Parkwood residents at the public hearing held 1 August 1994, the City of Durham (the City) amended the annexation report. On 21 October 1994, the City Council adopted an ordinance to an-

nex Parkwood. Petitioners filed a petition for review of the annexation ordinance, claiming the ordinance was void because the annexation report failed to comply with the provisions of N.C. Gen. Stat. § 160A-47.

After a hearing, in an order filed 4 April 1995 the trial court ordered the annexation report be remanded to the Durham City Council to specify the methods available for financing the capital costs of the annexation. The order also dismissed petitioners' remaining allegations. The City later amended the report to address petitioners' concerns regarding capital financing. Petitioners now appeal from the order dismissing their remaining allegations that the annexation report failed to comply with statutory requirements.

Michael B. Brough & Associates, by Michael B. Brough, for petitioner-appellants.

Assistant City Attorney Karen A. Sindelar for respondent-appellee.

McGEE, Judge.

Petitioners bring forward three arguments on appeal. They contend the trial court erred in refusing to find the annexation ordinance invalid because: 1) the annexation report failed to sufficiently specify the level of police and fire protection to be provided in the annexed area; 2) the report failed to provide for the extension of major trunk water lines into the annexed area; and 3) the court erroneously excluded evidence regarding the accuracy of the City's figures in the annexation report concerning the financial impact of annexation and evidence of the City's intent to provide bus service. We disagree with petitioners' contentions and affirm the order of the trial court.

I.

[1] Petitioners first argue the trial court erred in holding the City provided sufficient evidence in the annexation report that it would provide the annexed area with a nondiscriminatory level of police and fire protection. On appeal, the trial court's findings of fact are binding on this Court if supported by the evidence, but conclusions of law drawn from those facts are reviewable *de novo*. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 25-26, 265 S.E.2d 123, 126-27 (1980). We find no error in the trial court's findings of fact or conclusions of law on this issue.

By statute, an annexation report must set forth the plans of the municipality to "[extend] to the area to be annexed each major municipal service performed within the municipality at the time of annexation." G.S. § 160A-47(3). "The minimum requirements of the statute are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service . . . ." *In re Annexation Ordinance*, 304 N.C. 549, 554, 284 S.E.2d 470, 474 (1981). The purpose of the statute is to insure that, in return for the financial burden of city taxes, the annexed residents receive all major city services. *Id.*

> [To satisfy the statutory requirement] the report need only contain the following: (1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services. With this minimal information, both the City Council and the public can make an informed decision of the costs and benefits of the proposed annexation, a reviewing court can determine whether the City has committed itself to a nondiscriminating level of services, and the residents and the courts have a benchmark against which to measure the level of services which the residents receive within the statutory period.

In re Annexation Ordinance, 304 N.C. at 555, 284 S.E.2d at 474. We note that petitioners agree the City, after remand to the city council, has provided sufficient information as to how the City will finance the extension of services to the annexed area. Therefore, upon review of the annexation report, we find the report fulfilled the minimum statutory requirements.

As the trial court found, the annexation report contains a detailed listing of the fire and police services currently available within the City. The report lists the number of personnel and types of equipment sent to different categories of fire emergencies. It also contains details of the City's rescue service, its hazardous materials team, and fire prevention services. The report details: how the City provides police protection through the use of patrol zones, listing the various zone sizes and the criteria used in determining the size of a particular patrol zone; the number of officers within a patrol zone and the type of patrol services provided; and other non-patrol police services

such as the Criminal Investigation Division, Crime Prevention Services, the Organized Crime Division, *etc.* Therefore, the report meets the first requirement of providing "information on the level of services then available in the City."

The report also states fire and police service "will be provided to the annexation area on substantially the same bases and in the same manner as provided in the rest of the City." It states police protection will be provided by reconfiguring existing patrol zones, emergency fire protection will be provided on a contract basis by the local volunteer fire department, and all other general fire services will be provided directly by the City in the same manner as those services are currently furnished city-wide. Petitioners contend the City must detail *precisely* how it will extend and provide fire and police services in order to demonstrate a commitment to a "realistic course of action" to fulfill its obligations. We disagree.

The City detailed the police and fire services now available to city residents and committed to provide the same services to the annexed area. The statute and case law require no more. *See, e.g., In re Annexation Ordinance*, 304 N.C. at 554-55, 284 S.E.2d at 474 ("The satisfaction of [the statutory] purpose does not require the degree of specificity petitioners demand. The additional personnel and equipment needed to extend services need not be estimated . . ."); *Moody v. Town of Carrboro*, 301 N.C. 318, 328, 271 S.E.2d 265, 271 (1980) ("The plan details what services are provided in the Town and states that all such services will be provided in the annexed area. Providing a nondiscriminating level of services within the statutory time is all that is required."); [*See also Chapel Hill Country Club v. Town of Chapel Hill*, 97 N.C. App. 171, 388 S.E.2d 168, *disc. review denied*, 326 N.C. 481, 392 S.E.2d 87-88 (1990) (Town complied with statute where report called for annexed area to be served by volunteer fire department on contract basis in same manner as service provided to rest of Town); *In re Annexation Ordinance*, 255 N.C. 633, 122 S.E.2d 690 (1961) (under former statute, plan calling for extension of jurisdictional boundaries and lengthened patrol routes held sufficient)]. The evidence is sufficient to support the trial court's findings of fact, which in turn support its conclusion of law holding the annexation report sufficiently addressed fire and police services. Therefore, the assignments of error dealing with this issue are overruled.

Although we hold the City did not need to provide the precise details of how it intends to extend police and fire service to the

annexed area, we note the City did provide this detailed information to petitioners at the hearing in this case. While we understand petitioners' concerns over whether they will receive city services in return for city taxes, the City fulfilled its statutory obligation by promising to provide those services. Also, petitioners' rights are further protected by statute. If the City fails to provide the services as promised within the statutory time limits, petitioners may apply for a writ of mandamus to order the City to provide those services. N.C. Gen. Stat §. 160A-49(h).

II.

[2] Petitioners next argue the evidence was insufficient for the trial court to find the annexation report adequately provided for the extension of major water mains as required by statute. Although virtually all of Parkwood is currently served by city water lines and the City has agreed to extend a line in one of two areas where there is a gap in water lines in the annexation area, petitioners argue the City is also required to connect the water lines in the remaining gap. G.S. § 160A-47(3)(b) mandates, in part, that an annexation report "[p]rovide for the extension of major trunk water mains . . . into the area to be annexed so that . . . property owners in the area to be annexed will be able to secure public water . . . according to the policies in effect in such municipality for extending water . . . lines to individual lots or subdivisions." The annexation report stated water services exist and are available to the Parkwood area "on substantially the same basis and in the same manner as such service is made available in the rest of the City," and water service would be provided in accordance with the policies and ordinances adopted, or to be adopted in the future, by the city council. We find the trial court correctly held the report adequately addressed the extension of water mains.

The trial court made, among others, the following findings of fact to which the petitioners have not assigned error:

> 10. The City currently provides water service to the Parkwood area and charges twice the water rate paid by City residents. After annexation, this rate will be reduced to the City rate. The water line that petitioners claim should have been provided as part of the annexation report is a missing section of approximately 3,400 feet of an existing water line that runs along N.C. 55. The land along the missing section is relatively undeveloped. The point that is furtherest from a water line is approximately 1,700

> feet from a water line. None of the property owners along the contested water line requested that a line be installed under G.S. § 160A-47(3)(b), which allows them to make such a request under existing city policies and have a line installed within two years of annexation.
>
> 11. It is not the City's policy to put water lines along every street in the City. Rather, it is the City's policy to construct a system of lines that provides sufficient flow for domestic service and fire service and to bring such system within a reasonable distance of all areas of the City, and to rely on private property owners to have lines extended and gaps filled in as they are needed. The City has four policies for extension of water lines which are described in City charter, ordinance, and written documents in the Engineering Department. They generally result in the extension of water lines upon the following occurrences: a) a petition from a certain percentage of property owners along the proposed line, which, following approval by the City Council, results in assessment for the cost of the line on all owners along the line; b) a petition from a single owner who then pays the entire assessed cost for the line and receives reimbursement as other owners hook on over the years; c) the building of the line by a developer who pays the actual cost of the line and receives reimbursement as other owners hook on over the years; and d) the City Council ordering that the line be built, and then assessing the cost on all owners adjacent to the line. These policies have resulted in water lines being extended throughout much of the City of Durham. Upon annexation, these policies will be equally available in the annexed area as they are in the City.

Since petitioners did not except or assign error to these findings, they are presumed to be correct and supported by the evidence. *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). Further, a review of the record shows these findings are supported by the evidence. The petitioners have excepted to the following findings of fact:

> 12. The absence of a water line along NC 55 is typical of other parts of the City of Durham water system. There are currently many gaps in water lines throughout the City that exceed in distance the gap that exists along N.C. 55. . . .
>
> 13. The City does not have to construct the missing segment of the water line along N.C. 55 in order to provide Parkwood resi-

> dents the same service as residents elsewhere in Durham receive, since other areas do not have water lines along every street, and since the line is not necessary to give the Parkwood area adequate flow or sufficient redundancy in case of system breakdowns.

A review of the report, exhibits, and transcript shows these findings of fact are also supported by the evidence.

Several of the maps included as exhibits in the record show a number of existing gaps in water line service within the current city limits. For example, just to the north and east of the gap complained of by the petitioners there are two gaps in the water main along Alston Avenue. Each of the gaps is longer than the gap along N.C. 55. Further to the north, there are also gaps along Cook Road. There are also numerous other gaps inside the city limits both longer and shorter than the water line gap along N.C. 55. Lee Murphy, Assistant City Engineer for the City, testified at the hearing that it is not the City's policy to provide water lines on every street. He testified the City's policy was to provide lines to enable water service for fire flows and domestic consumption at a minimum of twenty pounds per square inch pressure. Murphy also testified the Parkwood area already received water service which was "[a]s good or better than any place" inside the city limits because of the existing number of feeds and the redundancy of flow in case of breaks or disruption in service. He further testified there are numerous gaps in water lines inside the city, and that property owners along the N.C. 55 gap could have the lines extended under city policy in the same manner and under the same policies as the property owners along other gaps within the city limits.

This evidence supports the trial court's findings of fact, which in turn support its conclusion of law that "the City's plan for extending water lines in the annexation area provides property owners in the annexed area the opportunity to secure public water according to the policies in effect in the City for extending water lines to individual lots or subdivisions, affords such owners water service on substantially the same basis and in the same manner as such service is offered in the remainder of the City, and complies in all regards with the requirements of G.S. § 160A-47(b)." *See Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 429, 378 S.E.2d 225, 229 (1989) (where policy requiring petitioners to pay for the cost of water line extensions was consistent with policy for extending lines within preexist-

ing municipal limits, trial court correctly held Town had complied with requirements of G.S. § 160A-47). This assignment of error is overruled.

III.

[3] Lastly, petitioners argue the trial court erred in excluding evidence of what they claim are inaccurate statements in the annexation report regarding the proposed costs of the annexation and the extension of bus services to Parkwood. The trial court held the accuracy of the calculated costs and adequacy of the City's plan to provide transportation services were not proper subjects for judicial review. We agree with the trial court.

A proceeding to review an annexation ordinance is a limited judicial review. *Campbell v. City of Greensboro*, 70 N.C. App. 252, 257, 319 S.E.2d 323, 326, *disc. review denied and appeal dismissed*, 312 N.C. 492, 322 S.E.2d 553 (1984). Under the judicial review provided pursuant to N.C. Gen. Stat. § 160A-50, the reviewing court may hear evidence, "but only with regard to the statutory procedure not being followed, the City's plan not meeting the requisites set forth in G.S. § 160A-47, and the area to be annexed not having the proper characteristics for annexation as set forth in G.S. § 160A-48." *Id.* G.S. § 160A-50(f) "limits the reviewing court's consideration to whether the procedures and plans *required by law* have been followed and adopted and whether the area involved is one that the law approves for annexation." *Id.* (emphasis added). In this case, petitioners' arguments deal with procedures and plans not required by statute. Therefore, these issues are not proper subjects for judicial review.

As to the issue of transportation services, our Supreme Court has held that municipal services, such as transportation, which are not specifically enumerated in G.S. § 160A-47(3) are not required to be included in the annexation report. *Cockrell v. City of Raleigh*, 306 N.C. 479, 485, 293 S.E.2d 770, 774 (1982). Since plans and procedures concerning transportation are not required by law, a reviewing court has no jurisdiction to hear evidence on this issue. *See Campbell, supra.* Therefore, the trial court properly excluded evidence regarding the City's proposed bus service. As to the accuracy of the City's statements regarding the financial impact of the annexation, we find nothing in the statutes which requires the City to provide the projected costs of providing services to the annexed area. The statute merely requires the City to provide information on the method of

financing these services, which petitioners admit the City has done in this case. Therefore, the trial court had no jurisdiction to decide this issue and properly excluded any evidence on the subject.

Although the courts have no jurisdiction to review these issues, we find some merit in petitioners' argument that even if not required, when the City does include information on these subjects in the annexation report they should be required to provide accurate information. While not required by law to be included in the report, such information is informative to persons in the proposed annexation area, and to be of the greatest possible benefit, should be as detailed and accurate as possible. *Cockrell*, 306 N.C. at 485, 293 S.E.2d at 774. These issues, especially the proposed costs of the annexation, involve whether the annexation will result in a net benefit or loss for the City, an important consideration to both petitioners and the City. However, it is not the role of the reviewing court, but the role of the elected officials, to determine the wisdom of a proposed annexation. The proper forum for attacking the accuracy of projected costs and other items in the report not required by statute is the hearing before the City Council provided under N.C. Gen. Stat. § 160A-49. The role of the reviewing court is simply to determine whether the city has committed to provide a nondiscriminatory level of major services to the annexed area. *In re Annexation Ordinance*, 304 N.C. at 555, 284 S.E.2d at 474.

For the reasons stated, the order of the trial court is affirmed.

Affirmed.

Judges EAGLES and LEWIS concur.

DR. MATTHEW F. WARE, PLAINTIFF-APPELLANT v. CHANCELLOR EDWARD B. FORT, IN HIS PERSONAL AND OFFICIAL CAPACITY AS CHANCELLOR OF THE NORTH CAROLINA A & T STATE UNIVERSITY; DR. A. JAMES HICKS, IN HIS PERSONAL AND OFFICIAL CAPACITY AS THE DEAN OF THE COLLEGE OF ARTS AND SCIENCES AT NORTH CAROLINA A & T, AND THE NORTH CAROLINA A & T STATE UNIVERSITY, DEFENDANT-APPELLEES

No. COA95-1349

(Filed 3 December 1996)

Constitutional Law § 85 (NCI4th)— college professor—not reappointed—§ 1983 action—no property right

The trial court did not err by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff filed an action under 42 U.S.C. § 1983 arising from defendant-university's failure to reappoint him to the faculty. The essence of plaintiff's argument is that the meandering grievance procedure employed by the university administration, combined with the underlying malicious non-reappointment decision, deprived him of a property right in his probationary employment without adequate due process of law, but plaintiff simply had no property right in the position under either the North Carolina or federal constitutions.

Am Jur 2d, Constitutional Law § 584.

Appeal by plaintiff from summary judgment entered 29 September 1995 by Judge Thomas W. Ross, in Guilford County Superior Court. Heard in the Court of Appeals 10 September 1996.

McSurely, Dorosin & Osment, by Alan McSurely, Mark Dorosin and Ashley Osment, for plaintiff appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko, for the State.

SMITH, Judge.

Plaintiff is a university professor whose employment contract ended and who was not thereafter reappointed to the faculty by his university-employer. Plaintiff claims the circumstances surrounding his nonreappointment constituted a violation of 42 U.S.C. § 1983 and various provisions of the North Carolina Constitution. The trial court disagreed and dismissed this case on defendants' motion. We affirm.

The facts in this case are as follows. Plaintiff was a tenure-track, probationary professor in the physics department at North Carolina A & T University (University). On 20 April 1992, plaintiff was notified by Dr. Sekazi Mtingwa, Chairman of the University physics department, that plaintiff would not be reappointed to his position. Plaintiff's employment contract expired 14 May 1993. In May 1992, plaintiff appealed Mtingwa's nonreappointment decision through the University's grievance procedure as having been based on personal malice.

The first step in the appeals process was to the Dean of the College of Arts and Sciences, defendant Arthur James Hicks (Dean Hicks). Dean Hicks, however, did not respond to plaintiff's appeal in a fashion plaintiff deemed timely. So, in August 1992, plaintiff appealed his case to the University's Vice-Chancellor for Academic Affairs, Dr. Edward J. Hayes (Dr. Hayes). Dr. Hayes' involvement apparently prompted Dean Hicks to move forward with a decision on plaintiff's case. After a meeting with plaintiff in September 1992, Dean Hicks formally rejected plaintiff's appeal. Dr. Hayes urged Dean Hicks to reconsider his decision, and upon that reconsideration, Dean Hicks rejected plaintiff's appeal once again in January 1993.

Dean Hick's second rejection of plaintiff's grievance was then appealed to the Faculty Committee. On 3 May 1993, the Faculty Committee found that plaintiff's nonreappointment was "flawed," and recommended a contract renewal. Despite the Faculty Committee's recommendation, plaintiff's grievance was again rejected by Dean Hicks. At this point, the entire matter was sent to University Chancellor Edward B. Fort (Chancellor Fort) for his review. Chancellor Fort declined review of the grievance and remanded the matter to the Faculty Committee.

At the second hearing of the Faculty Committee on 21 June 1993, the Committee found evidence of personal malice in Dr. Mtingwa's decision not to reappoint plaintiff, and found that Dean Hick's dilatory response(s) had deprived plaintiff of "due process." Again, the Faculty Committee's decision was considered by Dean Hicks, and once again, the grievance was rejected. This rejection by Dean Hicks was affirmed by Chancellor Fort in August 1993, after review of the record compiled by the Faculty Committee.

Plaintiff then appealed Chancellor Fort's decision to the University Board of Trustees (the A & T Board). After more procedural meandering, the A & T Board took up the matter on 19 July

1994, and decided in plaintiff's favor. The A & T Board found that Dr. Mtingwa's decision "not to renew Dr. Ware's contract and not to promote him was based on personal malice." As a remedy, the A & T Board ordered reinstatement of plaintiff, back pay, and removal of Dr. Mtingwa from future evaluations of plaintiff's job performance.

Plaintiff appealed this decision to the University of North Carolina Board of Governors (BOG), asserting that the remedy afforded him by the A & T Board was inadequate because it did not provide for his attorney's fees and other attendant consequential damages. The BOG's Committee on Personnel and Tenure, in November 1994, affirmed the substance of plaintiff's grievance on the merits, but declined to award damages beyond those awarded by the A & T Board. In so ruling, the BOG distinguished the damages it was willing to award an aggrieved party through its administrative grievance policy from the full range of damages available in a court of law. "Such [consequential] damages," the BOG concluded, "should best be determined by and awarded in a court of law."

Plaintiff then brought the instant action alleging state and federal constitutional claims; the foundation of these claims being the initial malicious decision of Dr. Mtingwa and the ensuing bureaucratic procedure described above. Defendants moved to dismiss the instant case pursuant to N.C.R. Civ. P. 12(b)(6), 12(b)(1) and 12(b)(2). The trial court granted defendants' motion and dismissed all claims.

We begin by discussing the posture of this case, and the standard of review. To affirm dismissal of an action on the basis of a Rule 12(b)(6) motion, the complaint must fail to state any set of facts which would entitle plaintiff to relief. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985). In considering the sufficiency of the complaint under Rule 12(b)(6), a court must accept as true the facts alleged therein. *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E.2d 282, 288 (1976).

Plaintiff's claims are twofold. The first is based on 42 U.S.C. § 1983, which allows a private right of action for damages and injunctive relief against individuals and governmental bodies whose conduct under color of state or local law deprives a plaintiff of rights, privileges or immunities "secured by the Constitution and laws." 42 U.S.C. § 1983; *Corum v. University of North Carolina*, 330 N.C. 761, 770, 413 S.E.2d 276, 282, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied sub. nom.*, *Durham v. Corum*, 506 U.S. 985,

121 L. Ed. 2d 431 (1992).[1] To state a claim under 42 U.S.C. § 1983, plaintiff must allege facts demonstrating that some right secured by the federal constitution or federal law has been abridged. *Id.* Absent such allegations, a claim under § 1983 will not lie. *Id.*

Similarly, and somewhat obviously, there can be no state constitutional claim against governmental defendants absent a violation of plaintiff's rights under some provision of the North Carolina Constitution. *Hawkins v. North Carolina*, 117 N.C. App. 615, 630, 453 S.E.2d 233, 242 (1995); *Corum*, 330 N.C. at 789, 413 S.E.2d at 293. Direct claims for a monetary remedy against governmental officials for state constitutional violations are allowed against them *in their official capacity*. *Corum*, 330 N.C. at 789, 413 S.E.2d at 293; and *see Sale v. Highway Commission*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1950). Such a claim is commonly called a "*Corum* claim."

Manifestly, plaintiff's § 1983 claim is dependent on allegations that violation of a federally secured right occurred. *Spell v. McDaniel*, 591 F.Supp. 1090, 1099 (E.D.N.C. 1984). Equally so, plaintiff's *Corum* claim is wholly reliant on allegations making out a state constitutional violation. *Hawkins*, 117 N.C. App. at 630, 453 S.E.2d at 242. Accordingly, plaintiff rests his § 1983 claim on notions of substantive and procedural due process under U.S. Const. amend. XIV, § 1. *See, e.g., McDaniel*, 591 F.Supp. at 1101 (discussing procedural and substantive due process). Plaintiff's *Corum* claim is based on alleged violations of the law of the land clause of the North Carolina Constitution, a provision guaranteeing due process rights separate from, though similar to, those guaranteed by the federal constitution. *See* N.C. Const. art. I, § 19 ("the law of the land clause"); *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) (Federal constructions of Fourteenth Amendment, although persuasive, do not control interpretations of our law of the land clause's due process protections).

1. A § 1983 plaintiff's remedies are limited when the defendants are the State or State officials sued in their official capacity. *Corum*, 330 N.C. at 770-71, 413 S.E.2d at 282-83; *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 105 L. Ed. 2d 45, 55 (1989). In such situations, the § 1983 plaintiff may not seek a monetary remedy, as only injunctive relief will be available. *Corum*, 330 N.C. at 771, 413 S.E.2d at 283; *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 87 L. Ed. 2d 114, 122 n.14 (1985). These rules would bar the instant plaintiff's suit for monetary damages against Chancellor Fort and Dean Hicks in their official capacities (as State officers), and against North Carolina A & T State University as an agency of the State. *Corum*, 330 N.C. at 771, 413 S.E.2d at 282-83. We do not pursue this analysis further, as it is unnecessary to our resolution of this case.

We find plaintiff's reliance on federal and state due process misplaced. The essence of plaintiff's argument is that the meandering grievance procedure employed by the university administration, combined with the underlying malicious non-reappointment decision of Dr. Mtingwa, deprived him of a property right in his probationary employment without adequate due process of law. This argument fails because plaintiff simply had no property right in the position of which he could be constitutionally deprived—under either the North Carolina or federal constitutions. *See Kilcoyne v. Morgan*, 664 F.2d 940, 942 (4th Cir. 1981), *cert. denied*, 456 U.S. 928, 72 L. Ed. 2d 444 (1982); *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 302, 337 S.E.2d 644, 648-49 (1985) (discussing *Kilcoyne*), *disc. review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986), *motion to dismiss allowed by order* (3 June 1986).

In this instance, Dr. Mtingwa's decision to deny plaintiff reappointment was based on personal malice. Because Dr. Mtingwa's decision was tainted by this malice, plaintiff was entitled under his employment contract to appeal this decision through the grievance procedure provided by *The Code of the BOG of the University of North Carolina* (the *BOG Code*). It is unquestionable that the grievance procedure as applied to plaintiff was marked by ineptitude. However, ineptitude is not the same as a denial of due process—at least under these circumstances.

In *Kilcoyne*, the Fourth Circuit faced a situation nearly identical to the instant one. The *Kilcoyne* plaintiff (Kilcoyne) was, much like the instant plaintiff, a probationary, tenure-track professor at East Carolina University (ECU). *Kilcoyne*, 664 F.2d at 941. Kilcoyne was denied reappointment, and he appealed under procedures mandated by the ECU Faculty Manual (the Manual). *Id.* at 942. Kilcoyne maintained that ECU failed to follow the procedures mandated by the Manual as "prescribed by the terms of his employment contract." *Id.* This failure, Kilcoyne argued, violated procedural due process. *Id.*

The *Kilcoyne* Court disagreed, holding that "[b]ecause [Kilcoyne] lacked a right to further employment at ECU, his denial of tenure and further employment without *any* procedural safeguards would have been permissible under the Fourteenth Amendment." *Id.* Failure to provide the procedural safeguards contracted for between a university and a probationary professor may give rise to a contract claim (or, under the right circumstances, to a tort claim), the *Kilcoyne*

Court held, but such an "issue is not elevated to a constitutional question solely because the State is a party to the contract." *Id.*

We discern little difference between the instant case and *Kilcoyne*. Plaintiff points this Court to *Siu v. Johnson*, 748 F.2d 238 (4th Cir. 1984), a case decided subsequent to *Kilcoyne* by the Fourth Circuit—though by a different panel. *Siu* does indeed lend some support to plaintiff's constitutional claims. *Id.* at 243-44. The *Siu* Court alludes, in *dicta*, that an "expectancy" of reappointment "might be elevated to constitutional[] . . . status by contractually binding provisions which, in some form or another, require a regularized decisional process for declining to award tenure." *Id.* at 243. *Siu* lacks persuasiveness as authority though, because the Fourth Circuit limited the potential application of such a constitutional right to situations where "the University's procedures and their application over time [] give[] rise to an institutional 'common law of re-employment' under which the interest created by [a] probationary appointment [is] elevated to something firmer than a mere 'unilateral expectation' " *Id.* at 244 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 578 n.16, 33 L. Ed. 2d 548, 561 n.16 (1972)).

The instant plaintiff argues that an expectancy in re-employment was created since he "was entitled to re-appointment when a non-reappointment decision was based on personal malice." We cannot agree. Neither the instant complaint, nor plaintiff's brief analyzing the complaint, intimate the conditions of "expectancy" discussed by the *Siu* Court. Plaintiff's combination of (1) an employment decision based on malice with (2) a flawed execution of the University's grievance procedure does not constitute the ingredients of constitutional expectancy discussed in *Siu*. Plaintiff's combination of the above two factors exudes an incorrect (if not circular) logic, for it is the malicious decision by Dr. Mtingwa which provided the grounds for the initial grievance. Certainly, plaintiff could not argue that a personally malicious decision not to reappoint, in and of itself, is of constitutional significance. Plaintiff has not alleged any reasonable expectancy of reappointment.

Our hesitation to follow the *Siu dicta* is enhanced further by this Court's prior reliance on *Kilcoyne* in *Pressman*. *Pressman*, 78 N.C. App. at 302-03, 337 S.E.2d at 648-49. In *Pressman*, a University of North Carolina at Charlotte (UNC-Charlotte) professor, who was ineligible for tenure, argued the University failed to follow the reappointment procedures set forth in the UNC-Charlotte *Code and*

Tenure Policies Manual, and the *BOG Code*, in terminating his employment. *Id.* The *Pressman* Court applied the principles elucidated by the Fourth Circuit in *Kilcoyne*, and held that no colorable claim of constitutional dimension existed on such facts. *Id.* Seeing no compelling factual differences between this case, *Pressman*, and *Kilcoyne*, we decline to pursue the path alluded to by the *Siu* Court and urged upon us by plaintiff.

Plaintiff also cites *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832, 62 L. Ed. 2d 41 (1979), and *Mabey v. Reagan*, 537 F.2d 1036 (9th Cir. 1976) in support of his constitutional claims. The *Skehan* decision is inapplicable here because it involved a nonreappointed professor who was *denied access* to the university grievance procedure guaranteed by his employment contract. *Skehan*, 590 F.2d at 485. There is a significant difference between the complete denial of contractual process in *Skehan* and the flawed process involved here. *Mabey*, on the other hand, involved an unquestionably constitutionally protected interest, that of the State attempting to chill legitimate First Amendment expression. *Mabey*, 537 F.2d at 1044-45. The First Amendment considerations present in *Mabey* conclusively distinguish that case from this one.

This Court does not countenance North Carolina A & T's conduct toward plaintiff. However, neither a 1983 claim, nor a *Corum* claim, will lie where no appropriate protected interest exists. *Corum*, 330 N.C. at 789, 413 S.E.2d at 293. Further, where adequate state remedies exist, no *Corum* claim will lie. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. The pleadings indicate that plaintiff had a number of alternative state law remedies whereby he could have pursued the damages he seeks. Plaintiff could have sought judicial review of the final BOG decision under Chapter 150B of the Administrative Procedure Act. N.C. Gen. Stat. § 150B-1(f) (1995); and *see Hawkins*, 117 N.C. App. at 629, 453 S.E.2d at 241. Plaintiff also could have sued the University for breach of contract, since " 'the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.' " *Hawkins*, 117 N.C. App. at 629, 453 S.E.2d at 241 (quoting *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976)).

Plaintiff has not alleged facts supporting a due process claim under either the North Carolina Constitution or the Fourteenth Amendment of the federal constitution. Therefore, neither plaintiff's § 1983 claim nor his *Corum* claim against any defendant are

viable under federal law or North Carolina law. As no cognizable claim is presented by plaintiff's complaint, we affirm the trial court's dismissal.

Affirmed.

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

NATIONAL ADVERTISING COMPANY AND WHITECO INDUSTRIES, INC., T/A WHITECO METROCOM, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA95-1350

(Filed 3 December 1996)

1. Eminent Domain § 34 (NCI4th)— advertising sign—removal by DOT—absence of leasehold interest in land—no statutory right to compensation

The DOT's removal of plaintiff's outdoor advertising sign from property purchased by the DOT did not entitle plaintiff to compensation under N.C.G.S. § 136-111 because, at the time the sign was removed, plaintiff did not have a leasehold interest in the land on which its sign was located where plaintiff's purported five-year lease of land for the sign was unrecorded and was thus not valid to pass title to plaintiff as against the DOT, a purchaser for value, pursuant to N.C.G.S. § 47-18; even if the DOT succeeded to the previous owners' lessor obligations, the DOT also succeeded to the previous lessors' right under the lease to terminate on ninety days' notice, and notice given by the DOT terminated plaintiff's purported lease; and plaintiff effectively abandoned its sign by failing to remove it within a reasonable time after being given notice by the DOT to do so.

Am Jur 2d, Eminent Domain §§ 171, 172, 180, 184, 294-297.

2. Eminent Domain § 36 (NCI4th)— threat of condemnation—land purchase—no compensation for removable personal property

Even if the DOT purchased land under the threat of condemnation, the DOT was not required to pay just compensation for

removable of personal property located on the land when the own-er of the personal property has no interest in the purchased land.

Am Jur 2d, Eminent Domain §§ 171, 172, 180, 184, 294-297.

3. Eminent Domain § 92 (NCI4th)— advertising sign—removal by DOT—eminent domain not used—personal property—landowner rights

The DOT was not proceeding pursuant to its power of eminent domain but was simply exercising its rights as a property owner when it removed plaintiff's outdoor advertising sign from land it had purchased, and the DOT was thus not obligated to pay just compensation for a "taking" of the sign under the federal and state constitutions, where the evidence, including an admission by defendant that the sign was a "trade fixture," showed that it was plaintiff's intent that the sign would remain its personal property; plaintiff's right to exhibit the sign on DOT land under a lease agreement had expired; and plaintiff effectively abandoned its sign by refusing to remove it within a reasonable time after the DOT gave plaintiff notice to do so.

Am Jur 2d, Eminent Domain § 136.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs. 73 ALR3d 1122.

4. Highways, Streets, and Roads § 32 (NCI4th)— advertising sign—removal by DOT—compensation not required by OACA

The Outdoor Advertising Control Act (OACA), N.C.G.S. § 136-126 *et seq.*, does not require the payment of just compensation for signs removed by the DOT. Even if the OACA does require such payment, this requirement only applies when the DOT removes the sign pursuant to the exercise of its regulatory power under the OACA and does not apply when the DOT removes an abandoned advertising sign from property which it owns and in which the advertising company had no property interest.

Am Jur 2d, Advertising §§ 1, 2, 24-26; Eminent Domain §§ 294-297.

5. Highways, Streets, and Roads § 31 (NCI4th)— advertising sign—removal by DOT—compensation not required by HBA

The federal Highway Beautification Act (HBA) does not require the DOT to pay just compensation for its removal of an advertising sign from property which it purchases since the HBA does not create individual rights and does not impose regulations but simply authorizes federal-state agreements pursuant to which state regulatory statutes may be adopted.

Am Jur 2d, Eminent Domain §§ 317, 320, 343.

6. Highways, Streets, and Roads § 31 (NCI4th)— sign removal—compensation not required by federal statute

Just compensation for removed outdoor advertising signs is not required by 42 U.S.C. § 4652 when a state's case law precludes compensation on the ground that the signs are removable personal property.

Am Jur 2d, Eminent Domain §§ 317, 320, 343.

Appeal by defendant from order entered 24 October 1995 by Judge Cy A. Grant, Sr. in Northampton County Superior Court. Heard in the Court of Appeals 11 September 1996.

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

Attorney General Michael F. Easley, by Assistant Attorney General W. Richard Moore and Assistant Attorney General Elizabeth N. Strickland, for defendant-appellant.

LEWIS, Judge.

Defendant appeals the trial court's grant of summary judgment for plaintiffs.

The following undisputed facts were presented at the summary judgment hearing:

Prior to August 1994, plaintiffs (hereinafter collectively "Whiteco") owned an outdoor advertising sign which was located adjacent to Interstate 95 on land owned by the J.W. Crew estate ("Crew estate"). In 1972, the Department of Transportation ("DOT") issued an advertising permit for the sign. In July, August and September, 1993, in anticipation of its pending purchase of the Crew

estate land on which the sign was located, the DOT wrote Whiteco and offered to pay for the sign's removal. Whiteco rejected the DOT's relocation offer and refused to move the sign.

By deed recorded 24 February 1994, the DOT purchased part of the Crew estate land, including the land on which the sign was located, in order to construct a Welcome Center. In March, June, and July 1994, the DOT again wrote Whiteco and warned that it would remove the sign if Whiteco did not do so. In August 1994, Whiteco's sign was moved during construction of the Welcome Center.

On 27 October 1994, Whiteco filed a complaint for inverse condemnation against the DOT. Both parties filed motions for summary judgment on the issue of the DOT's liability to pay just compensation. On 24 October 1995, Judge Cy A. Grant, Sr. granted Whiteco's motion for partial summary judgment. The DOT appeals.

We first note that the trial court's order, although interlocutory, is immediately appealable under N.C. Gen. Stat. section 1-277(a) because it affects a substantial right of appellant DOT. *See City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 107, 338 S.E.2d 794, 797 (1986).

The DOT contends that the trial court erred by ruling that it must pay Whiteco just compensation for its purported leasehold interest and its sign. We agree.

[1] We first address plaintiff's contention that it is entitled to just compensation under N.C. Gen. Stat. section 136-111. This statute provides a remedy for persons whose "land or compensable interest therein" has been taken by the DOT when the DOT has not filed a complaint or declaration of taking. G.S. § 136-111 (1993). We find that plaintiff is not entitled to recover under this statute because it has failed to show that it had an interest in land that was taken.

Whiteco asserts that it had a leasehold interest in the land on which its sign was located at the time the sign was removed. We disagree. There are no recorded leases between the landowners and Whiteco regarding Whiteco's placement of its sign on the Crew estate land. There is an unrecorded document purporting to be a lease, designated as a "Sign Location Lease." This document states, on its face, that it is for a period of five years. It was signed by the Honorable W. Lunsford Crew, the executor of the Crew estate, on 8 March 1991, but not by Whiteco, and was never recorded.

After Mr. Crew signed the "Sign Location Lease," Whiteco and Mr. Crew then agreed to incorporate by reference the terms of a 11 March 1991 letter from Mr. Crew to Whiteco into the "Sign Location Lease." In this letter, Mr. Crew stated that the property was under an option to purchase and that, if the purchase went forward, the owners of the Crew estate land would not execute the "Sign Location Lease." In the letter he also stated that, if the property was not sold, he and the other landowners would continue the lease at $300 per year for a period of five years. However, he further stated that they would only agree for the lease to be "on a month-to-month basis" but that they "would try to give at least ninety days' notice" of termination if the property was sold. On the record before us, it appears that the property was not sold pursuant to the option mentioned in this letter and that on the first day of January of 1992, 1993, and 1994, Whiteco paid, and the owners of the Crew estate land accepted, a payment of $300 rent.

Whiteco asserts that, according to these terms, it had a five year lease enforceable against the DOT. Pursuant to N.C. Gen. Stat. section 47-18, a lease of land for more than three years is not valid to pass title as against a purchaser for valuable consideration unless it is recorded. *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E.2d 769, 770-71 (1965). Since the 1991 "Sign Location Lease" purports to be for five years and was never recorded, it is not valid to pass title to Whiteco as against the DOT, a purchaser for value. Thus, at the time Whiteco's sign was removed, Whiteco did not have an enforceable five-year leasehold interest in the property.

In fact, the record evidence shows that, regardless of the actual term of the lease between Whiteco and the owners of the Crew estate land, it was terminable by agreement, at most, on ninety days notice. Assuming for the sake of argument that the DOT succeeded to the previous owners' lessor obligations, then the DOT also succeeded to the previous lessors' right to terminate on ninety days notice.

The undisputed facts of record show that, prior to and after purchasing the property, the DOT satisfied this ninety days notice requirement. On 1 January 1994, Whiteco paid, and the owners of the Crew estate land later deposited, its $300 rent. The DOT's deed of purchase was recorded on 24 February 1994. On 29 March 1994, more than 90 days prior to the actual removal of the sign in August 1994, the DOT notified Whiteco that it must remove its sign. We conclude that the notice given by the DOT effectively terminated any purported

lease that Whiteco may have had with the DOT by virtue of the DOT's purchase of the property.

Thus, at the time the sign was removed, Whiteco did not have a leasehold interest in the land on which its sign was located and was not entitled to exhibit its sign there. Whiteco was given a reasonable time to remove the sign. By not doing so, it effectively abandoned its sign. *See* 51C C.J.S. *Landlord and Tenant* § 317(b) (1968). We conclude that the DOT's alleged subsequent removal of the sign in August 1994 did not entitle Whiteco to just compensation under G.S. section 136-111.

Whiteco further asserts that the DOT is obligated to pay just compensation for removal of its sign as a "taking" under our federal and state constitutions.

Whiteco asserts that the DOT was required to purchase its sign when it exercised its powers of eminent domain by purchasing the land on which the sign was located. To support its assertion, Whiteco relies on *United States v. General Motors Corp.*, 323 U.S. 373, 89 L. Ed 311 (1945), and *Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 272 S.E.2d 920 (1980).

[2] In both of these cases, the complainant had an interest or alleged interest in the land being condemned and its personal property was damaged as a result of the removal necessitated by the condemnation. *See General Motors Corp.*, 323 U.S. at 375, 383-84, 89 L. Ed. at 317, 321; *Advertising Co.*, 50 N.C. App. at 153-54, 272 S.E.2d at 922. Here, in contrast, the evidence establishes that when its sign was removed, Whiteco did not have an interest in the land on which its sign was located. Even if the DOT did purchase the Crew estate land under threat of condemnation, neither *General Motors Corp.* nor *Advertising Co.* require a government entity which purchases land in this manner to pay just compensation for removable personal property located on the land when the owner of the personal property has no interest in the real property purchased.

[3] Whiteco also asserts that it *did* have an interest in land because its sign was realty, not personal property. We disagree. The undisputed record evidence establishes, as a matter of law, that Whiteco's sign was removable personal property and not part of the realty. Here, the DOT purchased land which was the subject of a purported lease between Whiteco and the owners of the Crew estate land. When the rights of a third party purchaser are concerned, the issue of

whether property attached to land is removable personal property or part of the realty is determined by examining external indicia of the lessee's "reasonably apparent" intent when it annexed its property to the land. *Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 693, 340 S.E.2d 510, 513 (1986).

Here, Whiteco's intent that its sign remain its personal property became reasonably apparent to the DOT when it purchased the Crew estate land, as indicated by external evidence of this intent. During the negotiations between the owners of the Crew estate land and the DOT, the landowners signed a disclaimer of any ownership interest in Whiteco's sign. At this time, Whiteco had listed the sign as its personal property for tax purposes. The DOT permit for the sign was not issued to the landowner but to White Advertising Int., the entity which applied for the permit in 1972. Whiteco's logo was displayed on the sign pursuant to N.C. Gen. Stat §. 105-86(e) which requires that the owner's logo be displayed on the sign. In addition, we note that Whiteco has admitted, in its response to the DOT's First Request for Admissions, that the sign was a "trade fixture" which by law is removable personal property. *See Taha v. Thompson*, 120 N.C. App. 697, 703, 463 S.E.2d 553, 557 (1995), *disc. review denied,* 344 N.C. 443, 476 S.E.2d 130, 131 (1996).

Once the DOT purchased the land where Whiteco's sign was located, it had the right as a property owner to exclude others from use of the property. As the owner of the sign, once its right to exhibit the sign on DOT land under a lease agreement had expired, Whiteco was required to move it within a reasonable time. Whiteco had ample opportunity to do so but refused. By refusing to remove its sign within a reasonable time after termination of the tenancy, Whiteco effectively abandoned the sign. *See* 51C C.J.S. *Landlord and Tenant* § 317(b). By removing the abandoned sign, the DOT was simply exercising its rights as a property owner and was not proceeding pursuant to its power of eminent domain. Given these facts, we hold that Whiteco is not entitled to just compensation for its sign.

Whiteco also contends that 23 U.S.C. § 131 *et. seq.* and N.C. Gen. Stat. section 136-126 *et. seq.* require the DOT to pay just compensation for its sign. We disagree.

[4] In 1967, North Carolina adopted the Outdoor Advertising Control Act ("OACA"), codified at N.C. Gen. Stat. section 136-126 *et. seq.*, in response to the federal Highway Beautification Act, 23 U.S.C. § 131 *et. seq.* ("HBA") which imposes a reduction in federal funding for

highway projects on any state which fails to provide for effective control of outdoor advertising. *See* 23 U.S.C. § 131(b) (1990). The OACA *authorizes* the DOT to acquire by purchase, gift, or condemnation all outdoor advertising and all property rights pertaining to the advertising which are prohibited under certain provisions of the OACA. N.C. Gen. Stat. § 136-131 (1993). However, the OACA does not expressly *require* the DOT to exercise this power.

In fact, no provision of the OACA *expressly* requires the payment of just compensation for signs removed by the DOT. Granted, this Court has previously stated that the OACA requires compensation to sign owners whose signs are removed pursuant to the OACA. *See Givens v. Town of Nags Head*, 58 N.C. App. 697, 700-701, 294 S.E.2d 388, 390, *appeal dismissed and cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982). However, since this language in *Givens* was not necessary to this Court's decision, it is *obiter dictum* and not binding. *See Trustees of Rowan Tech. v. Hammond Assoc.*, Inc., 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985).

If the General Assembly had intended to require payment of compensation whenever the DOT removes a sign under the OACA, it could have used the term "required" rather than "authorized" in G.S. section 136-131. It did so in another provision, G.S. section 136-131.1., inapplicable here, where it specified that a local unit of government which removes outdoor advertising adjacent to certain highways, when the DOT has issued a permit for the advertising, must pay just compensation. *See* N.C. Gen. Stat. § 136-131.1 (1993).

Be that as it may, assuming for sake of argument that the DOT is required under the OACA, as stated in *Givens*, to pay just compensation for signs it removes, this requirement only applies when the DOT removes the sign *pursuant to exercise of its regulatory power under the OACA*. This is not what occurred here. In removing Whiteco's sign, the DOT acted as a property owner, *i.e.*, it removed an abandoned sign from property which it owned and in which Whiteco had no property interest. Given these facts, we conclude that the OACA does not require the DOT to pay compensation for Whiteco's sign.

[5] We also disagree with Whiteco's assertion that the federal HBA requires the DOT to pay compensation for removal of its sign. As we stated in *Givens*, the HBA does not create individual rights and does not impose regulation, but simply authorizes federal-state agreements pursuant to which state regulatory statutes, *e.g.*, the OACA,

may be adopted. *Givens*, 58 N.C. App. at 703, 294 S.E.2d at 392. If the OACA needs to be amended to comply with federal specifications regarding payment of compensation and therefore to assure continued availability of federal funding for state highway projects, this is a matter for the General Assembly, not for this Court. *See id.* at 701, 294 S.E.2d at 391. The DOT is not legally required to comply with the HBA, only with the OACA.

[6] We further reject Whiteco's assertion that 42 U.S.C. § 4652 requires that the DOT pay just compensation for its sign. Our appellate courts have not addressed this issue. However, other state courts have held that this federal statute does not create a right to just compensation for signs where a state's case law precludes compensation on the grounds that the signs are removable personal property. *E.g.*, *Matter of Condemnation by Minneapolis Community Dev. Agency*, 417 N.W.2d 127, 131 (Minn. Ct. App. 1987), *review denied* (February 24, 1988) (citing *Creative Displays v. South Carolina Highway*, 248 S.E.2d 916 (S.C. 1978)). We agree with this approach. As discussed above, under North Carolina law, Whiteco's sign is removable personal property. We hold that 42 U.S.C. § 4652 does not entitle Whiteco to compensation for its sign.

The trial court erred by granting summary judgment to Whiteco. We reverse and remand for entry of summary judgment in favor of the DOT.

Reversed and remanded.

Judges JOHNSON and WYNN concur.

Judge JOHNSON participated in this opinion prior to his retirement on 1 December 1996.

PHYLLIS A. HELMS AND MARY B. MOSLAK, PLAINTIFFS v. JOYCE W. HOLLAND, PRUDENTIAL RESIDENTIAL SERVICES, A NORTH CAROLINA LIMITED PARTNERSHIP, GREATER CAROLINAS REAL ESTATE SERVICES, INC. D/B/A PRUDENTIAL TRIANGLE REAL ESTATE, BETTY JOHNSON AND GEORGE WHITE D/B/A GEORGE WHITE REALTY, DEFENDANTS

No. COA95-676

(Filed 3 December 1996)

1. Pleadings § 121 (NCI4th)— motion for judgment on pleadings—conversion into summary judgment motion

A motion for judgment on the pleadings will be treated as a motion for summary judgment where the trial court considered matters outside the pleadings in reaching its decision. N.C.G.S. § 1A-1, Rule 12(c).

Am Jur 2d, Summary Judgment § 13.

What, other than affidavits, constitutes matters outside the pleadings, which may convert motion under Federal Rule of Civil Procedure 12(b),(c), into motion for summary judgment. 2 ALR Fed 1027.

2. Fraud, Deceit, and Misrepresentation § 14 (NCI4th)— real estate brokers—failure to disclose—insufficient evidence of fraud

Plaintiffs' forecast of evidence was insufficient to support their claim against defendant real estate brokers for fraud in failing to disclose that the county health department had determined that property purchased by plaintiffs was not suitable for use as a family care facility where there was evidence that the sellers had received a letter from the county health department concluding that the property was unfit as a family health facility because of an unrepairable septic system; the evidence indicates that the sellers had advised one defendant that the property had experienced septic problems which had been remedied; and there was no evidence that any of the defendants were aware of the health department's letter.

Am Jur 2d, Fraud and Deceit §§ 145, 146, 158.

Real-estate broker's or agent's misrepresentation to, or failure to inform, vendor regarding value of vendor's real property. 33 ALR4th 944.

Necessity of real-estate purchaser's election between remedy of rescission and remedy of damages for fraud. 40 ALR4th 627.

3. Negligence § 102 (NCI4th)— negligent misrepresentation—insufficient forecast of evidence

Plaintiffs had no claim against defendant real estate brokers for negligent misrepresentation that property purchased by plaintiffs was suitable for use as a family care facility where plaintiffs' forecast of evidence indicated that the sellers never advised defendants that the county health department had concluded that the property was unsuitable for a family care facility because of septic system problems; the sellers simply told one defendant that septic problems had been remedied, and this information was communicated to plaintiffs; and nothing in the record shows that defendants negligently informed plaintiffs about the property.

Am Jur 2d, Brokers §§ 96, 108.

Real-estate broker's or agent's misrepresentation to, or failure to inform, vendor regarding value of vendor's real property. 33 ALR4th 944.

4. Fraud, Deceit, and Misrepresentation § 20 (NCI4th); Negligence § 134 (NCI4th)— fraud—negligent misrepresentation—absence of justifiable reliance

Assuming that defendant real estate brokers made intentional or negligent misrepresentations that property purchased by plaintiffs was suitable for use as a family care facility when septic system problems precluded such use, plaintiffs did not justifiably rely upon such information and thus had no claims for fraud or negligent misrepresentation where the contract of sale contained a provision added by plaintiffs stating that the "property must pass the state inspection for family care home guidelines"; the contract also included a recommendation that the "buyer should have any inspections made prior to incurring expenses for closing"; and had plaintiffs complied with the state inspection provision, they would have discovered that septic deficiencies precluded use of the property for a family care facility.

Am Jur 2d, Estoppel and Waiver § 76; Fraud and Deceit § 223.

5. Appeal and Error § 418 (NCI4th)— abandonment of issue on appeal

Plaintiffs abandoned the issue of the propriety of summary judgment for defendants on plaintiffs' claim for punitive damages where plaintiffs stated that "it would be an exercise in futility to analyze the trial court's error in allowing the summary judgment," and plaintiffs presented no argument or authority on this issue. N.C. R. App. P. 28.

Am Jur 2d, Appellate Review § 871.

Appeal by plaintiffs from orders entered in Wake County Superior Court, being: (1) Judge Donald W. Stephens' order dated 16 November 1994 allowing partial judgment on the pleadings and dismissing all of plaintiffs' claims for compensatory and treble damages and (2) Judge Robert L. Farmer's order entered 24 February 1995 granting summary judgment against the plaintiffs and in favor of all defendants. Defendants cross appeal from Judge Stephens' November 1994 order denying defendants' motion to dismiss pursuant to Rule 12(b)(6) and denying judgment on the pleadings as to the issue of punitive damages. Heard in the Court of Appeals 29 February 1996.

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

Young Moore and Henderson, P.A., by John N. Fountain and R. Christopher Dillon, for defendant-appellee/appellants Joyce W. Holland, Prudential Residential Services and Greater Carolinas Real Estate Services, Inc.

Maupin Taylor Ellis & Adams, P.A., by Elizabeth D. Scott, for defendant-appellee/appellants Betty Johnson and George White Realty.

McGEE, Judge.

In the spring of 1990 plaintiffs, who were in the family care facility business, made an offer to purchase a piece of real property for use as a family care facility. Paragraph 6 of the Offer to Purchase and Contract included a hand-written provision which stated, "B. Property must pass state inspection for family care home guidelines." Paragraph 8 of the Standard Provisions stated, "RECOMMENDATION: Buyer should have any inspections made prior to incurring

expenses for closing." On 4 April 1990, plaintiffs purchased the property for the contract price of $106,900.00. In the process of obtaining approval from the Wake County Department of Health, plaintiffs learned the septic system had previously malfunctioned and that the Department of Health had determined the system was not subject to repair and therefore the property was not suitable for use as a family care facility.

Plaintiffs filed an action against the owners of the property seeking compensatory and punitive damages (Action I). The case went to trial and a unanimous jury rendered a verdict in favor of plaintiffs answering, as follows, "[the owners] fraudulently represent[ed] to the plaintiffs, Phyllis A. Helms and Mary B. Maslak [sic], that all problems with the septic system had been fully corrected and that the septic system was suitable for use as a family care home." Consequently, the jury determined plaintiffs were entitled to recover $22,900.00 by reason of this false representation. Before judgment was entered, the parties reached a settlement, signed a release agreement and plaintiffs filed a voluntary dismissal with prejudice of their action against the owners.

In the spring of 1991, plaintiffs initiated a lawsuit against the owners' real estate agent, Joyce W. Holland (Holland) and the company she represented, Prudential Residential Services and Greater Carolinas Real Estate Services, Inc. d/b/a Prudential Triangle Real Estate (Prudential) for compensatory, treble and punitive damages (Action II). Defendants Holland and Prudential filed an answer and a third-party complaint against plaintiffs' real estate agent, Betty Johnson (Johnson) and the company she represented, George White d/b/a George White Realty (White Realty). On 8 March 1993, plaintiffs filed a voluntary dismissal of this lawsuit without prejudice.

On 3 March 1994, plaintiffs filed this third action against Holland, Prudential, Johnson and White Realty alleging fraud and in the alternative, negligent misrepresentation as well as unfair and deceptive trade practices and punitive damages (Action III). All defendants timely filed responsive pleadings and all moved (1) for dismissal of plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and (2) for judgment on the pleadings under N.C. Gen. Stat. § 1A-1, Rule 12(c). Defendants' motions were heard 16 November 1994. Judge Donald Stephens denied defendants' Rule 12(b)(6) motions, allowed the Rule 12(c) motion for judgment on the pleadings as to all claims for compensatory and treble damages, but denied defendants' motions as to plaintiffs' claims for punitive damages.

Following completion of discovery, defendants moved for summary judgment on plaintiffs' remaining claim for punitive damages and on 24 February 1995, Judge Robert Farmer granted defendants' motion for summary judgment. Plaintiffs timely filed a notice of appeal to this Court from the order allowing partial judgment on the pleadings as well as the summary judgment order. Defendants filed a notice of cross-appeal from the denial of defendants' motions for judgment on the pleadings as to the issue of punitive damages.

Conversion to Summary Judgment

[1] G.S. § 1A-1, Rule 12(c), in part, states that where matters outside the pleadings are received and not excluded by the trial court, a motion for judgment on the pleadings should be treated as a motion for summary judgment and disposed of in the manner and under the conditions set forth in Rule 56 of the North Carolina Rules of Civil Procedure. G.S. § 1A-1, Rule 12(c). Only the pleadings and exhibits which are attached and incorporated into the pleadings may be considered by the trial court. *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984). "No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings." *Id.* Included with the pleadings in this case was the 1990 deposition of defendant Holland taken in Action I against the owners of the real property. Additionally, the trial court's order granting partial judgment on the pleadings indicates the court considered "the pleadings in the file and the briefs and arguments of counsel." Because matters outside the pleadings were considered by the court in reaching its decision on the judgment on the pleadings, the motion will be treated as if it were a motion for summary judgment. *Id.*

Having converted defendants' Rule 12(c) judgment on the pleadings into a Rule 56 motion for summary judgment, the question on appeal is whether there is a genuine issue as to a material fact and whether defendants are entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c). This Court must consider the evidence in a light most favorable to the non-moving party, allowing the non-moving party a trial upon a favorable inference as to the facts. *Moye v. Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979). In order to prevail under the summary judgment standard, defendants must demonstrate an essential element of plaintiffs' claim is nonexistent or that plaintiffs are unable to produce evidence which supports an essential element

of their claim. *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, *temp. stay allowed*, 394 S.E.2d 167, *disc. review denied and stay dissolved*, 327 N.C. 426, 395 S.E.2d 675 (1990). Assuming, *arguendo*, res judicata and the statute of limitations are not bars to this action, we conclude defendants were entitled to summary judgment because plaintiffs failed to support essential elements of the claims of fraud, negligent representation, as well as unfair and deceptive trade practices.

Fraud

[2] As plaintiffs point out, the elements of fraud are well-established: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985). "A broker who makes fraudulent misrepresentations or *who conceals a material fact* when there is a duty to speak . . . is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller." *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 210, 400 S.E.2d 38, 43 (1991) (quoting P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* 132, at 165 (3rd ed. 1988)). However, this duty applies only to "material facts known to the broker and to representations made by the broker." *Clouse v. Gordon*, 115 N.C. App. 500, 508, 445 S.E.2d 428, 432-33 (1994). The record in this case is devoid of any showing that defendants (1) intended to deceive plaintiffs or (2) knew at the time of the sale that the Health Department had already disapproved the property as a family care facility because of the condition of the septic system. While there was evidence the *owners* had received a letter from the Health Department concluding the property was unfit as a family care facility, nothing in the record supports plaintiffs' conclusory statements that *defendants* were also aware of this decision. The evidence in the record indicates the owners advised defendant Holland that the property had experienced septic system problems due to tremendous rain and overuse by teenagers, but these problems had been resolved. However, there is no evidence Holland or any of the other defendants were aware of the Health Department's letter disapproving the property for use as a family care facility.

Negligent Misrepresentation

[3] Plaintiffs' alternative claim for negligent misrepresentation also fails. In *Powell v. Wold*, 88 N.C. App. 61, 67, 362 S.E.2d 796, 799,

(1987), this Court stated North Carolina has adopted the Restatement of Torts definition and requirements for negligent misrepresentation:

> "One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, and
>
> (ii) because of his *justifiable reliance* upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith."

Id. (quoting Restatement (Second) of Torts § 552 (1977) (emphasis added)). Nothing in the record shows defendants negligently informed plaintiffs about the property. As we have already noted, the evidence indicates the owners never advised their agent, Holland, of the severity of the septic system problems. They simply told Holland the problem had been remedied and this information was communicated to plaintiffs at least by the closing date.

[4] Even assuming, *arguendo*, defendants made intentional or negligent misrepresentations to plaintiffs regarding the property, we conclude that under the circumstances, plaintiffs' reliance upon this information was unreasonable and therefore plaintiffs' claims must fail. Justifiable reliance is an essential element of both fraud and negligent misrepresentation. *C.F.R. Foods, Inc. v. Randolph Development Co.*, 107 N.C. App. 584, 588, 421 S.E.2d 386, 389, *disc. review denied*, 333 N.C. 166, 424 S.E.2d 906 (1992) (stating that a plaintiff's reliance must be reasonable to prove fraud); *APAC-Carolina, Inc. v. Greensboro-High Point Airport Authority*, 110 N.C. App. 664, 680, 431 S.E.2d 508, 517, *disc. review denied*, 335 N.C. 171, 438 S.E.2d 197 (1993) ("Justifiable reliance is an element of negligent misrepresentation in North Carolina.")

The Offer to Purchase and Contract specifically contained a hand-written provision stating the "[p]roperty must pass the state inspection for family care home guidelines." One of the standard con-

tract provisions included the recommendation that the "buyer should have any inspections made prior to incurring expenses for closing." We note plaintiffs were already in the business of operating family care facilities and were familiar with the regulations governing such homes. Had plaintiffs complied with the state inspection provision which *they* added to the Offer to Purchase and Contract, the septic system deficiencies would have been revealed. Under these facts, we cannot conclude that plaintiffs would have been justified in relying upon a fraudulent or negligent misrepresentation of defendants as to this issue. *See APAC*, 110 N.C. App. at 681-82, 431 S.E.2d at 518 (concluding reliance was unjustified where the contract placed upon plaintiffs the burden of a full inspection and the evidence indicated the inspection would have revealed the problem of undercut work); *C.F.R. Foods, Inc.*, 107 N.C. App. at 588-89, 421 S.E.2d at 389 (Plaintiff's reliance was unreasonable where plaintiff requested and received a topographical map which served to put plaintiff on notice that further inspection of the soil was advisable before beginning construction.) For the foregoing reasons, plaintiffs' assignments of error as to fraudulent and negligent misrepresentation are overruled.

Based on our review of the record, we find plaintiffs' claim for unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 is without merit and we overrule this assignment of error.

[5] Plaintiffs' final argument is that the trial court erred in allowing defendants' motion for summary judgment on the issue of punitive damages. However, plaintiffs' statement that "it would be an exercise in futility to analyze the trial court's error in allowing the summary judgment" coupled with the absence of an argument or authority on the question of the propriety of the summary judgment motion cause us to conclude this issue has been abandoned pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure.

Because of our decision on plaintiffs' appeal, we need not address defendants' cross appeal in this matter.

Based on the foregoing, we affirm the orders of the trial court.

AFFIRMED.

Judges JOHNSON and MARTIN, JOHN C. concur.

Judge Johnson participated in this opinion prior to his retirement on 1 December 1996.

KENNETH RALPH SANDERS, PLAINTIFF-EMPLOYEE v. BROYHILL FURNITURE INDUSTRIES, DEFENDANT-EMPLOYER, AND SELF-INSURED (TRIGON ADMINISTRATORS, ADMINISTERING AGENT), DEFENDANT-CARRIER

No. COA95-1416

(Filed 3 December 1996)

Workers' Compensation § 414 (NCI4th)— review of deputy commissioner by full Commission—credibility of plaintiff—cold record—findings required of Commission

An Industrial Commission award was reversed and remanded for consideration of the Deputy Commissioner's findings of credibility where plaintiff had claimed a back injury, the deputy commissioner found plaintiff not credible and denied his claim, and the full Commission reversed the deputy commissioner and awarded plaintiff temporary total benefits. Prior to reversing the deputy commissioner's credibility findings on review of a cold record, the full Commission must demonstrate in its opinion that it considered the applicability of the general rule which encourages deference to the hearing officer who is the best judge of credibility. This holding is limited strictly to situations where the full Commission reviews the evidence on a cold record; clearly, the full Commission may make credibility findings without regard to any findings of credibility made by the deputy commissioner if witnesses appear before it. Here the majority of the full Commission relied solely on plaintiff's testimony without mention of plaintiff's credibility or its reasons for reversing the deputy commission's finding and this was a manifest abuse of discretion.

Am Jur 2d, Workers' Compensation §§ 691, 692.

Appeal by defendant-employer from opinion and award entered 21 September 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 September 1996.

Beach Law Office, by N. Douglas Beach, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Linda Hinson Ambrose and Erica B. Lewis, for defendant-appellant.

LEWIS, Judge.

On 16 November 1992, plaintiff filed a request for hearing with the Industrial Commission seeking compensation for injuries allegedly arising from a work-related accident occurring on 17 December 1991. After hearing, Deputy Commissioner Dillard found plaintiff not credible and denied his claim. The full Commission, with Commissioner Sellers dissenting, reversed the Deputy Commissioner and awarded plaintiff temporary total benefits. Defendant-employer appeals.

At the hearing before the Deputy Commissioner on 23 February 1994, plaintiff testified that he had worked for defendant Broyhill Furniture Industries ("Broyhill") for about thirty-two years. He testified that in December 1991, he hurt his back while pulling a truck loaded with stock. He explained that one of the standards which holds the stock on the truck broke, causing him to fall. Plaintiff testified that he worked the rest of the day and recalled telling Dwight Davis, his job supervisor, that he had hurt his back. Mr. Sanders testified that he could barely walk when he got home that evening, but returned to work the next day and worked a full day. However, Mr. Sanders testified that he was helped a great deal by his co-worker, Morris Parsons. Mr. Sanders worked the rest of that week until Christmas vacation. He worked only two days after Christmas and was not able to return to work thereafter.

Mr. Parsons, plaintiff's co-worker, testified that he helped Mr. Sanders on the job during December 1991 but Mr. Sanders never told him that he needed the help because he had injured his back at work. Dwight Davis, plaintiff's supervisor at Broyhill, testified that plaintiff never reported to him that he had suffered an injury at work. He further testified that after plaintiff was out of work for several weeks, he tried to contact him to find out how he was doing. Mr. Davis stated that he was told plaintiff was out of work because he was sick.

Reba Cobb, an insurance clerk for Broyhill, testified that Mr. Sanders did not report an injury to her in December 1991. She further testified that she received an out-of-work slip from plaintiff's doctor dated 1 January 1992 explaining that plaintiff was not able to work because of hip pain. Therefore, she testified that it was her understanding that the reason Mr. Sanders was out of work in January 1992 was due to arthritis in his hip. She testified that although she was in close contact with plaintiff and his wife, neither of them told her about an accident at work. The first time she was notified that

plaintiff alleged to have suffered a work-related accident was in September 1992.

Plaintiff's medical records, which were stipulated into evidence, contain contradictory accounts of how plaintiff received his injury.

Defendant-employer first argues on appeal that the Industrial Commission erred in finding and concluding that plaintiff suffered a compensable injury by accident on 17 December 1991. Defendant-employer contends that it was error for the Commission to rely solely on plaintiff's testimony, which is not credible. Broyhill maintains that the full Commission should have upheld the finding of the Deputy Commissioner that plaintiff was not credible because only the Deputy Commissioner could observe personally the witnesses.

N.C. Gen. Stat. section 97-85 empowers the full Commission, after application, to review an award of a deputy commissioner and "if good ground be shown therefor, [to] reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." N.C. Gen. Stat. § 97-85 (1991). These powers are "plenary powers to be exercised in the sound discretion of the Commission" and should not be reviewed on appeal absent a manifest abuse of discretion. *Lynch v. Construction Company*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979).

Ordinarily, the full Commission is the sole judge of the credibility of witnesses. *See Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. rev. denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). However, in cases where the full Commission does not conduct a hearing and reviews a cold record, this Court has recognized the general rule that "the hearing officer is the best judge of the credibility of witnesses because he is a firsthand observer of witnesses whose testimony he must weigh and accept or reject." *Pollard v. Krispy Waffle*, 63 N.C. App. 354, 357, 304 S.E.2d 762, 764 (1983).

In *Pollard*, this Court held that the full Commission "has the power to review determinations made by deputy commissioners on the credibility of witnesses" under G.S. § 97-85. *Id.* We leave this holding undisturbed. However, we believe that when the Commission reviews a deputy commissioner's credibility determination on a cold record and reverses it without considering that the hearing officer may have been in a better position to make such an observation, it

has committed a manifest abuse of its discretion. Accordingly, we hold that prior to reversing the deputy commissioner's credibility findings on review of a cold record, the full Commission must, as it did in *Pollard,* demonstrate in its opinion that it considered the applicability of the general rule which encourages deference to the hearing officer who is the best judge of credibility.

In so holding, we are aware that no specific findings are required to be made by the Commission before it decides whether or not to hear new evidence under G.S. § 97-85. *See Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 20, 348 S.E.2d 596, 600 (1986), *disc. rev. denied,* 319 N.C. 103, 353 S.E.2d 106 (1987). However, we have determined that matters of credibility require a different approach. While the Commission is entitled to overrule the deputy commissioner's ruling on credibility, its determination cannot be made lightly when the deputy commissioner is the only person who has observed the witnesses. Credibility can be decisive in deciding a party's success or failure. Our holding today recognizes this fact and reinforces the widely-held belief that credibility is best judged by those who are present when the record is made.

In civil and criminal trials, trial judges are considered to be the best judge of credibility since they are present to observe the witnesses. *See, e.g., State v. Sessoms*, 119 N.C. App. 1, 6, 458 S.E.2d 200, 203 (1995), *aff'd per curiam*, 342 N.C. 892, 467 S.E.2d 243, *cert. denied,* — U.S. —, 136 L.Ed. 2d 129 (1996); *Repair Co. v. Morris & Assoc.*, 2 N.C. App. 72, 75, 162 S.E.2d 611, 613-14 (1968). In *Sessoms*, we offered the following explanation for this deference:

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

Sessoms, 119 N.C. App. at 6, 458 S.E.2d at 203. This reasoning is equally true in the context of Industrial Commission hearings.

In her dissent, Commissioner Sellers voiced concern over the full Commission's treatment of the credibility issue, expressing her opinion that "Commissioners sitting as the Full Commission should exercise great restraint when tempted to replace the evaluation of a deputy, who was actually present to observe the witnesses who testi-

fied under oath, with the opinion of a Commissioner, who has reviewed only a cold record and the brief arguments of the party or their counsel." We agree.

We stress that our holding is limited strictly to situations where the full Commission reviews the evidence on a cold record. Clearly, if the witnesses appear before the full Commission, it may make credibility findings without regard to any findings of credibility made by the deputy commissioner. Neither do we lessen the Commission's discretion in determining whether to uphold the deputy commissioner's credibility findings. The Commission is free to reach an opposite conclusion. What we require today is documentation that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one. In doing so, we encourage the full Commission to include findings showing why the deputy commissioner's credibility determination should be rejected.

In the present case, the Deputy Commissioner made the following finding: "Plaintiff's testimony regarding the alleged accident is not credible. Plaintiff did not sustain an injury by accident within the course of his employment." The majority of the full Commission, without mention of plaintiff's credibility or its reasons for reversing the deputy commissioner's finding, relied solely on plaintiff's testimony to find that he had suffered an injury by accident within the scope of his employment. For the reasons stated above, we hold that this is a manifest abuse of the Commission's discretion.

We therefore reverse the Industrial Commission's award and remand this case to the Industrial Commission for consideration of the Deputy Commissioner's findings of credibility.

Reversed and remanded.

Judges WALKER and MARTIN, MARK D. concur.

VSD COMMUNICATIONS, INC., PLAINTIFF v. LONE WOLF PUBLISHING GROUP, INC., DEFENDANT

No. COA96-170

(Filed 3 December 1996)

1. Costs § 36 (NCI4th); Pleadings § 64 (NCI4th)— voluntary dismissal—jurisdiction to award attorney fees

The trial court could properly consider and rule upon defendant's motion for attorney fees pursuant to Rule 11(a) and N.C.G.S. § 6-21.5 after plaintiff voluntarily dismissed its claims without prejudice pursuant to Rule 41(a). N.C.G.S. § 1A-1, Rules 11(a) and 41(a).

Am Jur 2d, Costs §§ 5, 57, 70.

2. Pleadings § 63 (NCI4th)— claim not well-grounded—improper purpose—attorney fees as sanction

The trial court did not err in concluding that plaintiff apartment guide magazine publisher's action against its competitor for defamation, unfair trade practices, and malicious interference with contract was not well-grounded in fact, was not legally sufficient, and was interposed for an improper purpose, therefore entitling defendant to reasonable attorney fees as a sanction under Rule 11(a), where plaintiff's claims were based on statements in defendant's advertisements and correspondence about the circulation and pricing of plaintiff's magazine; plaintiff voluntarily dismissed its action under Rule 41(a); and the evidence supported the trial court's findings that plaintiff's president knew or should have known at the time the complaint was filed that the allegations therein concerning plaintiff's circulation and pricing were false, that the actual circulation of plaintiff's magazine did not exceed the amounts represented by defendant, and that plaintiff's president intended to use this lawsuit to damage defendant's relationships with its advertisers. N.C.G.S. § 1A-1, Rule 11(a).

Am Jur 2d, Pleading § 339.

Appeal by plaintiff from order entered 11 April 1995 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 23 October 1996.

Plaintiff, VSD Communications, Inc., and defendant, Lone Wolf Publishing Group, Inc., are competitors in the publishing business in

Wake County. Plaintiff publishes a guide called the "Apartment Finder" while defendant publishes a similar guide named the "Apartment Book." The dispute here began when defendant undertook an advertising campaign directly attacking plaintiff. On 19 September 1994, plaintiff filed suit against defendant alleging unfair trade practices, malicious interference with contract, and defamation, and seeking both legal and equitable relief. Plaintiff amended its complaint to allege additional specific instances of defamation.

On 7 February 1995, defendant moved for summary judgment. On 8 March 1995, plaintiff filed a voluntary dismissal without prejudice pursuant to Rule 41(a). Thereafter, defendant filed additional motions (1) for attorney's fees pursuant to G.S. 75-16.1, (2) to set aside plaintiff's voluntary dismissal without prejudice, and (3) for attorney's fees pursuant to Rule 11 and pursuant to G.S. 6-21.5.

On 4 April 1995, the matter came on for hearing before Judge Stafford G. Bullock. On 11 April 1995, the trial court ordered plaintiff to pay defendant's attorney's fees in the amount of $5,783.00 pursuant to Rule 11 and G.S. 6-21.5. The trial court denied defendant's motions for summary judgment and to set aside plaintiff's voluntary dismissal. On 28 April 1995, plaintiff filed a motion pursuant to Rule 60(b) to set aside the trial court's order of 11 April 1995. The trial court denied plaintiff's motion on 21 June 1995.

Plaintiff appeals.

Carlton & Carlton by Karen Kelly Carlton for plaintiff-appellant.

William E. Moore, Jr., for defendant-appellee.

EAGLES, Judge.

[1] We first address the threshold question of whether defendant's motions may be ruled upon by the trial court after plaintiff voluntarily dismissed its claims without prejudice pursuant to Rule 41(a). In *Walker Frames v. Shively*, 123 N.C. App. 643, 646, 473 S.E.2d 776, 778 (1996), we recognized that, as a general proposition, a Rule 41(a) dismissal "terminate[s] all adversary proceedings in [the] case." *Id.* The filing of a voluntary dismissal strips the trial court of its authority to enter further orders in the adversary proceedings, "except as provided by Rule 41(d) which authorizes the court to enter specific orders apportioning and taxing costs." *Id.* (citing *Fields v.*

Whitehouse & Sons Co., 98 N.C. App. 395, 397-98, 390 S.E.2d 725, 726-27, *disc. review denied*, 327 N.C. 427, 395 S.E.2d 676 (1990)).

This broad limitation on the trial court's power to enter orders after a voluntary dismissal does not extend so far, however, as to bar the trial court from awarding attorney's fees pursuant to Rule 11(a) or G.S. 6-21.5 where the plaintiff's now dismissed action was frivolously filed or maintained in the absence of a justiciable issue. *Bryson v. Sullivan*, 330 N.C. 644, 664, 412 S.E.2d 327, 338 (1992). In the Rule 41(a) context, we recognize that a motion for attorney's fees pursuant to Rule 11(a) or G.S. 6-21.5 is not a continuation of adversary proceedings. *Id.* These motions have a life of their own and they address the propriety of the adversary proceedings that have previously occurred in the case without regard to whether the adversary proceedings in question are continuing when the motion for fees is filed. *Id.* Accordingly, we conclude that the trial court here could properly consider and rule upon defendant's motion for attorney's fees pursuant to Rule 11(a) and G.S. 6-21.5.

[2] We turn now to plaintiff's argument that the trial court erred in concluding that plaintiff's action was not well-grounded in fact, was not legally sufficient, and was interposed for an improper purpose, therefore entitling defendant to reasonable attorney's fees under Rule 11(a). Plaintiff argues that competent evidence does not support the trial court's findings and that the findings do not support the court's award of reasonable attorney's fees. We disagree.

We review *de novo* the trial court's decision to impose or not to impose mandatory sanctions pursuant to G.S. 1A-1, Rule 11 (a). *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

> In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Id. If we determine in our *de novo* review that sanctions were properly imposed by the trial court, we then review under an "abuse of

discretion" standard the appropriateness of the particular sanction imposed. *Id.*

Here, the plaintiff challenges the following findings of fact made by the trial court:

> 5. Plaintiff's Distribution Director knew, at the time the Complaint was filed, that the statements in Defendant's advertisements and correspondence [complaint Exhibits A, B and C] were true, or at least, did not understate the actual circulation of Plaintiff's "Apartment Finder" magazine. The statements contained in Defendant's advertisements and correspondence were consistent with the figures for pricing and circulation as publicly stated by Plaintiff . . . . Plaintiff's Distribution Director communicated to Plaintiff's President, Walt Fletcher, that the number of Plaintiff's Apartment Finder magazines printed for both the monthly and quarterly publications were not actually being placed in circulation. Additionally, the number of Plaintiff's Apartment Finder magazines, for both the monthly and quarterly publications, were not consistently being printed at the volume Plaintiff quoted to its advertisers.
>
> 6. Plaintiff's President, Walt Fletcher, was told by his Distribution Director, and knew, or should have known (based on print orders placed by Plaintiff and printing invoices received by Plaintiff), at the time of filing the Complaint, and at the time of filing the Amended Complaint, that the allegations contained therein as to Plaintiff's circulation and pricing were false, frivolous, and without foundation or good faith basis in fact. Plaintiff's President, Walt Fletcher, believed that the filing of the Complaint would cause advertisers (actual or prospective clients of both Plaintiff and Defendant) to doubt the veracity of Defendant's advertisements, merely by virtue of the fact that a lawsuit had been filed, and intended to use this lawsuit in order to damage Defendant with regard to its relationship to advertisers.
>
> 7. The Plaintiff's publishing bills and the testimony of Plaintiff's former Distribution Director, Rich F. Good, unequivocally show that the size of Plaintiff's "Apartment Finder's" circulation was <u>not</u> 120,000 booklets for the Triangle area. The actual circulation of Plaintiff's "Apartment Finder" magazine (combining the quarterly and monthly publications) did not exceed the amounts represented by Defendant in its advertisements and

correspondence, and Defendant's pricing comparisons were accurate.

These findings are sufficiently supported in the record by advertising documents submitted by plaintiff as exhibits to plaintiff's amended complaint and by plaintiff's print invoices from the months immediately prior to plaintiff's filing of its complaint. We note here that we find adequate and independent support for the relevant findings by the trial court without considering the deposition of Rich F. Good. Accordingly we need not address whether the trial court could properly consider the deposition of Mr. Good in ruling upon defendant's motion for sanctions.

We also conclude that the trial court's findings of fact are sufficient to support its conclusion that "[p]laintiff's action was not well-grounded in fact, was not legally sufficient, and was interposed for an improper purpose . . . in violation of N.C. Gen. Stat. § 1A-1, Rule 11 . . . ." Based on this conclusion, some measure of sanction is mandatory under Rule 11(a). Here, the trial court acted within its discretion in awarding reasonable attorney's fees as an appropriate sanction.

As to the amount of fees awarded, the trial court "considered the skill, time and labor expended as well as the complexity of the case." *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 751, 392 S.E.2d 352, 358 (1990). The trial court's order here includes the appropriate findings of fact supported by competent evidence as to the "skill, time and labor expended as well as the complexity of the case." *Id.* Accordingly, we conclude that the trial court did not err in its award of attorney's fees here pursuant to Rule 11(a).

Having upheld the trial court's award of attorney's fees pursuant to Rule 11(a) in the full amount awarded, we need not address plaintiff's argument that the trial court erred in concluding G.S. 6-21.5 provides an adequate and independent basis for the award of attorney's fees here.

Defendant also argues here that the trial court erred in denying plaintiff's Rule 60(b) motion. We disagree. The standard of review on this issue is abuse of discretion. Based upon our review of the record here, we conclude that the trial court acted within its discretion in denying plaintiff's motion pursuant to Rule 60(b). *E.g.*, *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). We have exam-

ined plaintiff's remaining assignments of error and conclude them to be without merit.

Affirmed.

Judges MARTIN, JOHN C., and SMITH concur.

RAY SHAFTER RIGGS, PLAINTIFF v. RAMONA ASKEW RIGGS, DEFENDANT

No. COA95-1375

(Filed 3 December 1996)

1. **Divorce and Separation § 134 (NCI4th)— equitable distribution—marital property—marital residence**

The trial court did not err in an equitable distribution action by classifying the marital residence as marital property where the court found that, while an agreement to purchase the property was entered into before the marriage and the property was acquired in plaintiff's name, it was paid for with marital funds. It appears that the trial court weighed and considered all the evidence and found the defendant's evidence more credible.

Am Jur 2d, Divorce and Separation §§ 878, 879, 903.

2. **Divorce and Separation § 119 (NCI4th)— equitable distribution—transferred property**

The trial court did not err in an equitable distribution action by determining that a tract of land and a mobile home were marital property where the property was conveyed to plaintiff by his son and daughter-in-law during the marriage and reconveyed to his son and himself after the separation. The defendant met her burden of showing that the property was marital in that it was acquired by one of the spouses during the marriage, before the separation, and was presently owned at the time of the separation. Plaintiff failed to prove that it was his separate property in that the trial court observed that plaintiff's testimony was only marginally credible and that it was significant that plaintiff's son did not testify concerning the circumstances surrounding the transfer.

Am Jur 2d, Divorce and Separation §§ 878-880.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. **Divorce and Separation § 119 (NCI4th)— equitable distribution—CD—portion as separate property—evidence insufficient**

The trial court did not err in an equitable distribution action by classifying a certificate of deposit as marital property where plaintiff contended that $9,677.67 of the CD (valued at $40,040) were his traceable, separate funds at the date of separation, but the only evidence that he produced was a savings withdrawal slip in the amount of $9,677.67. The trial court found that plaintiff had failed to produce any documentation of a deposit of $9,677.67 into any CD or account and that there was no other documentation tracing the origin of the funds in the CD. Plaintiff failed to carry his burden of showing that the $9,677.67 were his separate funds.

Am Jur 2d, Divorce and Separation §§ 878-880.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

4. **Divorce and Separation § 119 (NCI4th)— equitable distribution—Visa debt—marital property—insufficient findings**

The trial court erred in an equitable distribution action by determining that a debt on a Visa card held in defendant's name was marital debt where the trial court did not make any findings to support its determination except to classify it as a marital debt. The only evidence in the record regarding the debt was defendant's statement during cross-examination that she had no documentation to show what purchases were charged to this Visa account.

Am Jur 2d, Divorce and Separation §§ 878-880.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by plaintiff from order entered 19 May 1995 by Judge John W. Smith in New Hanover County District Court. Heard in the Court of Appeals 11 September 1996.

Nora Henry Hargrove for plaintiff-appellant.

Johnson & Lambeth, by Maynard M. Brown and Carter T. Lambeth, for defendant-appellee.

WALKER, Judge.

Prior to getting married on 25 May 1985, the plaintiff and defendant had been involved in a six and one-half year relationship, some part of which had been spent living together. The plaintiff filed suit seeking a divorce and equitable distribution. Following a hearing, the trial court ordered an unequal distribution of the marital estate in favor of the plaintiff. The plaintiff appeals from this order contending that the trial court erred in its classification of certain assets and debts as marital or separate.

The trial court has broad discretion in equitable distribution cases. In *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986), this Court stated:

> The General Assembly has committed the distribution of marital property to the discretion of the trial courts, and the exercise of that discretion will not be disturbed in the absence of clear abuse. Accordingly, the trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision. The trial court's findings of fact, on which its exercise of discretion rests, are conclusive if supported by any competent evidence. The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal. (Citations omitted.)

The trial court's determination "[a]s to whether property is marital or separate . . . will not be disturbed on appeal if there is competent evidence to support the findings." *Loving v. Loving*, 118 N.C. App. 501, 507, 455 S.E.2d 885, 889 (1995) (*citing Nix v. Nix*, 80 N.C. App. 110, 112-13, 341 S.E.2d 116, 118 (1986)). Furthermore, "formal errors in an equitable distribution judgment do not require reversal, particularly where the record reflects a conscientious effort by the trial judge to deal with complicated and extensive evidence." *Lawing*, 81 N.C. App. 163, 344 S.E.2d 104.

The trial court is responsible for identifying and classifying the property as either marital or separate. *Johnson v. Johnson*, 114 N.C.

App. 589, 591-92, 442 S.E.2d 533, 535 (1994). The burden of proof is as follows:

> The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. . . . The party claiming the property to be marital must meet her burden by showing by the preponderance of the evidence that the property: (1) was "acquired by either spouse or both spouses;" and (2) was acquired "during the course of the marriage;" and (3) was acquired "before the date of separation of the parties;" and (4) is "presently owned."

Atkins v. Atkins, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787-88 (1991) (citations omitted). Once the party claiming the property to be marital meets this burden, the party claiming the property to be separate has the burden of showing by the preponderance of the evidence that the property is separate, i.e. acquired before the marriage or acquired by gift, devise, descent or bequest during the marriage. *Id.*

[1] The plaintiff first assigns as error the classification of the marital residence as marital property. The plaintiff testified that he purchased the marital home shortly after the marriage by making an $18,000.00 down payment with his separate funds. However, the defendant testified that a portion of the down payment was in fact her funds.

The trial court found that, while an agreement to purchase this property was entered into before the marriage and it was acquired in plaintiff's name, the contention that it should be classified as plaintiff's separate property was not supported by the greater weight of the evidence. Instead, the trial court found that the property was paid for with marital funds. It appears that the trial court weighed and considered all the evidence and found the defendant's evidence more credible. Thus, the plaintiff failed to meet his burden of proof and the first assignment of error is overruled.

[2] The plaintiff next assigns as error the trial court's determination that the Eagle Ridge lot (a tract of land and mobile home) was marital property. We disagree.

The Eagle Ridge property was conveyed by warranty deed to the plaintiff by his son and daughter-in-law during the marriage. After the separation, the plaintiff then reconveyed the property to his son and himself. The trial court then found:

> Husband has failed to carry his burden to show that the conveyance was intended as a separate gift or trust. The court finds that full title was conveyed to husband during marriage, he had full power to control and dispose of the property during marriage, and in fact conveyed an interest in the property back to his son (but not son's wife) while this equitable distribution claim was pending. He has failed to carry his burden to establish a separate interest. On the date of separation, the court finds that the property was marital and that the fair market value of the lot and mobile home was $20,575.00

The defendant met her burden of showing that the Eagle Ridge property was marital in that it was acquired by one of the spouses, during the marriage, before separation and was presently owned at the time of the separation. The plaintiff then had the burden to show that this property was his separate property.

The trial court observed that the plaintiff's testimony as to the circumstances of the transaction was only "marginally credible" as he attempted to show he was unaware of the transaction. The trial court also noted it was significant that the plaintiff's son did not testify concerning the circumstances surrounding the transfer. The trial court's determination that the Eagle Ridge property was marital was based on sufficient evidence and plaintiff failed to prove it was his separate property.

[3] Plaintiff's third assignment of error concerns the classification of a Sharonview certificate of deposit as marital property. The plaintiff contends that $9,677.67 of the Sharonview CD valued at $40,040.00 were his traceable, separate funds at the date of the separation. Plaintiff argues that the $9,677.67 he deposited into this CD was money that had "rolled over" from another CD he had purchased before the marriage. However, the only evidence the plaintiff produced was a savings withdrawal slip, dated 1983, in the amount of $9,677.67. The trial court found that plaintiff failed to produce any documentation of a deposit of $9,677.67 into any CD or account and that there was no other documentation tracing the origin of the funds in the Sharonview CD. The trial court then found that plaintiff had failed to carry his burden of showing that $9,677.67 of the Sharonview CD were his separate funds. Based on this evidence, the trial court did not err in classifying the Sharonview CD as marital property.

[4] Plaintiff's fourth assignment of error is the determination by the trial court that the $3,101.00 debt to NationsBank Visa, held in

defendant's name, was marital debt. This Court has defined "marital debt" as "one incurred during the marriage and before the date of separation, by either spouse or both spouses, for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210, *review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994). "The party who claims that any debt is marital bears the burden of proof on that issue." *Tucker v. Miller*, 113 N.C. App. 785, 791, 440 S.E.2d 315, 319 (1994) (*citing Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993)). The party so claiming must show "the value of the debt on the date of separation and that it was 'incurred during the marriage for the joint benefit of the husband and wife.' " *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990) (*quoting Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987)). The trial court's only reference to this debt in its equitable distribution order states that it took into consideration the fact that the plaintiff made payments from his separate funds on marital debts, including a "visa bill." Except to classify it as a marital debt, the trial court did not make any findings to support its determination that the Visa debt was marital. The only evidence in the record regarding this debt was during cross-examination of the defendant when she stated that she had no documentation to show what purchases were charged to this Visa account. We find that there was no competent evidence in the record to show that this debt was incurred for the joint benefit of the parties. Thus, the trial court erred in classifying the $3,101.00 Visa debt as marital. We remand this case to the trial court with instructions to properly classify this $3,101.00 Visa debt as the defendant's separate debt and to enter a new equitable distribution order reflecting this classification.

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

Affirmed in part, reversed in part and remanded.

Judges EAGLES and McGEE concur.

WILLIAM A. STROUD v. CASWELL CENTER

No. COA95-903

(Filed 3 December 1996)

Workers' Compensation §§ 253, 233 (NCI4th)— asbestosis—retirement—disability—findings

An Industrial Commission award was remanded where plaintiff was exposed to asbestos in the course of employment with defendant, retired at age sixty, filed a claim alleging that he suffered from asbestosis, was paid 104 weeks of compensation, the parties entered into a Form 21 agreement whereby defendant acknowledged liability for plaintiff's asbestosis, a hearing was held to determine plaintiff's entitlement to further compensation, he was awarded $4,000 for permanent damage to his lungs, the deputy commissioner informed plaintiff's counsel that the "burden is on you to prove that [plaintiff] retired because of the disease" and awarded no additional temporary total disability compensation, and the full Commission adopted and affirmed the deputy commissioner's findings and conclusions. The Commission failed to make any findings of fact regarding plaintiff's capacity to earn wages at the conclusion of his initial 104 week term of compensation, but rather simply recited that plaintiff has not looked for work or been in the job market since his retirement. Plaintiff is not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease. Also, although defendant argues that there was substantial evidence that any incapacity to work was caused by prior cigarette smoking, the Commission failed to make its own determination as to the origins of plaintiff's impairment. The cause of plaintiff's disability need not be an "either/or" proposition.

Am Jur 2d, Pensions and Retirement Funds § 415; Workers' Compensation §§ 319, 399, 661, 709, 719.

Total disability or the like as referring to inability to work in usual occupation or in other occupations. 21 LR3d 1155.

Appeal by plaintiff from Opinion and Award filed 16 February 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 April 1996.

Robin E. Hudson for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General William H. Borden, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the decision of the North Carolina Industrial Commission (the Commission) denying his claim grounded upon reduction of earning capacity, and limiting him to benefits under N.C.G.S. § 97-31 (1991). We reverse the Commission's decision.

Pertinent facts and procedural information are as follows: plaintiff was employed by defendant from 1 June 1961 until 31 May 1987, working successively as farm-hand, general utility person, maintenance mechanic, and plumber. In the course of employment with defendant, plaintiff was exposed to asbestos. He retired in May 1987 at age sixty, after working for defendant twenty-five years and ten months, under a newly enacted regulation permitting retirement by state employees at age sixty with twenty-five years service.

Plaintiff filed a workers' compensation claim 20 September 1989, alleging he suffered from the occupational disease of asbestosis. Dr. Allen Hayes, a physician with the Industrial Commission's advisory medical committee, examined plaintiff 11 April 1990 and diagnosed him as exhibiting a "[m]ild obstructive pulmonary impairment, probably related to prior smoking," and also "[i]nterstitial changes consistent with pulmonary fibrosis (asbestosis)." The Commission thereafter ordered that plaintiff be paid 104 weeks of compensation pursuant to N.C.G.S. § 97-61.5 (1991), and the parties entered into a Form 21 agreement whereby defendant acknowledged liability for plaintiff's asbestosis.

A hearing was held 14 October 1993 to determine plaintiff's entitlement to further compensation. The Deputy Commissioner, weighing the testimony of Dr. Roy Everett, plaintiff's treating physician, and medical records assembled by the Commission's advisory panel, found as fact that:

> 11. The medical evidence in this case is somewhat inconsistent, but nonetheless reveals some asbestosis with permanent impairment.
>
> 12. The plaintiff voluntarily retired in 1987 after twenty-five years and 10 months of service with the state of North Carolina

> and he has not looked for work or been in the job market since his retirement. There is no evidence that asbestosis caused the plaintiff to retire.

The Deputy Commissioner also concluded as matter of law that:

> 1. The plaintiff was compensated for 104 weeks of temporary total disability compensation, but the evidence fails to establish that he was thereafter unable to work or unable to earn the same or greater wage in the same or any other like employment as a result of asbestosis as opposed to his voluntary retirement on May 31, 1987, and his resulting lack of efforts to seek employment after retirement. The plaintiff is not entitled to any additional temporary total disability compensation pursuant to the provisions of N.C.G.S. § 97-29 or N.C.G.S. § 97-61.6.

Plaintiff was awarded $4,000 under N.C.G.S. § 97-31(24) (1991) for permanent damage to his lungs. The Full Commission adopted and affirmed the Deputy Commissioner's findings and conclusions in an Opinion and Award filed 16 February 1995. Plaintiff filed notice of appeal to this Court 16 March 1995.

At the hearing below, the Deputy Commissioner informed plaintiff's counsel that "the burden is on you to prove that [plaintiff] retired because of the disease." As *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 349 S.E.2d 70 (1986), demonstrates, the Deputy Commissioner misspoke.

The plaintiff in *Heffner* retired in early 1984 at age sixty-five, when he learned that the plant at which he was employed would be closing. "Knowing that he shortly would lose his job, plaintiff applied for Social Security retirement benefits and quit his job." *Id.* at 85, 349 S.E.2d at 72. Plaintiff thereafter filed a claim 16 May 1984 seeking workers' compensation for an occupational lung disease. *Id.* After a hearing, the Commission determined plaintiff " 'sustained no incapacity for work resulting from his occupational disease,' " *id.* at 87, 349 S.E.2d at 74, and limited his benefits to those attainable under G.S. § 97-31(24).

The *Heffner* court held that:

> [i]n denying plaintiff's claim for disability compensation, the Commission apparently placed great reliance on its conclusion . . . that the plaintiff's lack of earnings was due to his desire to retire and the closing of the plant where he was working. In

> doing so, we believe the Commission acted under a misapprehension of the law. Because disability measures an employee's present ability to earn wages, *Webb v. Pauline Knitting Industries*, 78 N.C. App. 184, 336 S.E.2d 645 (1985), and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired where there is evidence of diminished earning capacity caused by an occupational disease.

Id. at 88, 349 S.E.2d at 74 (emphasis omitted). The *Heffner* rule is consistent with G.S. § 97-29, the statute through which claimants are awarded benefits for total disability, in that the section provides that compensation is to be paid "during the lifetime of the injured employee," and payments are not terminated when a claimant reaches an age at which he or she would have retired if able to work.

The facts of the present case parallel those of *Heffner.* Like the plaintiff therein, plaintiff *sub judice* is not barred from seeking disability benefits if his retirement was for reasons unrelated to his occupational disease. The pertinent issue is whether plaintiff, subsequent to retirement and at expiration of the 104 weeks of compensation pursuant to G.S. § 97-61.5, experienced a loss in wage-earning capacity.

Also relevant to plaintiff's appeal is *Lackey v. R.L. Stowe Mills*, 106 N.C. App. 658, 418 S.E.2d 517 (1992), a case in which the Commission ruled the claimant's " 'actual earning capacity [could not] be determined because, having retired, she [] made no effort to obtain employment.' " *Id.* at 660, 418 S.E.2d at 518-19. This Court pointed out that

> the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment. . . . Where . . . an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.

Id. at 661, 418 S.E.2d at 519 (quoting *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986)).

In case *sub judice*, plaintiff testified he had completed the eighth grade, had worked only in manual labor, and further that he had not been able to engage in any type of physical work since his retirement.

The Commission, however, failed to make any findings of fact regarding his *capacity* to earn wages at the conclusion of his initial 104 week term of compensation, but rather simply recited that plaintiff "has not looked for work or been in the job market since his retirement." As in *Heffner*, the Commission's findings in the present case are "insufficient to support its conclusion that the plaintiff [is] not disabled." 83 N.C. App. at 88, 349 S.E.2d at 74.

Defendant argues substantial evidence indicates that any incapacity to work on the part of plaintiff is due to air flow obstruction caused by prior cigarette smoking as opposed to asbestosis. The Commission's findings state that "[t]he advisory medical committee opined . . . that the plaintiff's primary physiologic impairment is that of air flow obstruction most likely caused by prior cigarette use and not by his asbestos exposure," and that Dr. Everett believed "plaintiff's symptoms were more related to the asbestos exposure." The Commission, however, failed to make its own determination as to the origins of plaintiff's impairment.

We note that the cause of plaintiff's disability need not be an "either/or" proposition.

> When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not [so caused], the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated, or aggravated by the occupational disease.

Morrison v. Burlington Industries, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981); *see also Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216-17, 360 S.E.2d 696, 700 (1987) (explaining steps Commission must take in an apportionment case).

In sum, the Opinion and Award of the Commission is reversed and this matter remanded to the Commission for further findings of fact, receipt of such additional evidence as the Commission deems appropriate, and entry of an Opinion and Award consistent with the opinion herein.

Reversed and remanded with directions.

Judges GREENE and MARTIN, Mark D., concur.

C.C. MANGUM, INC., PLAINTIFF-APPELLANT v. C.K. BROWN, JR., DEFENDANT-APPELLEE

No. COA 96-239

(Filed 3 December 1996)

Judgments § 211 (NCI4th)— trustee's voiding of foreclosure sales— relitigation of issues—collateral estoppel

Plaintiff, the holder of two deeds of trust and one of the high bidders at foreclosure sales under two other deeds of trust on the same property, was collaterally estopped from relitigating the propriety of the trustee's actions in voiding and not reporting the foreclosure sales because there was confusion regarding the file numbers and order of bidding where the clerk of court determined that the trustee properly voided and postponed the sales, the clerk ordered the trustee not to report the sales and to conduct resales, and plaintiff did not appeal the clerk's order.

Am Jur 2d, Judgments §§ 524-526.

Appeal by Plaintiff from Judgment entered 3 October 1995 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 October 1996.

Wood & Francis, PLLC, by Brent E. Wood, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, PLLC, by Jerry S. Alvis and Johnny M. Loper, for defendant-appellee.

WYNN, Judge.

In December 1988, Claridge Development Corporation ("Claridge") executed a deed of trust in favor of Southern National Bank of North Carolina ("SNB") in the amount of $1,554,025 ("the first SNB deed of trust") covering five tracts of land (Tracts I-V). In May 1990, Claridge executed another deed of trust in favor of SNB for $776,584.87 ("the second SNB deed of trust") covering the same five tracts of land plus tracts VI and VII.

Between the execution of the first and second SNB deeds of trust, Claridge executed two deeds of trust in favor of plaintiff C.C. Mangum, Inc. covering Tract IV. As a result, the first SNB deed of trust created a first lien on Tracts I through V; and the second SNB deed of trust created a second lien on Tracts I, II, III and V, a fourth

lien on Tract IV, and a first lien on Tracts VI and VII. Mangum's deed of trust represented a second and third lien on Tract IV.

Claridge defaulted on both the first and second SNB deeds of trust. To commence foreclosure proceedings, SNB appointed defendant C.K. Brown, Jr. to act as substitute trustee ("the trustee") under both the deeds of trust. Without explanation, the record indicates that the Clerk of Court for Wake County assigned a file number to the first SNB deed of trust foreclosure (92 SP 625) that was higher than the file number given to the foreclosure proceeding on the second SNB deed of trust (92 SP 624).

At the foreclosure sale on 9 July 1992, the trustee apparently incorrectly assumed that the first deed of trust had been given the lower file number and thus called the sale of 92 SP 624 (the second SNB deed of trust) first. SNB was the only bidder in the amount of $2,111,200. Immediately thereafter, the trustee commenced the sale of 92 SP 625 (the first SNB deed of trust). At that time, Mangum offered a bid of $250,000 for Tract IV only. No other bids were made. Thereupon SNB, through its counsel, indicated to the trustee that it had become confused and incorrectly entered a bid for 92 SP 624 thinking that it pertained to the first SNB deed of trust. In response, the trustee announced that "due to the misunderstanding and confusion of the parties" the sales in 92 SP 624 and 92 SP 625 that had just taken place were going to be voided, and a resale would be held the next day.

At that time, Mangum did not object to the trustee's actions. However, on 10 July 1992, the day of the resale, Mangum obtained a temporary restraining order ("TRO") enjoining the trustee from conducting the sales. On 20 July 1992, the superior court dissolved the TRO and instructed the parties to appear before the Clerk of Superior Court for a hearing to determine whether "the sales were completed and must be reported or if [the trustee] has a right to vacate and void such sales and conduct a resale."

The Clerk conducted this hearing on 7 August 1992. By order dated 14 August 1992, the Clerk determined, pursuant to N.C. Gen. Stat. § 45-21.21(a)(5) (Cum. Supp. 1990), that the trustee properly postponed the sales in question due to the confusion that existed regarding the order of bidding on 92 SP 624 and 92 SP 625. The Clerk ordered the trustee not to report the sales held on 9 July 1992 and to conduct a resale of those same properties. Mangum did not appeal the Clerk's order.

The trustee scheduled the resale for 4 September 1992. On 3 September 1992, Mangum obtained another TRO enjoining the sale of both 92 SP 624 and 92 SP 625. On 17 September 1992, the superior court denied Mangum's motion for a preliminary injunction on the ground that it failed to show that it would be irreparably harmed by the resale of the properties as ordered by the Clerk. The court noted that Mangum failed to appeal the Clerk's order, but held that to the extent Mangum's motion for a preliminary injunction constituted an appeal, it was dismissed. The court affirmed the Clerk's order and ordered the trustee to post and publish a notice of sale.

Mangum entered its notice of appeal of the superior court's order on 24 September 1992. Thereafter, Mangum moved to stay the public sale which the trustee had set for 18 October 1992, but was denied. On 7 October 1992, Mangum filed a Petition for Writ of Supersedeas and Motion for Temporary Stay with the Court of Appeals. Initially, this Court allowed the stay but dissolved it after reviewing the writ of supersedeas. On 26 October 1992, the trustee conducted the sale of the properties at issue. This Court then granted the trustee's motion to dismiss Mangum's appeal of the superior court's 17 September 1992 order.

Thereafter, Mangum filed a complaint against the trustee seeking damages for negligence, professional malpractice, breach of fiduciary duty and tortious interference with contract. The trustee filed a motion for summary judgment which was granted on 3 October 1995. Mangum appeals.

All of Mangum's claims are based upon the proposition that the trustee did not have the discretion to: (1) void and not report the foreclosure sale conducted under 92 SP 624; and (2) postpone both that sale and the sale to be conducted under 92 SP 625 on 9 July 1992. We find, however, that Mangum is estopped from relitigating these issues because they have previously been decided in the trustee's favor.

The issues that Mangum seeks to raise in this action are precluded by collateral estoppel. Collateral estoppel bars a claim where (1) there has been a prior judgment on the merits; (2) identical issues were involved; (3) the issues were actually litigated; (4) the issues were actually determined; and, (5) the determination of those issues was necessary to the resulting judgment. *Johnson v. Smith*, 97 N.C. App. 450, 452, 388 S.E.2d 582, 583-84, *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (1990). It is appropriate to grant summary

judgment against "a party who has had a full and fair opportunity to litigate a matter and now seeks to reopen the identical issues." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986).

In the instant case, the Clerk of Court determined that the trustee acted within his discretion and authority in postponing and not reporting the sales of 9 July 1992. Further, the Clerk specifically ordered the trustee not to report the July 9th sales. Mangum did not appeal from the Clerk's order and is therefore collaterally estopped from relitigating these same issues in the instant case.

Therefore, the ruling of the trial court granting the trustee's motion for summary judgment is,

Affirmed.

Judges GREENE and MARTIN, John C. concur.

CHARLES I. TAYLOR, PLAINTIFF v. CENTURA BANK, DEFENDANT

No. COA95-1262

(Filed 3 December 1996)

Banks and Other Financial Institutions § 41 (NCI4th); Injunctions § 36 (NCI4th)— checking account—temporary restraining order—expiration—continued freeze on funds—liability of bank

A temporary restraining order prohibiting defendant bank from disbursing any funds to plaintiff from his checking account expired, by operation of law under N.C.G.S. § 1A-1, Rule 65(d), after ten days, and defendant bank thus had no authority to continue to freeze plaintiff's funds after ten days had passed, where no hearing was ever held to determine the propriety of a preliminary injunction and no order was ever issued extending the temporary restraining order or creating a permanent injunction. Therefore, the trial court erred by granting summary judgment for defendant bank on plaintiff's claims for negligence, breach of contract, and conversion.

Am Jur 2d, Banks § 493.

Appeal by plaintiff from order entered 12 July 1995 by Judge Dexter Brooks in Nash County Superior Court. Heard in the Court of Appeals 26 August 1996.

Brett A. Hubbard for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Randall R. Adams, for defendant-appellee.

PER CURIAM

On 18 September 1989, Judge George M. Britt issued a temporary restraining order ("TRO") prohibiting Peoples Bank and Trust Company (now defendant Centura Bank) from disbursing any funds to plaintiff Charles I. Taylor from his checking account, in connection with a divorce action (89 CVD 1296) brought by plaintiff's wife (now ex-wife) in Nash County District Court. Defendant was served with the order on or about 18 September 1989 and subsequently froze all funds in plaintiff's account.

The TRO provided, in pertinent part:

> Peoples Bank and any other lending institutions in which the [plaintiff] has funds in the State of North Carolina are restrained from releasing to the [plaintiff] and/or his agents any funds from any accounts he may have with said institutions, until a hearing can be had in this matter.
>
> . . .
>
> It is further ORDERED that the [plaintiff] shall appear before the Judge of the District Court of Nash County, Nash County Courthouse, Nashville, North Carolina on 9-26-89, at 9:30 a.m. to show cause, if any, why this Temporary Restraining Order should not be continued as a Preliminary Injunction.

The hearing set in the TRO for 26 September 1989 was never held and no preliminary injunction was ever issued against plaintiff's bank account.

On 28 September 1992, plaintiff filed this action against defendant asserting claims for wrongful dishonor, negligence, breach of contract and conversion. Defendant answered and moved for summary judgment. On 5 August 1994, Judge Quentin T. Sumner granted defendant's motion only as to the claim for wrongful dishonor. The remaining claims came on for trial on 10 July 1995 in Nash County

Superior Court, Judge Dexter Brooks presiding. Defendant again moved for summary judgment, and plaintiff stipulated that the issue of the validity of the temporary restraining order was properly before the court for a summary judgment determination. On 12 July 1995, Judge Brooks entered an order granting summary judgment for defendant on the remaining claims. Plaintiff appeals from this order.

Plaintiff's sole argument on appeal is that the trial court's 12 July 1995 summary judgment order was error because that ruling was based on the erroneous conclusion that the TRO remained in effect until the case in which it was issued was dismissed.

All TROs must be obtained pursuant to N.C.R. Civ. P. 65. *See* N.C. Gen. Stat. § 1A-1, Rule 65 (1990). Like most, this one was obtained without notice to any party or Centura Bank. In the TRO, the date and time were set for a hearing to determine the propriety of a preliminary injunction to last for a longer period. However, no hearing was ever held and no order ever issued either extending the TRO or creating a permanent injunction.

Rule 65(b) clearly limits every TRO to a maximum of 10 days. Since the order expired, by operation of law, after ten days, *see* *Lambe v. Smith*, 11 N.C. App. 580, 582-83, 181 S.E.2d 783, 784 (1971), defendant had no legal authority to continue to freeze plaintiff's funds after ten days had passed.

Thus, the trial court's 12 July 1995 order granting summary judgment for defendant was error.

Reversed and remanded.

Panel consisting of:

Judges Johnson, Lewis, and Wynn

Judge Johnson participated in this opinion prior to his retirement on 1 December 1996.

STATE OF NORTH CAROLINA v. SAMUEL M. McCRAE

No. COA96-214

(Filed 3 December 1996)

Criminal Law § 1093 (NCI4th Rev.)— sentencing—prior record level—habitual felon status—use of consolidated judgment

The trial court did not err when it determined defendant's prior record level pursuant to N.C.G.S. § 15A-1340.14 by assigning points for a prior conviction which was consolidated for judgment with a conviction already used to constitute defendant as an habitual felon.

Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 7, 29.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender. 19 ALR2d 227.

Appeal by defendant from judgment entered 27 October 1995 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 29 October 1996.

Attorney General Michael F. Easley, by Associate Attorney General Teresa F. Harris, for the State.

Jay H. Ferguson for defendant-appellant.

WALKER, Judge.

Defendant contends that the trial court erred when it determined his prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14 (1995) by assigning points for a prior conviction which was consolidated for judgment with a conviction already used to constitute defendant as an habitual felon. Defendant makes the following argument: (1) A trial judge can assign points for only one conviction with the highest point total for multiple convictions entered in the same week; but (2) a trial judge may not assign points for prior convictions used to establish habitual felon status; (3) the General Assembly intended for a trial judge to use only one conviction handed down per week for habitual felon status, as appropriate, to enhance an offender's sentence; therefore, (4) the trial judge may not do an end run around these prohibitions by using a conviction for prior record level calcu-

lation gained in the same week in which a consolidated conviction was already used to establish habitual felon status.

On 15 February 1988, defendant pled guilty to two counts of assault with a deadly weapon inflicting serious injury and the convictions were consolidated for judgment. By an indictment dated 6 February 1995, defendant was alleged to be an habitual felon in that he previously committed three felonies, one of which was an assault with a deadly weapon inflicting serious injury (convicted 15 February 1988). Further, in calculating defendant's prior record level, the trial court assigned four points for a prior Class E felony (the second count of assault with a deadly weapon inflicting serious injury from 15 February 1988).

Defendant's assertion that consolidation of two convictions for judgment results in only one conviction for sentencing purposes is without merit. Consolidation of offenses for judgment means only that convictions are consolidated for the purpose of rendering judgment, each conviction still stands.

This Court has recently decided a similar issue in *State v. Truesdale*, No. 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996), where the Court held that: ". . . G.S. 14-7.6 prohibits using the same conviction to establish both habitual felon status and prior record level [and] . . . G.S. 15A-1340.14 (d) prohibits the use of more than one conviction obtained during the same calendar week to increase the defendant's prior record level." However, the sentencing court could use one of defendant's convictions obtained in a single calendar week to establish his habitual felon status and could use another separate conviction, obtained during the same week, [consolidated for judgment] to determine his prior record level. *Id.* Thus, the trial court here did not err in sentencing the defendant.

No error.

Judges LEWIS and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 19 November 1996

BARRINEAU v. BARRINEAU No. 96-496	Haywood (93CVD265)	Affirmed
CAUTHEN v. RUSSELL No. 95-1223	Guilford (95CVS3116)	Appeal Dismissed
CISNEROS v. CISNEROS No. 96-460	Cumberland (93CVD2190)	Affirmed
DARDEN v. SOULES No. 95-1183	Dare (95CVS244)	Affirmed in part, Reversed in part
DUKE v. DUKE No. 96-30	New Hanover (88CVD3373)	Affirmed
DUNES EAST PARTNERSHIP v. HOLLEY No. 95-1236	Dare (89CVS422)	Affirmed in part, Reversed in part and Remanded
FAIRWAY OUTDOOR ADVERTISING v. CITY OF SALISBURY No. 96-85	Rowan (95CVS1110)	Affirmed in Part; Dismissed in Part
FAIRWAY OUTDOOR ADVERTISING v. CITY OF SALISBURY No. 96-410	Rowan (95CVS1110)	Affirmed in Part; Dismissed in Part
FIRST FINANCIAL INS. CO. v. BERRY No. 96-38	Robeson (94CVS473) (94CVS2023)	Affirmed in part and reversed in part
HARRELL v. DARDEN No. 95-1425	Dare (95CVS324)	Affirmed
HEMBY BRIDGE FARM & GARDEN v. B&P CONSTRUCTION CO. No. 96-83	Union (91CVD1168)	Reversed and Remanded
HOLT v. SARA LEE CORP. No. 96-557	Lee (94CVS1104)	Dismissed
IN RE D.L.B. No. 96-135	Durham (95J194)	Vacated
IN RE JONES No. 96-153	Durham (95J230)	Reversed and Remanded
IN RE KOONCE No. 96-1	Lenoir (95J47)	Affirmed

INGRAM v. JOHN H. BRINKLEY, INC. No. 95-1307	Ind. Comm. (223654)	Affirmed
IT'S PRIME ONLY v. DARDEN No. 95-1426	Dare (95CVS323)	Affirmed
LIBERTY NATIONAL LIFE INS. CO. v. MITCHELL No. 95-604	Mecklenburg (95CVS905)	Appeal Dismissed
MOORE v. OSBORNE No. 95-1421	Bladen (95CVS0153)	Affirmed
SHAW v. BROWN No. 96-104	Columbus (95CVD90)	Reversed
SHELDON v. SAMUEL No. 96-197	Rutherford (94CVD1155)	Reversed and Remanded
SMITH v. SMITH No. 95-1164	Wake (93CVD842)	Dismissed
SOULES v. DARDEN No. 95-1434	Dare (95CVS437)	Affirmed in part Reversed in part and Remanded
STATE v. BEAM No. 96-643	Mecklenburg (95CRS13374) (95CRS13375) (95CRS13376) (95CRS13377)	No Error
STATE v. CURRIE No. 96-228	Alamance (95CRS12696)	No Error
STATE v. DOUTHIT No. 96-251	Forsyth (94CVS40738)	No Error
STATE v. EDMONDSON No. 96-653	Lenoir (95CRS3359) (COUNT I AND II)	No Error
STATE v. GREEN No. 96-651	Edgecombe (95CRS5465)	No Error
STATE v. HOLLOWAY No. 96-434	Durham (94CRS30676) (94CRS30677) (94CRS30678)	No Error
STATE v. HUFFMAN No. 95-1202	Guilford (95CRS20348) (95CRS25015)	No Error

STATE v. JEFFRIES No. 96-380	Guilford (93CRS76701) (93CRS76702) (93CRS76703) (93CRS76704) (93CRS76705) (93CRS76706) (93CRS76710)	No Error
STATE v LIPFIRD No. 96-164	Buncombe (93CRS62872) (93CRS62873) (93CRS07565) (93CRS07564) (93CRS07566) (93CRS07567) (93CRS07568) (93CRS07569) (93CRS07570) (93CRS07571) (93CRS07572) (93CRS07573)	Affirmed
STATE v. PROVOST No. 95-1442	Forsyth (95CRS3088)	Dismissed
STATE v. SIERRA No. 96-588	Randolph (94CRS8191)	Dismissed
STATE v. SMITH No. 96-106	Anson (93CRS1703) (93CRS1704) (93CRS1712) (93CRS1713) (93CRS1714)	No Error
STATE v. SMITH No. 96-295	Duplin (94CRS4876) (94CRS4877) (94CRS4878)	No Error
STATE v. SPEIGHT No. 96-500	Lenoir (95CRS5099) (95CRS7158)	No Error
STATE v. STANLEY No. 96-529	Guilford (95CRS57726)	No Error
STATE v. WALTER No. 96-390	Stokes (95CRS1774)	Affirmed
THOMAS v. FREEMAN No. 96-226	Lee (93CVS831)	No Error

VAN DYKE v. JEFFRIES No. 95-1409	Wayne (92CVD2922)	Affirmed
VANCE COUNTY DSS v. HARGROVE No. 95-1005	Vance (94CVD805) (93CVD712) (91CVD492)	Reversed and Remanded
WARREN v. ANGOLD No. 95-949	Hertford (93CVS316)	Appeal Dismissed
WINSTEAD v. DP PROS OF BURLINGTON No. 96-167	Alamance (94CVS1069)	Affirmed

FILED 3 DECEMBER 1996

BARROW v. BARROW No. 96-210	Yadkin (94CVD305)	Affirmed
BRYANT v. N.C. STATE BD. OF ELEC. CONTRACTORS No. 95-598	Wake (91CVS13301)	Affirmed
BULLARD v. TIME INS. CO. No. 96-236	Robeson (94CVS1134)	No Error
CHILDRESS v. N.C. DEPT. OF HUMAN RESOURCES No. 96-144	Burke (93CVS339)	Affirmed
COUNTY OF WAYNE ex rel. GRAHAM v. GRICE No. 96-90	Wayne (94CVD2484)	Reversed and Remanded
DANIEL & LECROY v. KINCAID No. 96-488	Burke (94CVS881)	Dismissed
DILLINGHAM v. CITY OF ASHEVILLE No. 95-979	Buncombe (91CVS01736)	Affirmed
DOTSON v. ESTATE OF DOTSON No. 96-718	Buncombe (94CVS2071)	Affirmed
FARMER v. LANE No. 96-650	Carteret (94CVS892)	Dismissed
GRAHAM v. GRAHAM No. 95-1174	Lenoir (95CVD24)	Reversed and Remanded
HAYNES v. COLUMBUS COUNTY FARM BUREAU FEDERATION No. 96-78	Columbus (94CVS268)	Affirmed

HELMS v. CREANGE No. 95-539	Union (93CVS00766)	Affirmed
IN RE ALEXANDER No. 96-481	Yadkin (93J7)	Affirmed
IN RE BEASLEY No. 96-797	Mecklenburg (92J33)	Vacated and Remanded
JOHNSTON v. WILLIAMS No. 96-482	Wayne (94CVS1644)	No Error
JONES v. N.C. A&T STATE UNIVERSITY No. 96-457	Wake (94CVS06347)	Affirmed
MANSFIELD v. GOLDEN CORRAL CORP. No. 95-1290	Alamance (94CVS2296)	Affirmed
McKENZIE v. WHITE No. 95-932	McDowell (93CVS280)	Affirmed
MEADS v. N.C. PESTICIDE BD. No. 96-130	Pasquotank (93CVS347)	Reversed and Remanded
MILLSAPS v. YATES No. 96-45	Gaston (94CVS2219)	Affirmed
NATIONWIDE MUT. FIRE INS. v. LOCKLEAR No. 96-94	Wake (93CVS9903)	Affirmed
NOLAN v. FORSYTH MEMORIAL HOSP. No. 95-1344	Forsyth (92CVS5833)	Reversed in part, dismissed in part, and remanded for a new trial
NORWOOD v. ATAEI-KACHUEL No. 96-294	Wake (94CVD03139)	Dismissed
ONSLOW COUNTY v. MOORE No. 96-828	Onslow (95CVS2836)	Dismissed
SMITH v. N.C. DEPT. OF CORRECTION No. 95-1193	Mecklenburg (92CVS7760)	Affirmed
STATE v. BAILEY No. 96-533	Mecklenburg (94CRS29710) (95CRS10552)	No Error
STATE v. BOWMAN No. 96-754	Durham (94CRS10379)	Appeal Dismissed

STATE v. BRASWELL No. 96-134	Durham (94CRS5937)	New Trial
STATE v. BRIGHT No. 96-479	Carteret (94CVD980)	Affirmed
STATE v. BUNDY No. 96-477	Cumberland (93CRS46702)	No Error
STATE v. CHAPPELL No. 96-29	Scotland (95CRS395) (95CRS396) (95CRS397) (95CRS398)	No Error
STATE v. COMPTON No. 95-589	Mecklenburg (94CRS6865) (94CRS6866) (94CRS6868) (94CRS6873) (94CRS6874) (94CRS6875) (94CRS6876) (94CRS6877) (94CRS6878)	No Error
STATE v. CUMMINGS No. 96-245	Forsyth (94CRS32124)	No Error
STATE v. DANCY No. 96-578	Guilford (95CRS35296)	No Error
STATE v. DAVIS No. 96-517	Rowan (95CRS1415)	Affirmed
STATE v. FORTUNE No. 96-627	Durham (95CRS12388)	No Error
STATE v. GLASGOW No. 96-511	Randolph (95CRS393)	No Error
STATE v. GRIFFITH No. 96-596	Mecklenburg (94CRS73061)	No Error
STATE v. HARRISON No. 96-585	Wake (95CRS41236) (95CRS41237) (95CRS41238) (95CRS41239)	No Error
STATE v. HOLDERMAN No. 96-601	Forsyth (89CRS5994)	Affirmed
STATE v. JEFFERSON No. 96-727	Orange (95CRS2357)	No Error

STATE v. JOHNSON No. 96-595	Onslow (95CRS9579)	No Error
STATE v. MARTIN No. 96-476	Pasquotank (94CRS4323)	No Error
STATE v. McCOY No. 96-806	Mecklenburg (95CRS52898)	No Error
STATE v. MOORE No. 96-686	Cumberland (92CRS44486)	No Error
STATE v. PEARSON No. 96-461	Onslow (95CRS11189)	No Error
STATE v. PIERCE No. 95-837	Onslow (94CRS8396)	No Error
STATE v. REID No. 96-556	Forsyth (94CRS8835) (95CRS18336) (95CRS18337) (95CRS18343)	No Error
STATE v. ROWE No. 96-632	Mecklenburg (94CRS726)	No Error
STATE v. SABIN No. 95-894	Mecklenburg (94CRS44100)	No Error
STATE v. SLOAN No. 96-200	Mecklenburg (95CRS9706)	Affirmed
STATE v. STALLINGS No. 96-507	New Hanover (93CRS21588)	Remanded
STATE v. STARKS No. 96-524	Wake (94CRS83746) (94CRS83747)	No Error
STATE v. STATEN No. 96-714	Hertford (95CRS4169) (95CRS4170) (95CRS4172)	No Error
STATE v. THOMAS No. 96-491	Wake (95CRS2627) (95CRS34320) (95CRS34323)	No Error
STATE v. WALLACE No. 95-950	Cabarrus (93CRS3785)	No error; motion for appropriate relief denied; trial court's 11 November 1994 order vacated

STATE v. WAYNE No. 96-563	Lenoir (95CRS7037)	No Error
STATE v. WEATHERINGTON No. 96-162	Beaufort (94CRS1020)	No Error
STATE v. WILLIAMS No. 95-324	Forsyth (89CRS5151) (89CRS4522)	No Error
STATE v. WOODARD No. 96-415	Duplin (92CRS6858) (92CRS6859) (92CRS6860)	No Error
STATE v. YANCEY No. 96-499	Mecklenburg (95CRS31908-01) (95CRS31908-02)	No Error
TELEFLEX INFORMATION SYSTEMS v. ARNOLD No. 96-99	Guilford (94CVS4295)	Dismissed
TRAVIS v. THOMAS No. 96-738	Brunswick (95CVS0580)	Affirmed
TREASURER OF STATE OF CONN. v. HOWARD No. 96-117	Davie (95CVS404)	Reversed and Remanded
TRI-CITIES DOOR CORP. v. PARNACHER No. 96-829	Guiford (95CVD10289)	Dismissed
WHITT v. FOUR HUNTERS, INC. No. 95-1319	Randolph (94CVS1845)	Reversed
WILLIAMS v. SUTTON No. 96-346	Sampson (94CVS484)	No Error

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA RATE BUREAU, APPELLANT. IN THE MATTER OF THE FILING DATED FEBRUARY 1, 1994 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES-PRIVATE PASSENGER CARS AND MOTORCYCLES.

No. COA95-641

(Filed 17 December 1996)

1. Insurance § 421 (NCI4th)— rate case—whole record test—Commissioner determines credibility of witnesses

In reviewing rate orders of the Commissioner of Insurance, the test is whether the Commissioner's conclusions of law are supported by material and substantial evidence in light of the whole record. While the Court of Appeals employs the "whole record" test, the Court does not substitute its judgment for that of the Commissioner when the evidence is conflicting. The weight and sufficiency of the evidence as well as the credibility of the witnesses are determined by the Commissioner.

Am Jur 2d, Administrative Law and Procedure §§ 225 et seq.

2. Insurance § 421 (NCI4th)— automobile rates—Commissioner's findings must be mathematically specific—Commissioner's determinations are prima facie correct

On appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner of Insurance under the provisions of Articles 1 through 64 of Chapter 58 of N.C.G.S. are *prima facie* correct. N.C.G.S. § 58-2-90(e). The Commissioner must be mathematically specific in his findings of fact.

Am Jur 2d, Administrative Law and Procedure §§ 225 et seq.

3. Insurance § 403 (NCI4th)— automobile rates—Commissioner must show factual basis for determination of dividends and deviations—decision remanded

"Due consideration" as required by N.C.G.S. § 58-36-10 does not mandate that a numerical adjustment to automobile rates must reflect the effects of dividends and deviations. While there was substantial evidence to support the majority of the Commissioner of Insurance's findings regarding dividends and

deviations, the Court was unable to determine from the record exactly how the Commissioner selected the figure of 4.96% as the amount which may be used for dividends and deviations. The Court remanded the decision to allow the Commissioner to make specific findings that clearly show the facts upon which he based his decision that the rate contains a 4.96% margin for dividends and deviations.

Am Jur 2d, Administrative Law and Procedure §§ 152 et seq.; Insurance §§ 30, 59, 828 et seq.

4. Insurance § 400 (NCI4th)— automobile rates—investment income—unearned capital—Commissioner's consideration of investment income was error

While investment income from unearned premiums and loss reserve funds are appropriately considered in ratemaking hearings, the Commissioner of Insurance erred, as a matter of law, in considering investment income from capital and surplus in his ratemaking calculations.

Am Jur 2d, Insurance §§ 30, 828 et seq.

5. Insurance § 403 (NCI4th)— automobile rates—underwriting profit—statutory accounting principles—total rate of return

The Commissioner of Insurance's use of statutory accounting principles (SAP) rather than generally accepted accounting principles to determine underwriting profit for automobile insurance purposes was supported by substantial and material evidence where expert testimony indicated that SAP was the appropriate method and North Carolina statutes refer to the accounting practices set forth by the NAIC (*i.e.* SAP system) in requiring insurance companies to evaluate and make regular reports of their financial positions. N.C.G.S. § 58-2-165. Further, the Commissioner's calculations and selection of a 13.67% total rate of return as a percentage of surplus was supported by the evidence.

Am Jur 2d, Insurance §§ 30, 828 et seq.

6. Insurance § 403 (NCI4th)—automobile rates—normative premium-to-surplus ratio

It was not error, as a matter of law, for the Commissioner of Insurance to use a normative 2 to 1 premium-to-surplus ratio rather than the historical ratio where there is neither a statutory

mandate for a premium-to-surplus ratio nor anything to preclude the Commissioner's use of a hypothetical normative premium-to-surplus ratio, so long as there is substantial evidence to support the Commissioner's selection.

Am Jur 2d, Insurance §§ 30, 828 et seq.

7. Insurance § 400 (NCI4th)— automobile rates—underwriting profit—prepaid expenses and agents' balances

There is substantial evidence in the record to support the Commissioner of Insurance's decision as to the calculation of investment income from unearned premium, loss, and loss expense reserve funds where the Commissioner clearly defined the factors involved in considering investment income; selected a reasonable rate of return on investments; and carefully explained that the Rate Bureau's amount of reserves subject to investment was incorrect because the Bureau had excluded prepaid expenses and agents' balances from the calculations of the reserves available for investment.

Am Jur 2d, Insurance §§ 30, 828 et seq.

8. Insurance § 403 (NCI4th)— automobile rates—general and other acquisition expenses—allocation of voluntary and facility markets by premium volume

There was substantial evidence before the Commissioner of Insurance to support his method of calculating general and other acquisition expenses by allocating expenses between the voluntary and Reinsurance Facility markets by premium volume rather than exposures even though the Commissioner's method had not been used in prior filings.

Am Jur 2d, Insurance §§ 30, 828 et seq.

9. Insurance § 393 (NCI4th)— consideration of Rate Bureau evidence—resolution of conflicting evidence—Commissioner failed to show specific consideration of Bureau's evidence

The Commissioner of Insurance recognized the conflicting evidence in an automobile rate hearing concerning trends that would most accurately predict the prospective loss and expense experience, but failed to resolve the conflicts in precise detail and failed to specifically show he had given consideration to the material and substantial evidence of the Rate Bureau. The Court

of Appeals remanded the issue to the Commissioner for more specific findings as to the Bureau's evidence.

Am Jur 2d, Insurance §§ 30, 828 et seq.

10. Insurance § 389 (NCI4th)— filing date adjustment—Commissioner's authority to disprove filing

The filing date adjustment is part of the overall proposed filing and, as such, the Commissioner of Insurance is vested with the statutory authority to disapprove of any provision in the filing and to specify the appropriate rate to be used. N.C.G.S. § 58-36-70(d).

Am Jur 2d, Insurance §§ 30, 828 et seq.

Appeal by the North Carolina Rate Bureau from the North Carolina Commissioner of Insurance's Order entered 28 September 1994. Heard in the Court of Appeals 19 March 1996.

North Carolina Department of Insurance, by Ann W. Spragens, General Counsel, and Law Offices of E. Daniels Nelson, by E. Daniels Nelson, and Ragsdale, Liggett & Foley, PLLC, by George R. Ragsdale and Kristin K. Eldridge, for the Commissioner of Insurance.

Young Moore and Henderson P.A., by R. Michael Strickland, Marvin M. Spivey, Jr., William M. Trott, and Terryn D. Owens, for the North Carolina Rate Bureau.

McGEE, Judge.

On 1 February 1994, the North Carolina Rate Bureau (Bureau) filed a general request for increased rates for private passenger automobiles and motorcycles. The rate increase requested an increase of 10.8% for automobile rates and 22.4% for motorcycle rates. The Commissioner held a comprehensive hearing during the summer of 1994. The filing request was more than 1,500 pages in length; there were an additional 800 pages of responses by the Bureau to the Commissioner's requests for data to explain the filing; the hearing transcript is more than 3,500 pages in length and the evidence included more than 120 exhibits. The Commissioner's lengthy order of more than 500 pages, including calculations and exhibits, disapproved the Bureau's filing and ordered rate changes reducing rates for automobiles by 13.8% and increasing rates for motorcycles by 10.2%. The Bureau appealed from this order and brought forward 13

assignments of error based on more than 40 pages of exceptions to various findings of fact, conclusions of law and exhibits.

I. STANDARDS OF REVIEW

A. *Appellate Court Review*

[1] In reviewing orders of the Insurance Commissioner, the test is whether the Commissioner's conclusions of law are supported by material and substantial evidence in light of the whole record. *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 75 N.C. App. 201, 208, 331 S.E.2d 124, 131, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985). "The whole record test requires the reviewing court to consider the record evidence supporting the Commissioner's order, to also consider the record evidence contradicting the Commissioner's findings, and to determine if the Commissioner's decision had a rational basis in the material and substantial evidence offered." *Id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 205, 214 S.E.2d 98, 106 (1975). It is "more than a scintilla or a permissible inference." *Id.* (quoting *Utilities Commission v. Trucking Company*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943)).

While this Court employs the "whole record" test in reviewing the Commissioner's orders, "it is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting." *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 96 N.C. App. 220, 221, 385 S.E.2d 510, 511 (1989). The weight and sufficiency of the evidence as well as the credibility of the witnesses are determined by the Commissioner. *Id.*

B. *Review by the Insurance Commissioner*

[2] An order or decision of the Insurance Commissioner regarding premium rates is presumed to be correct if it is supported by substantial evidence. N.C. Gen. Stat. § 58-2-80. "Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner under the provisions of Articles 1 through 64 of this Chapter shall be prima facie correct." N.C. Gen. Stat. § 58-2-90(e).

The Commissioner's order regarding a rate filing must comply with the standards set forth in N.C. Gen. Stat. § 58-36-10:

> (1) Rates shall not be excessive, inadequate or unfairly discriminatory.

> (2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which such information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.

N.C. Gen. Stat. § 58-36-70(d) regarding rate filings and hearings for motor vehicle insurance states, in part:

> If the Commissioner after the hearing finds that the filing does not comply with the provisions of this Article, he may issue an order disapproving the filing, determining in what respect the filing is improper, and specifying the appropriate rate level or levels that may be used by the members of the Bureau instead of the rate level or levels proposed by the Bureau filing, unless there has not been data admitted into evidence in the hearing that is sufficiently credible for arriving at the appropriate rate level or levels.

"In reaching his ultimate determination, the Commissioner must make findings which clearly and specifically indicate the facts on which he bases his order, the resolution of conflicting evidence, and the consideration he has given to the material and substantial evidence that has been offered." *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 95 N.C. App. 157, 159, 381 S.E.2d 801, 803 (1989). This requires the Commissioner to be mathematically specific as to his findings of fact. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 456, 269 S.E.2d 547, 592, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980).

II. DIVIDENDS AND DEVIATIONS

[3] The Bureau contends the Commissioner exceeded his statutory authority and entered an order which is unsupported by material and

substantial evidence when he ignored the requirements set forth in G.S. 58-36-10 by failing to give "due consideration" to dividends and deviations in ruling on this rate request. Particularly, the Bureau argues the Commissioner determined the aggregate losses, expenses and an appropriate profit; he then calculated and used underwriting profit provisions without any adjustment in the ratemaking formula for dividends and deviations. In so doing, the Bureau contends the Commissioner "camouflage[d] his continuing refusal to adhere to the requirement of the law that the rates reflect the effects of dividends and deviations" by devoting almost half of his order to an examination of the issue of dividends and deviations, but ultimately concluding that our current system of ratemaking already includes, within the average rate, a provision for dividends and deviations.

The Bureau argues this conclusion is erroneous and will result in rates which will not generate sufficient premium to provide for a reasonable profit for all automobile insurance. Because deviations and dividends reduce the cost of insurance to policyholders, the Bureau argues they should be treated as an expense item as opposed to profit. The Commissioner rejected the Bureau's treatment of deviations and dividends as a reduction in premium (an expense) and he simply adjusted the expected premium back to the amount which would be collected if there were no deviations without making an adjustment for dividends and deviations in his rate calculations. With this adjustment, the Bureau contends the targeted profit is only generated "if one assumes that the premiums not charged (i.e. the amount deviated) are somehow collected by the companies and the premiums returned to policyholders (i.e. dividends) are somehow retained by the companies."

The Bureau argues the Commissioner's reasons for ignoring deviations and dividends are baseless and irrelevant. The Bureau notes the Commissioner's concern that dividends and deviations are voluntary and discretionary has already been settled by our Court, which has held the discretionary nature of dividends and deviations is not a basis for the Commissioner to ignore them in developing the rate level. *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 97 N.C. App. 644, 646, 389 S.E.2d 574, 575, *disc. review denied*, 326 N.C. 804, 393 S.E.2d 905 (1990). Furthermore, the Bureau points out the Commissioner's finding that deviations and dividends are unfairly discriminatory ignores the fact that our General Assembly "created a system of ratemaking that is by design 'discriminatory' " because the formula is based on the collective experience of all insured motorists,

pooling drivers with both good and bad driving records. The Commissioner's charges that dividends and deviations (1) are not competitive tools, (2) they lead to spiraling manual rates, and that (3) they are payable from surplus are not supported by material or substantial evidence, according to the Bureau. Finally, the Bureau contends the Commissioner's last two arguments are erroneous: (1) ratemaking must assume that every company charges the manual rate and (2) there is an actual margin in the rates for dividends and deviations. The Bureau concludes by arguing the Commissioner's failure to explicitly recognize deviations and dividends is in excess of his statutory authority, his reasoning is flawed and irrelevant, and his implicit provision for deviations and dividends is unsupported by material and substantial evidence.

The Commissioner contends his order is the product of a thorough consideration of dividends and deviations and that the concept of "due consideration" required by G.S. 58-36-10 does not necessarily mean that an adjustment to the rates must be made to reflect the effects of dividends and deviations. He argues there was substantial evidence that the Bureau's proposed rate was excessive and that the Bureau formula results in the double counting of dividends and deviations which, in turn, leads to spiraling manual rates. Left uncorrected, this situation leads to excessive and unfairly discriminatory rates. Consequently, the Commissioner contends he remedied the inequities by: (1) using the manual rates actually in effect in North Carolina; (2) correcting the Bureau's mathematical error in its ratemaking formula; (3) determining the appropriate amount of dividends and deviations based on the corrections; and (4) deriving a profit provision which included the appropriate dividends and deviations.

We agree with the Commissioner that "due consideration" does not mandate that a numerical adjustment to the rates must be made to reflect the effects of dividends and deviations. In *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 75 N.C. App. at 224-25, 331 S.E.2d at 141, this Court addressed the meaning of "due consideration" in terms of the underwriting profit rating factor. Our Court said:

> G.S. § 58-124.19(2) [now G.S. 58-36-10] only requires that the Commissioner give "due consideration" to the enumerated rating criteria, including allowance for an underwriting profit. Nothing in the language of the statute requires that the Commissioner provide for an underwriting profit so long as the rate level estab-

> lished on the statutory rate criteria is not inadequate, excessive, or unfairly discriminatory.

Id. The Court quoted our Supreme Court as saying the General Assembly never intended "to make any one, or all, of these matters [statutory rating standards] conclusive. . . . The weight to be given the respective factors is for the Commissioner to determine in the exercise of his sound discretion and expertise. . . ." *Id.* at 225, 331 S.E.2d at 141 (quoting *Comr. of Insurance v. Rating Bureau*, 292 N.C. 471). Like underwriting profit, dividends and deviations are statutory rating factors to which the Commissioner must give "due consideration," but the Commissioner must then weigh the various statutory rate factors to achieve an adequate rate level and to ensure the proposed rate will leave the insurers with a fair and reasonable profit. *Id.*

After a careful review of the record, we find there is substantial support for a number of the Commissioner's concerns and his rejection of the Bureau's treatment of dividends and deviations. At the hearing, there was conflicting expert testimony as to where to reflect dividends and deviations—in the expenses or in calculating the underwriting profit. While two of the Bureau's witnesses testified these factors are expenses, a number of experts testifying for the Department of Insurance (Department) stated the appropriate place to reflect dividends and deviations is in the margin for underwriting profits. There was expert testimony that the Bureau used neither of the two accepted ratemaking formulas (Loss Ratio and Pure Premium Methods) and consequently, the results lead to inflated levels of dividends and deviations. This testimony was illustrated by comparing the two accepted formulas and showing they always produced the same result. The expert then compared these formulas to the Bureau's method and demonstrated the Bureau's formula resulted in double counting, excessive and inflated rates, and was unfairly discriminatory as it ultimately led to spiraling rates. Department witnesses echoed the testimony as to the double counting and spiraling effect of the Bureau's formula. Relying on this testimony, "the Commissioner corrected the Bureau's mathematical and actuarial error and used the manual rates in effect in North Carolina without the improper reduction for deviations."

After making the appropriate corrections, the Commissioner then provided for the appropriate amount for dividends and deviations in the profit provision by calculating the amount that is provided in his

prospective rate level based on evidence in the Record on existing levels. The Commissioner made the following findings in his order:

> 74. The testimony and evidence summarized in Exhibits C through H, attached, together with the matters and things set forth in the exhibits referred to in this Section are found to be substantial, credible, convincing, true and supportive of the Findings of Facts and Conclusions of Law set forth in this Order and collectively such evidence and testimony are hereby adopted as additional Findings of Facts and they are incorporated herein as fully as if set forth verbatim in the main body of this Order.
>
> 75. The evidence for the Department convincingly and repeatedly demonstrates that the average rate includes within it a provision for dividends and deviations.
>
> 76. DOI-44 shows the effects of the Bureau method and corroborates the testimony of the Bureau expert Michael Miller and the Department experts that manual rates based on average costs do, in fact, provide a margin for insurers to deviate and/or pay dividends. Furthermore, it demonstrates that for the prior decade, there have been deviations and dividends in North Carolina in excess of total savings and shows the actual dividends and deviations in dollars from 1983 through 1992.
>
> 77. Using the historical results in the evidence supplied by the Bureau and used in the Jordan model, it appears that a reasonable margin has been included in prior rates for the accumulation of surplus for the payment of dividends and deviations even without an extra explicit expense load provision as set forth in this filing. These margins are set forth below.
>
> 78. These margins were provided by an average manual premium. The Commissioner finds and concludes that any margin in excess of the margin provided for in the average manual premium is unreasonable and produces rates that are excessive and unfairly discriminatory.
>
> 79. Based on the foregoing, the Commissioner finds that profit provisions of -3.75 for liability and +1.75 for physical damage will provide 4.96% of manual premiums, or $90 million, that may be dividended and deviated as a savings to insureds, assuming the same book of business. DOI-44, p. 4; *Jordan Transcript, pp. 1826-1828.*

80. The 4.96% of premium or approximately $90 million provided in the manual rate for policyholder dividends and deviations by the Bureau member companies is reasonable, adequate and is provided in the rates which are adopted and approved hereinafter by this Order and which are not inadequate, excessive or unfairly discriminatory.

81. Dividends and deviations in excess of the 4.96% of premium or approximately $90 million may occur, as in the past. If so, the excess may come from companies which are prepared to accept, on an individual basis, less than the average profit provided in the manual rate, from accumulated surplus, from lower expenses, from an excessive rate level implemented by the Bureau or from sources which are not within the jurisdiction of the Commissioner.

82. This 4.96% of the premiums will become retained earnings, i.e. profit, if it is not dividended or deviated. Including more than 4.96% of premium for dividends and deviations in the rate calculation will cause rates to spiral and become excessive and unfairly discriminatory.

While there is substantial evidence to support the majority of the Commissioner's findings regarding dividends and deviations, we are unable to determine from the record exactly how the Commissioner selected the figure of 4.96% as the amount which may be used for dividends and deviations. Department exhibit DOI-44 appears to be the basis for the Commissioner's figure; however, we agree with the Bureau that the estimates shown in the chart for the years 1993, 1994 and 1995 are not supported by the evidence and there are no findings explaining the Commissioner's estimates, particularly how the Commissioner chose the 4.96% figure. Consequently, we remand to allow the Commissioner to make specific findings that clearly show the facts upon which he based his decision that the rate contains a 4.96% margin for dividends and deviations. *See State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 97 N.C. App. at 647, 389 S.E.2d at 576 (remanding the issue of underwriting profit provisions due to insufficient findings in the Commissioner's order).

III. INVESTMENT INCOME FROM CAPITAL AND SURPLUS FUNDS

[4] We agree with the Bureau's next contention that the Commissioner erred as a matter of law in considering investment income from capital and surplus in his ratemaking calculations.

In *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, our Supreme Court examined the issue of income on invested capital. The Court said:

> B. The Majority Rule
>
> We also find our view consistent with that prevailing in other jurisdictions. In 2 Couch, *Insurance Law* § 21:38 at 494 (Anderson ed. 1959) it is said:
>
> "In determining whether an insurer has made a reasonable profit, the amount of business done rather than its capital should be considered, and profits should be determined by subtracting losses and expenses from the total premiums actually received, *to the exclusion of profit on capital and surplus*, and excess commissions paid to agents *but considering interest on unearned premiums and related elements.*

Id. at 444, 269 S.E.2d at 586 (alteration in original). After summarizing the issue, the Court concluded, "prior decisions in this State have sustained the view that investment income from unearned premiums and loss reserve funds are appropriately considered in a ratemaking hearing. . . . Neither prior cases nor statutes, however, have permitted consideration of invested income from investment capital." *Id.* at 446, 269 S.E.2d at 587. In subsequent cases, this Court has clearly followed the Supreme Court's directive. In *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 75 N.C. App. at 228, 331 S.E.2d at 142 our Court said, "the Commissioner may not consider investment income from capital and surplus accounts . . . ." We remanded the issue of the Commissioner's selection of underwriting profit provisions for more findings showing how the Commissioner's figure was made without consideration of "investment income from capital and surplus" in *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 97 N.C. App. at 647, 389 S.E.2d at 576.

In this order, the Commissioner set forth the methodology by which he calculated the underwriting profit and contingency factor. He discussed the various methods used by several department and Bureau expert witnesses and then found, "it is appropriate to use the formula of the Bureau and O'Neil [a department expert] to calculate the target underwriting profit and contingency factor in this proceeding, with due consideration and appropriate adjustments to each factor in the calculation." This formula included a line item and calculation for "Income from Capital and Surplus." The Bureau witness

whose testimony the Commissioner relied upon in calculating this figure stated:

> [I]n addition to including investment income from loss, expense and unearned premium reserves, it includes installment payment income and realized and unrealized capital gains. It also includes both investment income and capital gains on stockholder-supplied funds, i.e. capital and surplus. Thus, it is a total return and not just a return on insurance operations.

The Order also states that in addition to the Bureau witness, the Commissioner relied upon the figures presented by department witness, O'Neil. In prefiled testimony, O'Neil stated she reflected investment income in her calculations by "us[ing] the Rate Bureau's calculation procedure. . . . My results differed slightly from the Rate Bureau's because my expected loss ratio . . . differs from the Rate Bureau's value because of differences in other underlying assumptions such as the treatment of dividends . . . ."

This order is remanded for recalculation of the underwriting profit provisions. The formula used must exclude investment income earned on capital and surplus.

IV. UNDERWRITING PROFIT PROVISIONS

The Bureau next argues the Commissioner erred in reducing the filed underwriting profit provisions from .8% to -3.75% for liability coverage and from 5.4% to 1.75% for physical damage. According to the Bureau, the Commissioner reached these figures by (1) accepting the 13.9% filed target return on net worth, but then improperly converting this to a return on statutory surplus; (2) improperly assuming a hypothetical capital structure by adopting a "normative" premium-to-surplus ratio rather than the existing ratio in North Carolina; and (3) improperly finding that the premiums used for prepaid expenses and agents' balances remain available for investment.

A. Rate of Return

[5] Essentially, the Bureau argues part of the methodology employed by the Commissioner in determining the underwriting profit provisions was faulty because the Commissioner used the more conservative accounting system known as SAP (statutory accounting principles) as opposed to the GAAP system (generally accepted accounting principles). The Bureau contends SAP, established by the National Association of Insurance Commissioners (NAIC), is inap-

propriate because its purpose is to measure the liquidation value of a company and it does not include all of a company's assets in its calculations. By contrast, the GAAP system measures the financial condition of a company as an ongoing concern, not its liquidation value. According to the Bureau, the more conservative SAP approach to measuring assets produced a chain of reactions: an understatement of the value of the aggregate insurance company and a smaller base upon which to apply the return, and ultimately resulted in a lower rate of return. Additionally, the Bureau contends the Commissioner's calculations are not supported by material and substantial evidence.

The Bureau has not cited any authority and we find nothing in the cases or statutes which prescribe the system the Commissioner must use, either SAP or GAAP, in calculating these profit provisions. In *Comr. of Insurance v. Rating Bureau*, 292 N.C. 471, 489, 234 S.E.2d 720, 730 (1977), our Supreme Court said:

> The ultimate question for the Commissioner's determination is whether the proposed rates will, after provision for reasonably anticipated losses and operating expenses, leave for the insurers . . . *a fair and reasonable profit and no more.* The purpose of the entire statutory plan is to provide for the public, at reasonable cost, insurance in financially responsible companies. The public interest extends as truly to the financial responsibility of the insurer as it does to the reasonable cost of the insurance to the insured, and vice versa. (citations omitted) (emphasis added).

The Commissioner is considered an expert in the field of insurance and his reliance on various "methods of analysis of the profit to which the insurance companies are entitled lies entirely within his discretion." *State ex rel Comr. of Insurance v. N.C. Rate Bureau*, 96 N.C. App. at 223, 385 S.E.2d at 512. The rates the Commissioner determines in his order are prima facie correct so long as there is substantial and material evidence to support the Commissioner's findings. G.S. 58-2-80; G.S. 58-2-90(e).

We find there is substantial and material evidence to support the Commissioner's use of SAP in calculating the profit provisions. Not only was there expert testimony that SAP was the appropriate method, but as the Commissioner pointed out in his order, even our statutes refer to the accounting practices set forth by the NAIC (i.e. SAP system) in requiring insurance companies to evaluate and make regular reports of their financial positions. N.C. Gen. Stat. § 58-2-165. Additionally, the Commissioner reasons that since SAP represents

that level of financial commitment an insurance company is legally required to make to its policyholders, it is a logical foundation upon which to base a rate of return in determining "a fair and reasonable profit and no more." *Comr. of Insurance v. Rating Bureau*, 292 N.C. at 489, 234 S.E.2d at 730. "As we do not find error in the Commissioner's judgment we cannot replace our judgment for his." *State ex rel Comr. of Insurance v. N.C. Rate Bureau*, 96 N.C. App. at 223, 385 S.E.2d at 512.

We turn now to the Commissioner's calculations and ultimate selection of 13.67% total rate of return as a percentage of surplus (SAP). The Bureau vigorously argues the Commissioner's calculations and findings, to the extent they portend to be based on the Bureau calculations, are "contrived in order to give the appearance of 'comparable' [Bureau] results." While there may be some misleading language in the Commissioner's findings as to comparisons with Bureau figures, including findings of Fact 47 and 48, we ultimately find there is material and substantial evidence to support the Commissioner's calculations.

The Commissioner's order included the following:

SELECTION OF RATE OF RETURN

44. The historical rate of return for the property and casualty insurance industry during the 1981 to 1990 period was 9.6% of GAAP and 9.4% of SAP. *DOI-39*.

45. Several recommendations as to the appropriate rate of return were advanced in the testimony. *See Exhibit A, Section C, pp. 30, 31, line (12)*.

a. Plotkin testified that a broad spectrum of U.S. industries has historically achieved average returns on net worth (GAAP) in the range of 12% to 15%. He opined that 13.9% (GAAP) was not excessive. *RB-15, Plotkin Prefiled Testimony, p. 15*.

b. Vander Weide opined that the cost of equity capital for the average company writing private passenger automobile insurance in North Carolina is 13.0% to 15.25% (GAAP), or a fair rate of return of 15.0% to 17.25% on GAAP equity. *RB-17, Vander Weide Prefiled Testimony, pp. 4, 17-18*.

c. Cohn testified that the appropriate rate of return is on operations (not a total rate of return) based on risk premium, and the required risk premium is 5.2% of surplus. *DOI-4, Cohn*

Prefiled Testimony, pp. 8-16; Exhibit A, Section C, pp. 30-31, line (16). Cohn did not calculate the cost of capital, but would estimate it to be 10%. *Cohn Transcript, p. 925.*

d. Schwartz testified that the required rate of return on operations is 3.6% of premium (3.8% for liability and 3.2% for physical damage). *Exhibit A, Section C, pp. 30-31, line (18).* He calculated that the recommended 3.6% results in an overall post-tax rate of return in relation to surplus of 17.3%, which may be overly generous. *DOI-5, Schwartz Prefiled Testimony, pp. 12-15.*

e. Wilson concluded that a return of 10% on surplus (SAP) is appropriate based on the current cost of equity capital for private passenger automobile insurance companies. *DOI-3, Wilson Prefiled Testimony, pp. 5, 44; Exhibit A, Section C, pp. 30-31, line (12).*

f. O'Neil concluded that an overall 11% post-tax rate of return (SAP) was appropriate, noting that the reasonable expected rate of return for all industries would be in the range of 10% to 15% (GAAP). *DOI-6, O'Neil Prefiled Testimony, pp. 47-49; Exhibit A, Section C, pp. 30-31, line (12).*

46. The rates of return recommended by each of the witnesses were derived by reference, in varying degrees, to rates of return in industries other than the North Carolina private passenger automobile insurance industry.

47. The rate of return used by the Bureau in its calculation is a 13.9% return on net worth (GAAP) (*see* RB1, L-461 and L-465), which converts to a return on surplus of 13.66% for liability and 13.61% for physical damage. *Exhibit A, Section C, pp. 32 and 33.*

48. In light of all the evidence, the Commissioner selects a 13.67% total rate of return as a percentage of surplus (SAP) for both liability and physical damage coverages. This is the return derived from the adjusted Bureau calculation. *Exhibit A, Section C, pp. 32 and 33.* Based on the evidence in this case, a 13.67% return leads to a reasonable margin for underwriting profit and to contingencies for the average carrier, and no more. *In Re Filing by Fire Ins. Rating Bureau, 215 [sic] N.C. 15, 32-33 (1969); Commissioner of Insurance v. Rate Bureau*, 300 *N.C. 381, 448-449 (1980).* Rates of return of 13.67% for both liability and physical damage are appropriate and do not lead to rates that are excessive, inadequate or unfairly discriminatory.

49. Therefore, 13.67% is entered into line (12) of Exhibit A, Section C, pp. 30 and 31.

After considering the wide variety of recommendations, the Commissioner used the Bureau's profit components related to surplus and calculated a return on surplus of 13.66% by multiplying the return on premium (the Bureau's figure of 9.26%) by 1.475, the premium-to-surplus ratio for 1992, the latest single year of data available for this filing. We have already discussed the evidence which allows the Commissioner to use a return on surplus (SAP) as one of the bases for deriving profit. The Commissioner's choice of the premium-to-surplus ratio for 1992 is also supportable. It represents data from the most current year; Bureau witnesses testified the 1992 data was credible; and the ratio was used in department witness O'Neil's calculations.

B. Premium-to-surplus ratio:

[6] The Bureau argues "the Commissioner erred as a matter of law in adopting a hypothetical 'normative' premium-to-surplus ratio rather than the actual ratio." This selection, according to the Bureau, further reduced the filed underwriting profit provisions. While the Bureau contends this hypothetical ratio is "error as a matter of law," the only case cited for this proposition is *Comr. of Insurance v. Rate Bureau*, 300 N.C. at 450-51, 269 S.E.2d at 589- 90. We find this case distinguishable.

In *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, the Court's discussion of the use of a hypothetical rate of return was in the context of the Commissioner's decision to use the "capital asset pricing model" for determining the underwriting profit margin. The Court stated:

> [T]he Commissioner's requirement for the use of a hypothetical "risk free" rate of return would clearly violate the intent of our Legislature in authorizing insurance companies operating in North Carolina to invest in certain securities. G.S. 58-79.1 specifically requires casualty insurance companies to invest reserve funds in one or more of ten different categories of investments.
>
> . . .
>
> It is inconceivable to us that our Legislature intended that insurance companies invest their funds in certain designated securities and then require that those companies' underwriting profits shall be computed on the hypothetical assumption that they were

invested in something else. Such an interpretation would, as appellants suggest, "make a mockery of the statute."

Id. at 450-51, 269 S.E.2d at 589-90. The statute at issue, G.S. 58-79.1 has since been repealed.

In this case, we find there was substantial evidence to support the Commissioner's selection of a 2 to 1 premium-to-surplus ratio. The 2 to 1 ratio is a traditional standard for the premium-to-surplus ratio and several expert witnesses used this 2 to 1 ratio in their calculations. Additionally, there was testimony that it is more appropriate to use a normative ratio than an historical one when determining rates on a prospective basis. We agree with the Commissioner there is no evidence of error as a matter of law; there is neither a statutory mandate for a premium-to-surplus ratio nor anything to preclude the Commissioner's use of a hypothetical normative premium-to-surplus ratio as opposed to the actual ratio so long as there is substantial evidence to support the Commissioner's selection.

C. Treatment of Reserves Subject to Investment

[7] The Bureau's final contention under the underwriting profit provision argument is that the Commissioner erred by improperly finding that the premiums used for prepaid expenses and agents' balances remain available for investment. We disagree.

G.S. 58-36-10 states, in part, "[d]ue consideration shall be given to . . . investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State . . . ." Section F of the Commissioner's order examined the issue of investment income from unearned premium, loss, and loss expense reserve funds. In this section, the Commissioner clearly defined the factors involved in considering investment income; selected a reasonable rate of return (7%) on investments; and carefully explained why he concluded the Bureau's amount of reserves subject to investment was incorrect.

The Commissioner found the Bureau had excluded from the calculations of the reserves available for investment prepaid expenses and agents' balances. Reasoning that decisions as to how to handle agents' balances and to prepay expenses are discretionary and outside the control of policyholders, the Commissioner stated, "it is appropriate to allow the interest earned on the entire amount of these funds to accrue to the benefit of policyholders." This conclusion was supported by the evidence in the record. Expert witness John Wilson

testified that by reducing the reserve by prepaid expenses and agents' balances, the Bureau "is saying that the working capital requirements of the insurance company—in particular things like agents' balances and other important capital requirements, any type of accounts receivable—should be funded by the premium reserve." Wilson further stated, "[t]hat is not the way in which business operates. . . . To make a deduction from policyholder-provided funds rather than owner-supplied funds, for the working capital requirements of the enterprise is incorrect accounting for purposes of ratemaking." The Commissioner also observed that none of the statutes authorize the Bureau to reduce investment reserves for prepaid expenses and agents' balances and that the annual statement includes "the entire unearned premium reserve and loss and loss adjustment expense reserves are allocated in their entirety to the benefit of policyholders."

We find there is substantial evidence in the record to support the Commissioner's decision as to the calculation of investment income from unearned premium, loss, and loss expense reserve funds.

V. GENERAL AND OTHER ACQUISITION EXPENSES

[8] General and other acquisition expenses for liability coverage is figured from information which combines the automobile expense experience from the voluntary market and the Reinsurance Facility (facility market). To calculate the proper expense provision for a filing, this combined expense data is allocated between the voluntary and facility markets. In the past, the Commissioner has approved filings where the expense dollars are allocated to each market based on the number of policies (called exposures) in each market. In this filing, the Commissioner concluded the best method for determining general and other acquisition expenses was by allocating expenses between the voluntary and facility markets by premium volume as opposed to exposures. The Bureau contends the Commissioner erred in accepting this method because it is not supported by substantial or material evidence. We disagree.

As we have already stated, the Commissioner weighs the sufficiency of the evidence as well as the credibility of the witnesses. *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 96 N.C. App. at 221, 385 S.E.2d at 511. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. at 205, 214 S.E.2d at 106. Additionally, we note the Commissioner is

free to consider and adopt a new method of allocation. As pointed out in the Commissioner's brief, our Supreme Court has stated, "[i]t is not a proper ground for the rejection of such evidence that such projection . . . has never before been used in the rate making process. The statute does not contemplate that procedures and methods for determining replacement costs for the future shall be frozen." *In re Filing by Fire Ins. Rating Bureau*, 275 N.C. 15, 36, 165 S.E.2d 207, 222 (1969). "[T]he head of an administrative agency in the executive branch of our government clearly has the power, provided he follows legal means, to chart new courses in discharging the functions of his office." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 485, 491, 269 S.E.2d 602, 606 (1980).

In choosing to change the method by which general and other acquisition expenses are calculated, the Commissioner had before him expert testimony from department witness Allan I. Schwartz, an actuarial consultant who had conducted an independent analysis of the issue. Schwartz testified, "the key issue in this item is how these expenses are distributed between the voluntary and involuntary [North Carolina Reinsurance Facility (NCRF)] markets. There are two main methods used to allocate these types of expenses. One would be on the basis of premiums, the other would be on the basis of exposures." Schwartz carefully explained the differences between allotment by exposure as opposed to allocating by premium. He reasoned that some expenses like advertising and a portion of boards, bureaus and surveys are already allocated on the basis of premiums and he stated, "[i]t is clear that a significant portion of other acquisition plus general expenses are more closely related to premiums than to exposures." Other evidence presented by Schwartz included a study performed by an industry-sponsored organization (AIPSO) responsible for the administration of automobile insurance residual markets in most jurisdictions. The results of this study showed the expense ratios are higher for the residual market than for the voluntary market whereas the Bureau method results in a much higher expense ratio for the voluntary market than the residual market. Schwartz was asked why insurance companies would take "contradictory positions through two of their agents (i.e. AIPSO and NCRB [Bureau]) with regard to the relationship of expenses to premiums for the residual market in comparison to the voluntary market." He responded:

> As it turns out, in most states other than North Carolina, residual market rates are more heavily regulated than the voluntary mar-

> ket rates. Hence, in those jurisdictions a financial incentive exists for insurance companies to try and push as many expense dollars as possible into the residual market rate level.
>
> In North Carolina, however, residual market rates are less regulated than the voluntary market rates. Hence, there is a financial incentive in North Carolina for insurance companies to try and push as many expense dollars as possible into the voluntary market rate level.
>
> . . .
>
> Hence, what at first may seem to be illogical and contradictory positions by insurance companies is simply consistent with an attempt by insurance companies to try and load as many expense dollars as possible into the rate level that is more closely regulated.

Schwartz went on to recommend to the Commissioner "that a reasonable procedure would be to allocate other acquisition and general expenses between the voluntary and residual markets based upon premiums." We conclude there was substantial evidence before the Commissioner to support his method of calculating general and other acquisition expenses by allocating expense dollars based on premium volume as opposed to exposures. Therefore, we overrule this assignment of error.

VI. CURRENT COST AND EXPENSE TREND PROVISIONS

[9] The Bureau next argues the Commissioner erred in disapproving the filed current cost and expense trend provisions and in ordering rates based on inadequate current cost and expense trend provisions.

As we outlined at the beginning of this opinion, G.S. 58-36-70(d) states, in part:

> If the Commissioner finds that a filing complies with the provisions of this Article, either after the hearing or at any other time after the filing has been properly made, he may issue an order approving the filing. If the Commissioner after the hearing finds that the filing does not comply with the provisions of this Article, he may issue an order disapproving the filing, determining in what respect the filing is improper, and specifying the appropriate rate level or levels that may be used by the members of the Bureau instead of the rate level or levels proposed by the Bureau filing, unless there has not been data admitted into evidence in

> the hearing that is sufficiently credible for arriving at the appropriate rate level or levels.

"In reaching his ultimate determination, the Commissioner must make findings which clearly and specifically indicate the facts on which he bases his order, the resolution of conflicting evidence, and the consideration he has given to the material and substantial evidence that has been offered." *State ex rel. Comr. of Ins. v. N.C. Rate Bureau*, 95 N.C. App. at 159, 381 S.E.2d at 803. "[T]he present statute requires the Commissioner to be mathematically specific in rejecting proposed rate increases and future orders *should specify 'wherein and to what extent' the proposed filings are deemed improper.*" *Comr. of Insurance v. Rate Bureau*, 300 N.C. at 456, 269 S.E.2d at 592-93 (emphasis added).

After explaining the necessity of prospective loss and experience (trending) in insurance ratemaking cases, the Commissioner noted, "[t]he evidence in this case was conflicting concerning trends that will most accurately predict the prospective loss and expense experience . . . ." He then made detailed and specific findings based on department witness O'Neil's "extensive analysis" on the issue of current cost and expense trend provisions, occasionally making general references to inconsistencies between the Bureau and O'Neil findings. The Commissioner ultimately chose to use O'Neil's trend selections in the calculation of the rate level change. As to the Bureau's trends, the Commissioner made the following findings of fact:

> 4. The Bureau trends were all selected by its committees. However, no testimony was offered by any member of these committees to explain the reasons for the selection of exponential curves as has been automatically made by the Bureau in all auto filings for many years. The mechanical process of calculating the pure premium and cost trend was briefly explained by the Bureau witness Woods, without independent evaluation, on pages 25 and 26 of RB-14. Woods was not a member of the Bureau committees.
>
> . . . [findings 5-10 discussed O'Neil's research and conclusions]
>
> 11. The trends selected by the Bureau will result in rates which are excessive in violation of the law of this state.
>
> 12. The trends selected by the Bureau committees and briefly explained by Woods were not determined upon the same thoughtful analysis as those derived by O'Neil and, thus, are found to be less credible, reasonable and reliable, and are rejected.

13. For the reasons set forth above, the trend selections derived by O'Neil are accepted as credible and reliable for use in the calculation of the rate level change in this proceeding, while the trends selected by the Bureau are found to lack credibility and are rejected.

O'Neil's analysis and findings are supported by the evidence in the record; however, the Commissioner's statements regarding the Bureau's evidence are conclusory and unsupported by specific evidence. While "[t]here is no burden upon the Commissioner to disprove the filing," *Comr. of Insurance v. Rate Bureau*, 300 N.C. at 455, 269 S.E.2d at 592, the statutes do compel the Commissioner to be specific in rejecting rate increases by stating " 'wherein and to what extent' the proposed filings are deemed improper." *Id.* at 456, 269 S.E.2d at 592-93. The Commissioner's recognition of conflicting evidence, but his failure to resolve the conflicts in precise detail along with his failure to specifically show he has given consideration to the material and substantial evidence the Bureau offered before rejecting the Bureau in favor of O'Neil's evidence require us to remand this issue to the Commissioner for more specific findings as to the Bureau's evidence.

VII. FILING DATE ADJUSTMENT

[10] The Bureau argues the Commissioner erred in (1) disapproving the filing date adjustment it was legally authorized to include in the proposed filing and (2) improperly calculating and ordering into effect his own adjustment, which resulted in further decreasing the overall ordered rate change. According to the Bureau, the Commissioner exceeded his statutory authority by reviewing the filing date adjustment because only the Bureau was given the power to make an adjustment to compensate for the changed filing date.

In 1993, the General Assembly changed the annual filing date for automobile insurance rate filings from 1 July to 1 February. Since this change prevented the Bureau from filing for a rate change in 1993, the General Assembly provided:

> With respect to the nonfleet private passenger motor vehicle insurance rate filing made on or before February 1, 1994, the *Bureau may file an additional factor for an additional rate increase or decrease* to compensate for the changing of the filing rate (sic) from July 1 to February 1 as provided in Section 10 of this act.

1993 N.C. Sess. Laws 409, § 11 (emphasis added). Pursuant to this authority, the Bureau included an adjustment which "showed a need for an increase of 8.6% without the filing date adjustment. When combined with the filing date adjustment, the overall filed change was 10.7%." The Commissioner, using the Bureau's methodology, calculated and ordered into effect his own adjustment which resulted in a further decrease of the overall rate change.

While the legislation allows the Bureau an additional filing factor, we are not convinced the General Assembly intended that the ultimate decision on the amount of the additional rate increase or decrease be left solely in the hands of the Bureau. Indeed, the last line of this legislation states, "as provided in Section 10 of this act." G.S. 58-36-10 is the listing of factors to which *the Commissioner* must give "due consideration" in insurance ratemaking cases. The filing date adjustment was part of the overall proposed filing and as such, the Commissioner was vested with the statutory authority to disapprove of any provision in the filing and to specify the appropriate rate to be used. G.S. 58-36-70(d).

VIII. CONCLUSION

We have reviewed the parties' remaining assignments of error and find them to be without merit.

Affirmed in part; vacated in part; and remanded.

Judges JOHNSON and MARTIN, JOHN C. concur.

Judge Johnson participated in this opinion prior to 1 December 1996, the effective date of his retirement.

SHERRY D. THOMAS, BOTH INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DEFENDANT AND SECRETARY, U.S. DEPARTMENT OF AGRICULTURE, DAN GLICKMAN, INTERVENOR-DEFENDANT

No. COA95-1310

(Filed 12 December 1996)

1. Appeal and Error § 175 (NCI4th)— mootness does not preclude review—defendant voluntarily ceased practice—postponement of disqualification period—food stamp recipients

Mootness does not preclude review of the merits where the Department of Human Resources voluntarily ceased its challenged practice of postponing the disqualification period of food stamp recipients in the face of plaintiff's appeal and in the face of the USDA's concordant decision to cease its similarly challenged practice. The Court of Appeals had previously ruled in *Anderson v. N.C. Dept. of Human Resources*, 109 N.C. App. 680, 428 S.E.2d 267 (1993), that the Department wrongly postponed recipients' food stamp fraud disqualification period in violation of 7 U.S.C. § 2015(b)(1), which requires that those disqualification periods begin immediately.

Am Jur 2d, Appellate Review §§ 646-649.

2. Constitutional Law § 12 (NCI4th); Social Services and Public Welfare § 20 (NCI4th)— Court of Appeals decision—agency's failure to apply to others—violation of separation of powers provision

The NCDHR violated the separation of powers provision of Art. I, § 16 of the N.C. Constitution by applying a decision of the Court of appeals—that USDA and NCDHR regulations permitting postponement of the one-year food stamp disqualification period for fraud conflicted with the Food Stamp Act—only to the plaintiff in that case and not to others similarly situated.

Am Jur 2d, Constitutional Law §§ 294-359; Welfare Laws §§ 26-31.

3. Constitutional Law § 2 (NCI4th)— division of powers—authority to interpret Food Stamp Act

Under the federal system, the states possess sovereignty concurrent with that of the Federal Government subject only to

limitations imposed by the Supremacy Clause. The Court of Appeals acted within its authority in interpreting the Food Stamp Act and consequently invalidating the USDA's conflicting regulation where there was no evidence that Congress had divested the state courts of jurisdiction.

Am Jur 2d, Constitutional Law §§ 291 et seq.; Welfare Laws §§ 26-31.

4. **Courts § 137 (NCI4th); Social Services and Public Welfare § 20 (NCI4th)— interpretation of federal act—deference to federal agency not required**

The Court of Appeals was not required to defer to the USDA's interpretation of the Food Stamp Act but could declare a USDA regulation invalid as being in conflict with the Act.

Am Jur 2d, Conflict of Laws §§ 14, 15; Welfare Laws §§ 26-31.

5. **Social Services and Public Welfare § 20 (NCI4th)— argument not valid—effect on federal funding—Department must obey Court's order**

There was no validity to the Department of Human Resources' argument that it could not acquiesce in the Court of Appeals' interpretation of the Food Stamp Act because to do so would perhaps endanger some amount of federal funding or at least require the agency to undertake the somewhat onerous process of securing the necessary funding waiver from the USDA. The Department must obey duly enacted laws and duly entered court orders just as any citizen must.

Am Jur 2d, Welfare Laws §§ 26-31.

Judge WALKER dissenting.

Appeal by plaintiff from order entered 4 October 1995 by Judge Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 27 August 1996.

On 24 August 1989, the Guilford County Department of Social Services ("DSS") issued a decision determining that Edith Anderson fraudulently failed to report additional household income on her food stamp application dated 2 February 1988. Because of this violation, DSS notified Edith Anderson that she would be disqualified from receiving food stamps for a period of one year. Over one year later, in

January 1991, Ms. Anderson reapplied for food stamps and was found income eligible to participate in the program. DSS then notified Ms. Anderson, however, that she would have to wait one additional year to receive food stamps because the disqualification period did not begin until she had reapplied and been determined income eligible for food stamps.

Ms. Anderson exhausted her administrative remedies and, on 26 July 1991, filed a complaint in Guilford County Superior Court alleging that the North Carolina Department of Human Resources ("NCDHR") had wrongly postponed her food stamp fraud disqualification period in violation of 7 U.S.C. § 2015(b)(1), which requires that those disqualification periods begin immediately. Upon notice of a suit against it in State court, the NCDHR is required pursuant to 7 C.F.R. § 272.4(e) to notify the United States Department of Agriculture ("USDA") to afford the USDA an opportunity to seek removal of the case to federal court. When the NCDHR fails to properly notify the USDA, as it did here, the NCDHR is not entitled to any further federal contribution for any amount awarded in the State court action. 7 C.F.R. § 276.2(b)(5)(ii).

The case remained in State court and both parties filed motions for summary judgment. The trial court heard the parties' motions on 4 November 1991, and on 10 January 1992, granted defendant NCDHR's motion for summary judgment and denied plaintiff's motion. On appeal, this Court reversed the trial court and, on 20 April 1993, issued an opinion holding that USDA regulation 7 C.F.R. § 273.16(e)(8)(iii), which allowed postponement of the food stamp disqualification period, impermissibly conflicted with the Food Stamp Act. *Anderson v. N.C. Dept. of Human Resources*, 109 N.C. App. 680, 428 S.E.2d 267 (1993) ("*Anderson I*"). There was no appeal from this Court of Appeals decision.

Thereafter, the NCDHR applied *Anderson I* only to plaintiff and failed to apply the rule announced in *Anderson I* to all others similarly situated. In response, plaintiff filed a rulemaking petition pursuant to G.S. 150B-20(a) seeking the adoption of a proposed rule which would adopt the *Anderson I* holding. After this petition was denied, plaintiff filed a class action complaint in Guilford County Superior Court on 7 January 1994 seeking judicial review of the denial of her rulemaking petition. Plaintiff's complaint also sought an injunction to ensure the NCDHR's future compliance with *Anderson I* and other opinions of the courts of this State.

Specifically, plaintiff's complaint requested, *inter alia*, that the court:

1. Reverse the defendant's December 8, 1993 final agency decision and order it to adopt in its state regulations and Food Stamp Manual the rule requested by Plaintiffs in their Petition for Rule Making.

2. Issue a mandatory injunction requiring Defendant to reopen the cases of all class members as of the April 20, 1993 date of the filing of the decision in Anderson, supra, and issue the food stamps that they should have received had their disqualification periods commenced immediately.

3. Issue a Declaratory Judgment under G.S. § 1-253 that the Defendant is required to comply with the principles established in the decision in Anderson, supra, in subsequent cases involving similar material facts arising before the agency.

Defendant NCDHR filed its answer to plaintiff's complaint on 9 February 1994, and at that time notified the Secretary of Agriculture. On 10 March 1994, the Secretary of Agriculture filed a motion to intervene, which was granted on 6 April 1994 after the trial court determined that the USDA's interests were not adequately protected by the existing parties.

In anticipation of the trial court granting his motion to intervene, the Secretary of Agriculture filed an answer on 31 March 1994. The Secretary's answer included a motion to dismiss alleging that plaintiff's suit failed to state a claim upon which relief could be granted. Thereafter, on 13 April 1994, the Secretary filed a motion in the United States District Court for the Middle District of North Carolina seeking removal of the suit to federal court. Plaintiff Sherry D. Thomas then moved the federal court to intervene and join Edith Anderson as a named plaintiff in the case. On 7 July 1994, the federal district court substituted plaintiff Sherry D. Thomas for Edith Anderson as named plaintiff, and on 3 May 1995, the federal district court remanded the case to the State Superior Court after concluding that only the State courts had jurisdiction to enforce their own orders. *Thomas v. N.C. Dept. of Human Resources*, 898 F. Supp. 315 (M.D. N.C. 1995).

On 3 August 1995, plaintiff filed a motion to certify a class and a motion for summary judgment against defendant NCDHR. On 15 September 1995, defendant Secretary filed a motion for summary

judgment and, three days later, defendant NCDHR filed a motion to dismiss. Without ruling on plaintiff's motion to certify a class, the trial court denied plaintiff's motion for summary judgment and granted summary judgment in favor of defendant Secretary and dismissed plaintiff's claims against defendant NCDHR on 4 October 1995.

Plaintiff appeals.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert J. Blum and Associate Attorney General Elizabeth L. Oxley, for defendant-appellee North Carolina Department of Human Resources.

EAGLES, Judge.

In *Anderson I*, we determined "that 7 U.S.C.A. § 2015(b)(1) (1991) requires that food stamp disqualification periods begin immediately upon a finding that a violation has been committed." 109 N.C. App. at 682, 428 S.E.2d at 268. In reaching this conclusion, the *Anderson I* court supplied the following reasoning:

> The Food Stamp Act of 1977 provides that:
>
>> Any person who has been found by any State or federal court or administrative agency to have intentionally (A) made a false or misleading statement . . . for the purpose of . . . receiving . . . coupons . . . *shall, immediately upon the rendering of such determination, become ineligible* for further participation in the program . . . (ii) for a period of one year upon the second occasion of any such determination.
>
> 7 U.S.C.A. 2015(b)(1) (1991) (emphasis added). The federal regulations interpreting this statute, enacted by the Secretary of Agriculture pursuant to 7 U.S.C.A. 2013(c) (1991), however, postpone the penalty period mandated by the statute. 7 C.F.R. 273.16(e)(8)(iii) (1992) provides that "[i]f the individual is not eligible for the Program at the time the disqualification period is to begin, the period shall be postponed until the individual applies for and is determined eligible for benefits. . . ."
>
> In reviewing the validity of an agency's regulation, a court "must first determine if the regulation is consistent with the lan-

> guage of the statute." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 100 L.Ed.2d 313, 324 (1988). Both the courts and the agencies "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 81 L.Ed.2d 694, 703, *reh'g denied*, 468 U.S. 1227, 82 L.Ed.2d 921 (1984)). Therefore, if the language of the statute is clear and unambiguous, and the regulation is contrary to that language, "that is the end of the matter" and the regulation must be declared invalid. *See K Mart*, 486 U.S. at 291-92, 100 L.Ed.2d at 324; *Chevron*, 467 U.S. at 843, 81 L.Ed.2d at 703. While traditionally the courts pay deference to an agency regulation, such deference is inappropriate where the regulation alters the clearly expressed intent of Congress. *K Mart*, 486 U.S. at 291, 100 L.Ed.2d at 324. Only where the language of the statute is unclear, ambiguous, or fails to answer the specific question at issue should deference be paid to a contested agency interpretation. *See Chevron*, 467 U.S. at 842-43, 81 L.Ed.2d at 703.
>
> The specific issue in the case at bar is clearly resolved by the statute. The language of the statute requires a penalty of a specified period of time, to commence immediately upon a determination that a food stamp recipient has violated the provisions of the Food Stamp Act.

Anderson I, 109 N.C. App. at 682-83, 428 S.E.2d at 268-69. Since *Anderson I*, and during the pendency of this appeal, the USDA amended its regulations to eliminate the postponement period declared invalid in *Anderson I*. The current appeal arises and persists because, in the period between the issuance of *Anderson I* on 20 April 1993 and the effective date the USDA changed its regulations on 1 February 1996, the NCDHR refused to apply the rule of *Anderson I* to other similarly situated plaintiffs; instead, the NCDHR continued to enforce its regulations interpreting the Food Stamp Act in contravention of the opinion of this Court.

I.

Plaintiff first argues that each member of the class affected is entitled to the Food Stamps they would have received between 20 April 1993 and 1 February 1996 had the NCDHR uniformly applied *Anderson I*. Plaintiff bases this argument on the principle first articulated in *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970), that "[f]ood-stamp benefits . . . 'are a matter of statutory entitlement for

persons qualified to receive them.' " *Atkins v. Parker*, 472 U.S. 115, 128, 86 L. Ed. 2d 81, 92 (1985) (quoting *Goldberg*, 397 U.S. at 262, 25 L. Ed. 2d at 295). We need not further address plaintiff's argument here, however, because defendant NCDHR has conceded in a response filed here to an order of this Court that the members of the class identified by plaintiff are entitled to the full monetary compensation prayed for by plaintiff. Subject to some further refinement, the NCDHR has established a compensation plan to this effect this goal with a target completion date of 31 March 1997.

Plaintiff nevertheless expresses concern regarding the administration of the NCDHR's proposed compensation plan. Specifically, plaintiff worries that the NCDHR's plan will afford each member of the class affected only an average compensation rate, rather than affording each an amount specifically tailored to that person's individual circumstances. We note, however, that no class has of yet been certified by the trial court in this action and that no potential claimant's rights have been prejudiced. If an individual is inadequately compensated, that person retains every right to pursue their claim administratively before the NCDHR and thereafter in the courts of this State.

II.

Plaintiff next argues that the North Carolina Constitution requires the NCDHR to acquiesce in statutory interpretations made by North Carolina's appellate courts to the extent that they conflict with the NCDHR's interpretations. Plaintiff contends that the NCDHR and other administrative agencies of the State must give full effect to the statutory constructions of this court both as to the named litigants and as to all persons similarly situated. We agree.

A.

[1] Prior to addressing the merits of plaintiff's argument, we note that a question of mootness arises here. Now that the USDA has revised its regulations in accordance with this Court's order in *Anderson I* to eliminate the disqualification postponement requirement, defendant NCDHR assures this Court that it has voluntarily ceased its refusal to apply the principles of *Anderson I* equally to all similarly situated persons. Defendant argues that, by voluntarily ceasing to apply *Anderson I* uniformly, the challenged conduct no longer exists to be challenged and the case is rendered moot. In turn, plaintiff counters that an exception to the mootness doctrine applies

and that we must therefore reach the merits of this issue. We agree with plaintiff's contention that the mootness doctrine does not preclude our review of the merits here.

For over a century, both the courts of this State and the federal courts have generally refrained from addressing questions deemed moot. *See, e.g.*, *Crawley v. Woodfin*, 78 N.C. 4, 4 (1878); *Mills v. Green*, 159 U.S. 651, 653, 40 L. Ed. 293, 293-94 (1895). In State court, the exclusion of moot questions is considered "a principle of judicial restraint . . .," *N.C. Council of Churches v. State of North Carolina*, 120 N.C. App. 84, 88, 461 S.E.2d 354, 357 (1995), *aff'd*, 343 N.C. 117, 468 S.E.2d 58 (1996), while in federal court the mootness doctrine is considered to have constitutional jurisdictional underpinnings. *E.g.*, *Honig v. Doe*, 484 U.S. 305, 317-18, 98 L. Ed. 2d 686, 703 (1988). Despite this difference in origin, the limits of the mootness doctrine are articulated almost identically in the federal courts and the courts of this State. *E.g.*, *In re Jackson*, 84 N.C. App. 167, 170-71, 352 S.E.2d 449, 452 (1987) (citing *Moore v. Ogilvie*, 394 U.S. 814, 816, 23 L. Ed. 2d 1, 4 (1969)). If anything, the mootness doctrine is less restrictive in the courts of North Carolina than in the federal courts. *See, e.g.*, *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978).

"The general rule is that an appeal presenting a question which has become moot will be dismissed." *Matthews*, 35 N.C. App. at 770, 242 S.E.2d at 654. This general rule, however, is subject to at least five well-known exceptions. *E.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 71 L. Ed. 2d 152, 159 (1982) (holding that "a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice."); *In re Jackson*, 84 N.C. App. at 170-71, 352 S.E.2d at 452 (citing *Moore*, 394 U.S. at 816, 23 L. Ed. 2d at 4) (holding that courts may review cases that are otherwise moot but that are "capable of repetition, yet evading review."); *Matthews*, 35 N.C. App. at 770, 242 S.E.2d at 654 (citing *Leak v. High Point City Council*, 25 N.C. App. 394, 397, 213 S.E.2d 386, 388 (1975)) (holding that the court has a "duty" to address an otherwise moot case when the "question involved is a matter of public interest."); *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (citing *Sibron v. New York*, 392 U.S. 40, 55-56, 20 L. Ed. 2d 917, 930-31 (1968)) (stating that a case must be decided, "even when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom . . . ."); *Simeon v. Hardin*, 339

N.C. 358, 371, 451 S.E.2d 858, 867 (1994) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11, 43 L. Ed. 2d 54, 63 n.11 (1974)) (recognizing a "narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class.").

While we believe that both the "public interest" and the "capable of repetition, yet evading review" exceptions also apply to the case at bar, we conclude the most applicable exception is that which provides for review of cases where a defendant voluntarily ceases its illegal conduct during the pendency of the appeal. *Quern v. Mandley*, 436 U.S. 725, 731-32, 56 L. Ed. 2d 658, 665-66 (1978). As the United States Supreme Court stated in *City of Mesquite*:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice. Such abandonment is an important factor bearing on the question of whether a court should exercise its power to enjoin the defendant from renewing the practice, *but that is a matter relating to the exercise rather than the existence of judicial power.*

455 U.S. at 289, 71 L. Ed. 2d at 159 (emphasis added). The NCDHR here has voluntarily ceased its challenged practice in the face of this appeal and in the face of the USDA's concordant decision to cease its similarly challenged practice. If we were to decide that we must dismiss this or any substantially similar case as moot, defendants like the NCDHR here could virtually always manage to cease their offending practices in time to avoid meaningful review. Having ceased their practices and secured dismissal of the pending litigation, defendants would then be, as defendants would be here, "free to return to [their] old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 97 L. Ed. 1303, 1309 (1953). Accordingly, we decline to dismiss as moot plaintiff's appeal on this issue.

B.

[2] Turning now to the merits, Article I, section 6 of the North Carolina Constitution is entitled "[s]eparation of powers" and provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. We hold that the challenged conduct on the part of the NCDHR here violates this section of the State constitution.

In *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982), our Supreme Court engaged in an extensive historical analysis of the separation of powers doctrine before concluding "[t]here should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments." *Id.* at 601, 286 S.E.2d at 84. The *Wallace* court recognized that, in addition to Article I, section 6, other constitutional provisions reinforce the essential nature of the requirement that our State government's powers be divided among separate and distinct branches.

> Section 1 of Article II of our present constitution provides that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." Section 1 of Article III provides that "[t]he executive power of the State shall be vested in the Governor." Section 1 of Article IV provides:
>
> > The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

Wallace, 304 N.C. at 595-96, 286 S.E.2d at 82.

This commitment to the principal of separation of powers exemplified in our State constitution is virtually identical in practice to that shown at the federal level. *E.g.*, *id.* at 598, 286 S.E.2d at 83. Like the federal courts, we have long recognized that "[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Airports Authority v. Citizens for Noise Abatement*, 501 U.S. 252, 272, 115 L. Ed. 2d 236, 256 (1991). Our constitutional system of separated powers and checks and balances is a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122, 46 L. Ed. 2d 659, 746 (1976).

> The essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people. Each

> branch, in its own way, is the people's agent, its fiduciary for certain purposes.

Airports Authority, 501 U.S. at 272, 115 L. Ed. 2d at 256 (quoting *Levi*, *Some Aspects of Separation of Powers*, 76 Colum.L.Rev. 385-386 (1976)).

Separation of powers is violated when "[f]iduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master's other agents." *Id.* Traditionally, at both the federal and state level, "[v]iolations of the separation-of-powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two." *Airports Authority*, 501 U.S. at 272, 115 L. Ed. 2d at 256; *Wallace*, 304 N.C. at 599, 286 S.E.2d at 83-84. Nevertheless, we are sensitive to our responsibility to enforce the principle when necessary, as we do here.

This is not to say that the separation of powers clause in our Constitution requires or even authorizes us to broadly and generally supervise the administrative and executive agencies of our government. On the contrary, as we recognized in *Burton v. Reidsville*, 243 N.C. 405, 408, 90 S.E.2d 700, 703 (1956),

> we operate under the philosophy of the separation of powers, and the courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials. So long as officers act in good faith and in accord with the law, the courts are powerless to act—and rightly so.

Id. This standard of deference, however, does not render us powerless here. Deference is inappropriate where, by attempting to arrogate to itself the distinct duties of the judiciary in having the final word in interpreting statutes, the NCDHR has violated separation of powers and acted in disregard of the law.

Similar to the deference we apply here at the State level, the federal courts also defer to agency regulations in a wide variety of contexts. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 703, *reh'g denied*, 468 U.S. 1227, 82 L. Ed. 2d 921 (1984). Under this standard of deference set out in *Chevron*, courts reviewing federal agency regulations must nevertheless first determine if the regulation in question "is consistent with the language of the statute." *K Mart Corp. v. Cartier, Inc.*, 486 U.S.

281, 291, 100 L. Ed. 2d 313, 324 (1988). This minimal level of oversight is central to the doctrine of separation of powers as "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803); *See, e.g.*, *Smith v. Keator*, 21 N.C. App. 102, 106, 203 S.E.2d 411, 415, *aff'd*, 285 N.C. 530, 206 S.E.2d 203 (1974).

When a court determines that an agency's regulation is contrary to statute, the agency must acquiesce to that court's interpretation and apply the court's interpretation uniformly thereafter within the jurisdictional bounds of the interpreting court. *E.g.*, *Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986), *cert. denied*, 484 U.S. 820, 98 L. Ed. 2d 41 (1987); *Hyatt v. Sullivan*, 899 F.2d 329, 332 (4th Cir. 1990). "The separation of powers doctrine requires administrative agencies to follow the law of the . . . courts [which have] jurisdiction over the cause of action." *Heckler*, 807 F.2d at 379.

> An agency of the government entrusted with the administration and enforcement of a . . . statute . . . is bound to pay due respect to the decisions of this Court in matters brought before it from said agency and has no right or authority to disregard such decisions.
>
> If the agency is dissatisfied with any ruling or decision of this Court, it should seek its reversal or modification by the legal media provided by our laws for the review thereof.
>
> Absent any such reversal or modification, [and absent appropriate legislative relief,] the refusal or failure to follow such decisions in future cases appears to be contemptuous.

Flores v. Secretary of Health, Education & Welfare, 228 F. Supp. 877, 878 (D.P.R. 1964).

In sum, we hold that the separation of powers doctrine requires that the NCDHR and all other administrative agencies of the state give full effect to orders of this Court and acquiesce in the statutory and constitutional interpretations determined by this Court and by our Supreme Court. It is well-established that when an appellate court of this State determines that a statute enacted by the General Assembly is facially unconstitutional, that statute may not be subsequently enforced against any citizen or entity. An order of this Court proclaiming a statute unconstitutional applies not only to the named litigants, it voids the statute entirely as if it no longer existed. Once a statute is determined to be unconstitutional, no private citizen or

division of the State may take any further action pursuant to the provisions of that unconstitutional statute.

The same analysis holds true here, where we determined, not that a statute was unconstitutional, but that a federal administrative regulation and its corresponding state regulation, impermissibly conflicted with the language and intent of the federal enabling statute. In the same way a statute that conflicts with the constitution can have no effect, a regulation that conflicts with its enabling legislation can also have no effect. An order of this Court determining that a regulation impermissibly conflicts with the enabling statute has the effect of invalidating or voiding the regulation, and no action whatsoever by the administrative agency can breath life into the invalidated regulation absent reversal or modification of this Court's order by a higher court or absent legislative action sufficiently altering the enabling act.

III.

We now address defendant NCDHR's contention that a federal administrative regulation represents authority over its actions superior to an order of this Court. Defendant advances this argument to justify its refusal to apply this Court's decision in *Anderson I* to all similarly situated claimants. On the facts of this case, we are not persuaded.

Defendant NCDHR's argument here seems to raise two separate questions: (1) whether as a matter of federalism, we have the power to interpret the Food Stamp Act, and (2) whether as a matter of deference we may interpret the Food Stamp Act contrary to an interpretation previously advanced by a federal administrative agency, here the USDA.

A.

[3] Defendant NCDHR's argument here presents primarily a question of division of powers rather than of separation of powers. It is well-settled that "under our federal system, the States possess sovereignty concurrent with that of the Federal Government subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458, 107 L. Ed. 2d 887, 894 (1990).

> Under this system of dual sovereignty, . . . state courts have inherent authority . . . to adjudicate claims arising under the laws of the United States. . . . [I]f exclusive jurisdiction be neither

> express or implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.

Id. at 458-59, 107 L. Ed. 2d at 894. We conclude here that this Court, in *Anderson I*, acted within its authority in interpreting the Food Stamp Act and consequently invalidating the USDA's conflicting regulation. We note here that there is no evidence that Congress has divested the State courts of jurisdiction in any way relevant to the case at bar. *See, e.g., Tafflin*, 493 U.S. at 459-60, 107 L. Ed. 2d at 894-95.

The established law as stated here places no new and undue burden on either the USDA or the NCDHR in carrying out their duties administering the provisions of the Food Stamp Act. Federal administrative agencies regularly must deal with differing statutory interpretations among the federal circuits. Often these differing interpretations require adjustments in the agency's administration among the circuits with the differences confined to the geographic boundaries of the circuits in question. Here again, it is irrelevant that an order of this Court may require the USDA to administer the Food Stamp Act differently in North Carolina than it may elsewhere across the country. The remedy available to the USDA and the NCDHR is to seek reversal or modification from a higher court or to secure appropriate legislative relief.

B.

[4] In *Anderson I*, we declared invalid a USDA regulation interpreting a provision of the Food Stamp Act (codified at 7 U.S.C. § 2015(b)(1)). *Anderson I*, 109 N.C. App. at 682-83, 428 S.E.2d at 269. The NCDHR had enacted an identical regulation pursuant to its role as administrator of the Food Stamp Act at the State level. *Anderson I* served to invalidate that identical State regulation as well because it also impermissibly conflicted with the clear and unambiguous language of the Food Stamp Act. *Id.* In some instances, we would be required to defer to the agency's contested interpretation and we would lack authority to do otherwise. *See Chevron*, 467 U.S. at 843-44, 81 L. Ed. 2d at 703. We correctly concluded in *Anderson I*, however, that this standard of federal deference did not bar our review of the suspect regulation there. *See Garcia v. Concannon*, 67 F.3d 256, 259 (9th Cir. 1995). We recognized that judicial deference is inappropriate where the challenged regulation "alters the clearly expressed intent of Congress." *Anderson I*, 109 N.C. App. at 682, 428

S.E.2d at 269 (citing *K Mart*, 486 U.S. at 291, 100 L. Ed. 2d at 324). Accordingly, having correctly concluded in *Anderson I* that *Chevron* deference did not bar our review, we need not address this issue again here.

IV.

[5] Finally, we address defendant NCDHR's contention, made at oral argument, that it could not acquiesce in this Court's statutory interpretation because to do so would perhaps endanger some amount of federal funding or at least require the agency to undertake the somewhat onerous process of securing the necessary funding waiver from the USDA. We find this contention patently contrary to virtually every ideal upon which our government stands. Under our system of government, the NCDHR must obey duly enacted laws and duly entered court orders just as any citizen must. That the NCDHR might lose some federal funding because of this constitutionally required obedience is of no import—the NCDHR's recourse is through constitutionally established judicial or legislative processes.

Reversed and remanded.

Judge McGEE concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority opinion in that I believe this case has been rendered moot by the USDA amending its regulations to eliminate the postponement period declared invalid in *Anderson I*. This case does not fit into the exception to the mootness doctrine that allows for review when a defendant voluntarily ceases illegal conduct during the pendency of an appeal, as defendant NCDHR did not voluntarily cease its refusal to apply *Anderson I*. By amending its regulations, the USDA mandated that defendant NCDHR uniformly apply *Anderson I*, and defendant NCDHR was required to obey this mandate according to 7 U.S.C.A. § 2014(b) (1988), which declares that state eligibility standards must be consistent with federal eligibility standards. In addition, defendant NCDHR's failure to apply *Anderson I* between 20 April 1993 and 1 February 1996 cannot be said to amount to illegal conduct. The USDA did not amend its regulations until 1 February 1996, and up to that

time, defendant NCDHR was simply enforcing its regulations in the absence of further directives from the USDA.

This case also does not fit into the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception applies if "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989) (citations omitted). Because the USDA amended its regulations to eliminate the postponement period complained of in *Anderson I*, defendant NCDHR is bound to follow USDA regulations and is not "free to return to [its] old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 97 L. Ed. 2d 1303, 1309 (1953). It is therefore unlikely that plaintiff will be subjected to the same action again.

Finally, plaintiff's concern regarding defendant NCDHR's proposed compensation plan is premature. As the majority states, any member of the class affected by the compensation plan retains the right to pursue their claim administratively before defendant NCDHR if that member's rights are prejudiced.

For the above reasons, I believe this appeal should be dismissed as moot.

JENNIE S. ROBERTS, PLAINTIFF v. FIRST-CITIZENS BANK AND TRUST COMPANY, DEFENDANT

No. COA95-1369

(Filed 17 December 1996)

1. Appeal and Error § 426 (NCI4th)— cost of printing—violation of rules—taxed against defendant's attorney

The cost of printing defendant's brief was taxed to defendant's attorney where the brief clearly violated N.C. R. App. P. 26 and N.C. R. App. P. 28. The violations allowed the defendant to gain additional pages of text.

Am Jur 2d, Appellate Review § 578.

2. Secured Transactions § 119 (NCI4th)— CD—security for loan—default—notice to debtor

Where a certificate of deposit was used as collateral to secure a loan, the Court of Appeals held that pursuant to N.C.G.S § 25-9-504(3), upon default, notice to the debtor is required before payment on an instrument is demanded by the secured party as provided by N.C.G.S. § 25-9-502. The Court's ruling does not address whether other forms of collateral subject to N.C.G.S. § 25-9-502 are covered by N.C.G.S. § 25-9-504.

Am Jur 2d, Secured Transactions §§ 652-680.

Sufficiency of secured party's notification of sale or other intended disposition of collateral under UCC § 9-504(3). 11 ALR4th 241.

3. Labor and Employment § 77 (NCI4th)— bank employee—discharge for refusal to violate statutes—employment at will—public policy exception

The trial court correctly denied defendant's motions for directed verdict and JNOV in a wrongful discharge case where the plaintiff bank employee was terminated for refusing to cash out, without notice, a certificate of deposit which was being held as collateral by the defendant employer. The defendant employer's instructions to the plaintiff violated N.C.G.S. § 25-9-502 and N.C.G.S. § 25-9-504; therefore the plaintiff's firing constituted a public policy exception to the employment-at-will doctrine.

Am Jur 2d, Wrongful Discharge §§ 44-54.

Liability for discharging at-will employee for refusing to participate in, or for disclosing, unlawful or unethical acts of employer or coemployees. 9 ALR4th 329.

4. Trial § 538 (NCI4th)— violation of statutes—discharge—employee—wrongful discharge

There was no abuse of discretion on the part of the trial judge in denying defendant's Rule 59 motion for a new trial in a wrongful discharge case where the plaintiff alleged that she was fired because she refused to follow defendant employer's instructions, and the employer's instructions violated North Carolina statutes. N.C.G.S. § 1A-1, Rule 59.

Am Jur 2d, New Trial §§ 1 et seq.

Judge MARTIN (Mark D.) concurring.

Appeal by defendant from judgment entered 5 November 1993 and order entered 2 August 1995 by Judge Coy E. Brewer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 11 September 1996.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III, Harvey L. Kennedy, Annie Brown Kennedy and Lauren Michelle Collins, for plaintiff-appellee.

Ward and Smith, P.A., by William Joseph Austin, Jr. and Anne D. Edwards, for defendant-appellant.

LEWIS, Judge.

The issue before us is whether plaintiff was wrongfully discharged from her employment with defendant. A jury determined that she was and awarded her $300,000 in compensatory damages and $1,000,000 in punitive damages. Defendant moved for judgment notwithstanding the verdict ("JNOV") and alternatively, for a new trial. Both motions were denied. Defendant appeals from the final judgment and from the order denying its motions.

We first note defendant's violation of N.C.R. App. P. 26(g). This rule requires papers filed with this Court to be double-spaced and printed in 11 point type. N.C.R. App. P. 26(g) (1996). In *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996), this Court explicitly set out the requirements of this rule. The Court stated, "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." *Lewis*, 122 N.C. App. at 147, 468 S.E.2d at 273. Additionally, the Court explained that documents should have ten characters per inch and no more than 65 characters per line. *Id.*

[1] Defendant's brief contains 30 lines of type on each page and approximately 72 characters per line. This is a clear violation of Rule 26. Additionally, since the text of defendant's brief extends to the bottom of the thirty-fifth page, this violation enabled defendant to gain the equivalent of several extra pages of text in violation of N.C.R. App. P. 28. Consequently, we could dismiss defendant's appeal, *Miller v. Miller*, *see* 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988), or could choose not to consider its brief, *see Lewis*, 122 N.C. App. at 147, 468 S.E.2d at 273. However, since the brief was filed two months

prior to our decision in *Lewis*, we choose not to impose either of these sanctions. The rule, nevertheless, was in effect and clear, and therefore, in our discretion under N.C.R. App. P. 2, we tax the cost of printing defendant's brief to defendant's attorneys.

At trial, plaintiff testified that she began working for defendant First-Citizens Bank and Trust Company ("First-Citizens") at their Sparta office in 1974. In 1988, she was promoted to the position of commercial loan officer. Just before and subsequent to her promotion, Ms. Roberts received favorable performance reviews from two different supervisors. In 1989, Gary Fulbright became the city executive at the Sparta office and plaintiff's supervisor.

During the summer of 1990, after an internal audit at First-Citizens, concern arose about a loan taken out by James Church, a local farmer whose family was a longtime customer of First-Citizens. The $4,500.00 loan was secured by a $10,000.00 certificate of deposit ("CD") owned by Viola Church, James' mother. The CD also acted as security for a loan to Harold Church, James' brother. James' loan had been renewed every six months for approximately ten years. The auditors suggested breaking James' loan into 24 monthly payments or requiring it to be paid off when it became due in November 1990.

In August 1990, an interest payment was due on James Church's loan. Mr. Fulbright asked Ms. Roberts to call Mr. Church to remind him about this payment. Mr. Church explained that he was in the middle of harvesting his tobacco and would be in to pay as soon as possible. Mr. Fulbright told Ms. Roberts that if Mr. Church did not have the money to pay off his loan when he came in, she was to cash out the CD immediately. Ms. Roberts testified that she told Mr. Fulbright she could not do that without providing notice and reminded him that such action would leave Harold Church's loan unsecured. Ms. Roberts later spoke with Lucy Smith, a commercial loan administrator at First-Citizens' headquarters in Raleigh. Ms. Smith agreed that the CD could not be cashed out in the manner Mr. Fulbright requested.

On or around 9 September 1990, James Church came into the bank and made his interest payment. He assured Ms. Roberts that he would pay the entire loan when it became due in November. Ms. Roberts did not demand payment of the entire loan at that time, nor did she cash out the CD. Upon learning that Ms. Roberts did not follow his instructions, Mr. Fulbright became hostile and angry to her. On 18 September 1990, Mr. Fulbright gave Ms. Roberts a written rep-

rimand for failing to obey his orders regarding the Church loan. Ms. Roberts and several First-Citizens' employees testified that thereafter, Mr. Fulbright was disrespectful of Ms. Roberts and harassed her. In November 1990, Ms. Roberts received her second reprimand from Mr. Fulbright, in which he threatened to terminate her employment. She testified that the allegations in the reprimand were all false. The next month, Mr. Fulbright gave her a "below expected level" evaluation, her first during her employment with First-Citizens.

In March 1991, plaintiff's job was terminated, allegedly due to decreased loan volume. She was told that the bank was experiencing a state-wide layoff of loan officers. Plaintiff was offered a Teller I job, the starting position at the bank, but she declined. Prior to leaving the bank, plaintiff learned that loan volume had not decreased as she had been told; it had actually increased over the past year.

[2] Defendant first assigns error to the trial court's denial of its motions for a directed verdict and JNOV. Our standard for reviewing the trial court's ruling on a directed verdict is the same as that for JNOV. *Poore v. Swan Quarter Farms*, 94 N.C. App. 530, 532, 380 S.E.2d 577, 578, *modified on other grounds*, 95 N.C. App. 449, 382 S.E.2d 835 (1989), *disc. review denied*, 326 N.C. 50, 389 S.E.2d 93 (1990).

> A motion for a directed verdict or a JNOV must be granted if the evidence when taken in the light most favorable to the non-movant is insufficient as a matter of law to support a verdict in favor of the non-movant. The evidence is sufficient to withstand either motion if there is more than a scintilla of evidence supporting each element of the non-movant's case.

Id. at 532-33, 380 S.E.2d at 578 (citations omitted).

Defendant argues that plaintiff's allegations cannot, as a matter of law, constitute a public policy exception to the employment-at-will doctrine. Plaintiff argues that because she was fired for her refusal to act in violation of N.C. Gen. Stat. section 25-9-505(2), a provision of the North Carolina Uniform Commercial Code ("UCC"), the public policy exception applies.

We first address defendant's contention that the terms of the UCC do not apply because it was entitled to set-off the value of the CD against the debt in default. The common law right of set-off allows banks, as debtors of their general depositors, to set-off against the deposits any matured debts the depositors owe them. *State ex rel*

Eure v. Lawrence, 93 N.C. App. 446, 449, 378 S.E.2d 207, 208 (1989). However, this right to set-off may be waived. *See id.* at 450-451, 378 S.E. 2d at 209-10 (recognizing the possibility of waiver but not finding waiver under the facts of that case).

In the present case, we hold that First-Citizens waived any right of set-off it may have had in regard to Mrs. Church's CD. In the assignment agreement, First-Citizens, through its agent, acknowledged the assignment of the CD as collateral for Mr. Church's loan and agreed that it had "no claim or interest in or right of offset against said account(s)." Accordingly, there is no right of set-off and the terms of the UCC apply.

Defendant argues that, even if the UCC applies, the trial court nevertheless erred in ruling that G.S. 25-9-505(2) is relevant to the facts of this case and requires First-Citizens to provide notice to Mrs. Church prior to cashing in her CD. First-Citizens argues instead that N.C. Gen. Stat. section 25-9-502 alone applies and allows for collection without any notice to the debtor.

G.S. 25-9-502 allows a secured party "to notify . . . the obligor on an instrument to make payment to him" in the event of default. G.S. § 25-9-502(1) (1995). Since a CD is an instrument, *see* N.C. Gen. Stat. § 25-3-104(j) (1995), the terms of G.S. 25-9-502 are clearly applicable to this case. Upon default, First-Citizens undoubtedly had the right to notify the issuer of the CD to pay to First-Citizens the amount of the CD. However, the question before us is whether First-Citizens was also required under statutory authority to notify the debtor of the default and its intention to cash in the CD. G.S. 25-9-502 is silent on the issue of notice to the debtor in such instances. This appears to be a case of first impression in North Carolina.

Plaintiff argues that G.S. 25-9-505(2) applies and requires notice to the debtor. We note that under the UCC, Mrs. Church, as owner of the CD, is considered a "debtor" in any provision dealing with the collateral. *See* N.C. Gen. Stat. § 25-9-105(d) (1995). G.S 25-9-505 provides in relevant part:

> In any other case involving consumer goods *or any other collateral* a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection.

G.S. § 25-9-505(2) (1995). The phrase "any other collateral" clearly contemplates that this provision is potentially applicable to all types of collateral, even instruments. The key determination to be made is what the General Assembly meant by "retain," a term not defined in the Chapter.

"It is a basic rule of statutory construction that where a statute contains no definition of words used therein, the words of the statute are to be given their natural and ordinary meaning." *Southminster, Inc. v. Justus*, 119 N.C. App. 669, 673, 459 S.E.2d 793, 796 (1995). "Retain" is defined as "[t]o continue to hold, have, use, recognize, etc., and to keep." Black's Law Dictionary 1316 (1990).

Based on this definition, we agree with defendant that a secured party who has cashed in an instrument has not retained it as contemplated by G.S. 25-9-505. Defendant did not intend to simply keep or hold the CD. It intended to cash it in, since an instrument has no value aside from the right of payment it represents. We hold that G.S. 25-9-505(2) does not apply where the collateral involved is an instrument which the secured party intends to cash in. However, we make no judgment about situations where the secured party intends to continue to hold a CD or similar instrument in order to gain interest on it.

Although the trial court incorrectly relied upon G.S. 25-9-505, its conclusion that notice was required is nonetheless correct since notice is mandated by G.S. 25-9-504, which states in part:

> A secured party after default may sell, lease or *otherwise dispose of* any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . . Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of . . . the time after which any private sale *or other intended disposition* is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

G.S. § 25-9-504(1),(3) (1995). The definition of "dispose of" is not in the Chapter. However, it has been defined as "to transfer into new hands or to the control of someone else: relinquish." Webster's Third New International Dictionary 654 (1968). In our view, this definition certainly encompasses cashing in a CD. Furthermore, the present

case does not fit the exceptions where notice is not required. A CD is not perishable, nor does it threaten to speedily decline in value. A CD is also not customarily sold on a recognized market. *See Smith v. Mark Twain Nat. Bank*, 805 F.2d 278, 289 (8th Cir. 1986). Therefore, First-Citizens was required by statute to provide notice prior to cashing in Mrs. Church's CD.

In summary, because G.S. 25-9-502 is silent as to notice to the debtor, cashing in a CD is a disposal under G.S. 25-9-504 and we are to give effect to both statutes if possible, *see Campos v. Flaherty*, 93 N.C. App. 219, 222, 377 S.E.2d 282, 283, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989), we hold that notice is required under G.S. 25-9-504(3) to debtors who provide instruments as collateral before the secured party collects under those instruments upon default. However, our holding is very narrow. We do not address whether other forms of collateral also subject to G.S. 25-9-502 are covered by G.S. 25-9-504 as well.

Our holding is also supported by the general policies inherent in the UCC. Interpreting the UCC to allow secured parties to cash in instruments without debtor notification would thwart one of the basic principles present throughout the UCC: the exercise of good faith in commercial transactions. *See* N.C. Gen. Stat. § 25-1-203 (1995). " 'Good faith' means honesty in fact in the conduct or transaction concerned." N.C. Gen. Stat. § 25-1-201(19) (1995). Honesty is defined as "fairness and straightforwardness of conduct: integrity." Websters Third New International Dictionary 1086 (1968). These principles are evident in the requirements that a secured party give notice to the debtor before selling collateral, *see* G.S. § 25-9-504, and before retaining it, *see* G.S. § 25-9-505, in satisfaction of a debt. Defendant's argument that notice is not required under the UCC when the collateral is an instrument is at odds with the UCC's commitment to fairness and good faith. The debtors in such instances would be deprived of the opportunity to protect their rights.

Notice enables the debtor to exercise his rights under N.C. Gen. Stat. section 25-9-506 to redeem the collateral. G.S. 25-9-506 reads:

> At any time before the secured party has disposed of collateral . . . or before the obligation has been discharged under G.S. 25-9-505(2) the debtor . . . may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations . . . .

G.S. 25-9-506 (1995).

A debtor who secures a debt with an instrument should have the same opportunity to redeem that collateral as any debtor who pledges another type of collateral. This is especially true in cases like the one at hand where the instrument belongs to someone else and secures another's obligation. Mrs. Church would probably not know default had occurred. The CD, if cashed before its maturation date, would incur a loss of interest and a substantial penalty which the owner might well avoid if notified of default.

[3] We hold that under G.S 25-9-504(3), upon default, notice to the debtor is required before payment on an instrument is demanded by the secured party as provided by G.S. 25-9-502. We next determine whether plaintiff's allegations are sufficient to constitute a public policy exception to the employment-at-will doctrine.

"Ordinarily, an employee without a definite term of employment is an employee-at-will and may be discharged for any reason." *Vereen v. Holden*, 121 N.C. App. 779, 783, 468 S.E.2d 471, 474 (1996). However, even an employee-at-will cannot be terminated for " 'an unlawful reason or purpose that contravenes public policy.' " *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (quoting *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985)). Our Supreme Court has stated, "at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992).

The public policy exception to the employment-at-will doctrine is a "narrow exception." *Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 39, 370 S.E.2d 423, 425 (1988). However, appellate courts of this State have found a claim for wrongful termination when an employee alleges that he or she was fired due to political affiliation, *Vereen*, 121 N.C. App. at 784, 468 S.E.2d at 474-75, refuses to violate the Department of Transportation's regulations restricting truck drivers' driving time, *Coman*, 325 N.C. at 175, 381 S.E.2d at 447, refuses to testify untruthfully or incompletely in a court action, *Sides*, 74 N.C. App. at 343, 328 S.E.2d at 826- 27, and testifies at an Employment Security Act proceeding. *Williams*, 91 N.C. App. at 41-42, 370 S.E.2d at 426.

Turning to the present allegations, we find they encompass precisely the type of behavior by employers which is prohibited in the above cases. G.S. 25-9-504 requires notice to be given before a

secured party disposes of collateral to satisfy a defaulted obligation, unless the debtor has renounced this right. G.S. § 25-9-504(3). There is nothing in the record which shows that the Church's relinquished their right to notice. G.S. 25-9-506 allows the debtor to redeem the collateral at any time prior to the time that the collateral is disposed of by tendering his or her obligation in full.

Reading these two provisions together, it is clear that this State's public policy favors allowing debtors to redeem their property pledged as collateral, if possible, in order to protect their interest. North Carolina public policy therefore requires, in instances such as this one, that debtors be given notice and an opportunity to fulfill their obligation prior to the secured parties' disposition of their collateral.

In the present case, if Mr. Fulbright's order had been obeyed, Mrs. Church would have been deprived of the opportunity to redeem her collateral and our expressed public policy would have been violated. Therefore, defendant's argument that plaintiff's allegations cannot, as a matter of law, constitute a public policy exception to the employment-at-will doctrine must fail.

Additionally, viewing the evidence in a light most favorable to plaintiff, we cannot rule that it is insufficient as a matter of law to support a verdict in her favor. Plaintiff presented evidence that she was fired solely due to her refusal to cash out Mrs. Church's CD without notice to either Mr. or Mrs. Church. This termination would surely be for a "purpose that contravenes public policy," because Mrs. Church would have been deprived of any opportunity to redeem her collateral.

Defendant argues that Mr. Fulbright never affirmatively instructed Ms. Roberts to break the law, i.e. not to give notice, so the public policy exception cannot apply. We see no merit in this argument. Ms. Roberts testified that Mr. Fulbright ordered her to cash out the CD "immediately." The word "immediately" precludes the possibility of proper notice. *See* G.S. § 25-9-504, North Carolina Comment (explaining that the notice required is "notice sufficient to enable the persons entitled thereto to . . . protect their interests.") Although Mr. Fulbright may not have explicitly ordered Ms. Roberts to cash out the CD without notice, in effect, his order to do so immediately was an affirmative instruction to violate the statutory notice requirement. Accordingly, the trial court properly denied defendant's motions for directed verdict and JNOV.

[4] Finally, defendant contends that the trial court erred in refusing to grant a new trial. The standard of review of a ruling on a motion for a new trial pursuant to Rule 59 is whether the trial court abused its discretion in granting or denying the motion. *Corwin v. Dickey*, 91 N.C. App. 725, 729, 373 S.E.2d 149, 151 (1988), *disc. review denied*, 324 N.C. 112, 377 S.E.2d 231 (1989). Our review of the court's decision "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). After thorough review of the arguments and the record, we find no manifest abuse of discretion on the part of the trial judge in denying defendant's motion for a new trial.

Accordingly, we find no error in the judgment and orders of the superior court and assess the cost of printing defendant's brief to counsel for the defendant.

No error.

Judge JOHNSON concurs.

Judge MARTIN, MARK D. concurs with separate opinion.

Judge Johnson participated in this opinion prior to 1 December 1996, the effective date of his retirement.

Judge MARTIN, Mark D., concurring.

I write separately to emphasize, as properly recognized by the majority, that First Citizens, like any depositary institution, possesses a common law right to setoff against a deposit any matured debts owed by a depositor. *State ex rel. Eure v. Lawrence*, 93 N.C. App. 446, 449, 378 S.E.2d 207, 208-209 (1989). The adoption of the Uniform Commercial Code in North Carolina does not abrogate the common law right of setoff. N.C. Gen. Stat. § 25-9-104(i) (1995) (Article 9 does not supersede "any right of setoff"). Nonetheless, as the majority concludes First Citizens *waived* its right of setoff in the present case, I concur in the judgment.

RAYNOR v. ODOM

[124 N.C. App. 724 (1996)]

RITA RAYNOR, PLAINTIFF v. WILLIAM T. ODOM, III, DEFENDANT v. BETTY FOSTER, INTERVENOR v. JOHNNIE RAYNOR INTERVENOR

No. COA96-58

(Filed 17 December 1996)

1. Appeal and Error § 340 (NCI4th)— assignment of error—not properly preserved

Plaintiff did not properly preserve an issue for appeal where she did not include the issue within an assignment of error. N.C. R. App. P. 10(a).

Am Jur 2d, Appellate Review §§ 544, 615, 616.

2. Parent and Child § 24 (NCI4th)— no error—temporary order—contempt order—interests of child—child custody

The trial court did not err in its consideration of temporary custody orders and prior contempt orders in determining the issue of child custody. It is an undue restriction to prohibit the trial judge's consideration of the history of the case on record when a trial judge is attempting to evaluate what is in the best interests of the child or whether a parent is unfit or has neglected the child.

Am Jur 2d, Divorce and Separation §§ 369, 980; Infants § 43; Parent and Child § 25.

3. Appeal and Error § 486 (NCI4th)— affidavits—reports—no objection—consideration by court

The trial court did not err in considering evidence in the form of affidavits and reports that were admitted without objection into evidence during an *in camera* hearing. Where a party fails to object to the introduction of evidence, they may not thereafter object to findings based on that evidence because their silence presumes assent to the manner in which the evidence was presented and to the method of trial.

Am Jur 2d, Affidavits § 30; Divorce and Separation § 1068; Evidence §§ 1098, 1435; Trial § 408.

Place of holding sessions of trial court as affecting validity of its proceedings. 18 ALR3d 572.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision. 59 ALR3d 1337.

4. Appeal and Error § 418 (NCI4th)— abandonment of assignments of error

Assignments of error which were not specifically brought forth or argued are deemed abandoned. N.C.R. App. P. 28(a).

Am Jur 2d, Appellate Review §§ 544, 557, 558.

5. Parent and Child § 24 (NCI4th)— child custody—competent evidence supported findings of fact

The trial court's findings of fact in a child custody case were supported by a preschool screening report, affidavits, an articulation evaluation, and a speech therapy plan. Generally, on appeal from a case heard without a jury, the trial court's findings of fact are conclusive if there is evidence to support them, even though the evidence might sustain a finding to the contrary.

Am Jur 2d, Divorce and Separation § 1068.

6. Parent and Child § 24 (NCI4th)— child custody—unfitness of mother—consideration of unsupported finding—harmless error

The trial court's consideration of a finding of fact which was not supported by the evidence in determining child custody was harmless error where the court had other evidence to support its legal conclusions. In concluding that the plaintiff mother was unfit to have custody of the minor child, the trial court considered the unsupported finding of fact that the mother's failure to recognize her child's articulation problems was another indication of plaintiff's lack of concern for the child. While there is no precise definition of what findings are necessary for the trial court to conclude that a natural parent is unfit, the evidence presented to the trial court indicated that the plaintiff had substance abuse problems, did not respect authority, was unable to recognize her child's developmental problems, and was incapable of caring for the child's welfare. Further, the trial court considered 58 findings of fact that were supported by the evidence.

Am Jur 2d, Divorce and Separation § 984; Parent and Child § 26.

Mental health of contesting parent as factor in award of child custody. 74 ALR2d 1073.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child. 99 ALR3d 268.

7. Appeal and Error § 157 (NCI4th)— in camera hearing—child custody—plain error doctrine inapplicable

It was not plain error for the trial court to conduct a hearing *in camera* in a child custody case where the court had advised the parties of its intentions and no party objected. Generally, the plain error doctrine is a limited appellate doctrine that allows a defendant to assert on appeal in criminal cases some errors that were not preserved by objection. The Court of appeals refused to extend the plain error rule to child custody cases. N.C.R. App. P. 10(c)(4).

Am Jur 2d, Divorce and Separation § 985; Infants § 32.

Propriety of court conducting private interview with child in determining custody. 99 ALR2d 954.

Place of holding sessions of trial court as affecting validity of its proceedings. 18 ALR3d 572.

8. Parent and Child § 28 (NCI4th); Divorce and Separation § 378 (NCI4th)—findings of fact—limited visitation—unreasonable stress on child

There were sufficient adequately supported findings of fact as required by G.S. 50-13.5(i) (1995) to support the trial court's legal conclusion that plaintiff mother be allowed to visit her child once a month. It was not practical for the trial court to award more visitation given that the parties who had visitation rights live in different states. More visitations might put unreasonable stress upon the minor child who could be traveling hundreds of miles each month or could be subjected to visitors on every weekend.

Am Jur 2d, Divorce and Separation § 1001; Parent and Child § 36.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights. 10 ALR4th 827.

9. Parent and Child § 26 (NCI4th); Divorce and Separation § 372 (NCI4th)— modification of child custody—substantial change in circumstances—finding of unfitness

A finding of unfitness of the custodial parent satisfies the statutory requirement that the trial court find a change in cir-

cumstances in order to modify a prior child custody order where the custodial parent was found to be a fit and proper custodian in the prior order. N.C.G.S. §§ 50-13.7 and 50-13.5.

Am Jur 2d, Divorce and Separation §§ 980, 1014.

Appeal by plaintiff from order entered 9 August 1995 by Judge T. Yates Dobson in Johnston County District Court. Heard in the Court of Appeals 7 October 1996.

On 19 December 1991 a child was born to the unmarried couple of plaintiff and defendant. On 25 November 1992 the Johnston County Child Support Enforcement Agency, on behalf of plaintiff, filed a complaint against defendant to establish paternity and collect child support. Defendant admitted paternity and entered into a voluntary support agreement.

Ensuing disputes over custody, visitation, and child support involved plaintiff, defendant and their respective intervening parents. The trial court conducted several hearings and ordered *inter alia* that plaintiff undergo substance abuse testing, attend counseling and parenting classes, have a home study conducted of her residence, and share joint legal custody with defendant. The trial court held plaintiff in contempt on 31 October 1994 and again on 24 January 1995 and ordered plaintiff incarcerated and the minor child removed to the Johnston County Department of Social Services (DSS). On 16 February 1995 the trial court ordered that the minor child's paternal grandmother, intervenor Foster, be given temporary custody.

On 30 May 1995 with all parties present or represented by counsel, the trial court conducted an *in camera* hearing to review the custody of the minor child. The trial court reviewed evidence of record and evidence presented at the hearing, and considered arguments of counsel. On 9 August 1995 the trial court entered an order granting custody of the minor child to intervenor Betty Foster. From this order plaintiff appeals.

Clifton & Singer, L.L.P., by C.D. Heidgerd, for plaintiff-appellant.

Edward P. Hausle, P.A., by Edward P. Hausle, for intervenor-appellee.

EAGLES, Judge.

[1] In her brief plaintiff contends that the trial judge erred in retaining jurisdiction in this case; however, she failed to include this issue within an assignment of error. Accordingly, this argument is not properly preserved for appeal. *See* N.C.R. App. P. 10(a).

[2] The first issue before this Court is whether the trial court erred in using evidence from prior temporary custody orders and contempt orders entered in this case to support an award of custody.

No decisions in North Carolina specifically indicate that it is improper for a trial court to use orders from temporary hearings or contempt hearings in the same case to support permanent custody orders. This Court has found that it is not improper for a trial court to take judicial notice of earlier proceedings in the same cause. *See In re Isenhour*, 101 N.C. App. 550, 552-53, 400 S.E.2d 71, 72-73 (1991); *see also In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984) (a prior court order finding that mother neglected child may be used in a subsequent action for termination of parental rights). When a trial judge is attempting to evaluate what is in the best interests of the child or whether a parent is unfit or has neglected the child, it is an undue restriction to prohibit the trial judge's consideration of the history of the case on record. We hold that the trial court did not err in considering temporary custody orders and prior contempt orders in determining the issue of child custody.

[3] Plaintiff also contends that evidence in the form of affidavits and reports that were admitted without objection into evidence during the *in camera* hearing should not have been considered by the trial court, and therefore, that any findings based on this evidence are not supported by competent evidence.

Generally, where a party fails to object to the introduction of evidence, they may not thereafter object to findings based on that evidence, because their silence presumes assent to the manner in which the evidence was presented and to the method of trial. *See In re Hughes*, 254 N.C. 434, 436, 119 S.E.2d 189, 190 (1961); *Isenhour*, 101 N.C. App. at 552-53, 400 S.E.2d at 72-73. N.C.R. App. P. 10(b)(1) provides that "in order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Accordingly, we are not persuaded by plaintiff's

contentions that the trial court should not have considered the affidavits and reports.

[4] The second issue is whether the trial court's findings of fact that plaintiff is unfit to have custody of the minor child are supported by the evidence.

Plaintiff assignments of error on this issue address the trial court's findings of fact 20, 21, 23, 27, 28, 29, and 32 through 54. However, plaintiff's brief only addresses findings of fact 20, 21, 36, 37, and 38, which she encompassed in assignments of error 21, 30, 31, and 32. Although plaintiff sets out as assignments of error 21 through 49 below the heading of her argument, she fails to specifically bring forth or argue assignments of error 22 through 29, and 33 through 49 as required by the North Carolina Rules of Appellate Procedure. *See McManus v. McManus*, 76 N.C. App. 588, 591, 334 S.E.2d 270, 272 (1985). Accordingly, these assignments of error are deemed abandoned. *Id.*; N.C.R. App. P. 28(a).

[5] Generally, on appeal from a case heard without a jury, the trial court's findings of fact are conclusive if there is evidence to support them, even though the evidence might sustain a finding to the contrary. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975); *Chandler v. Chandler*, 108 N.C. App. 66, 71-72, 422 S.E.2d 587, 591 (1992). "The trial judge's decision will not be upset, in the absence of a clear abuse of discretion, if the findings are supported by competent evidence." *Sheppard v. Sheppard*, 38 N.C. App. 712, 715, 248 S.E.2d 871, 874 (1978), *disc. review denied*, 296 N.C. 586, 254 S.E.2d 34 (1979); *see Wachovia Bank & Trust Co. v. Bounous*, 53 N.C. App. 700, 706, 281 S.E.2d 712, 715 (1981).

Findings of fact 20 and 21 both concern the admission into evidence of the reports and affidavits during the *in camera* hearing. We have already found unpersuasive plaintiff's contentions that the trial court should not have considered these affidavits and reports. Accordingly, we conclude that there was competent evidence to support these findings of fact.

Finding of fact thirty six provides:

> After obtaining temporary custody, Betty Foster took the child for a pre-school screening at the Developmental Center for the Carolina Hospital System. During this screening, it was determined that the child has an articulation disorder. Betty Foster has arranged for treatment with the Carolinas Hospital System. The

> pre-school screening also indicated that the child was not as advanced or matured as many of his contemporaries.

This finding of fact is supported by an affidavit by intervenor Foster, a preschool screening report, an articulation evaluation by Carolinas Hospital System, and a speech and language therapy initial treatment plan also by Carolinas Hospital System. This affidavit, report, evaluation, and plan were all admitted into evidence without objection during the *in camera* hearing and are encompassed in findings of fact 20 and 21. Accordingly, we conclude this finding of fact is supported by competent evidence.

Finding of fact thirty eight provides:

> The court further finds that the fact that the child was not as advanced or mature as many of his contemporaries as indicated by the pre-school screening indicates that plaintiff was not providing for the child the motivation, opportunity and encouragement for normal and healthy development.

This finding of fact is also supported by the reports, affidavits, evaluation, and plan mentioned in our discussion of finding of fact thirty six. Plaintiff contends that within these reports, there is evidence that contradicts the testimony, and that the guardian ad litem's report is biased because he prefers intervenor Foster because of her socio-economic status. It is not the job of this Court to weigh the evidence, but rather we are bound by the findings of fact of the trial court so long as there is competent evidence to support them. *See id.* Accordingly, we conclude this finding of fact is supported by competent evidence.

Finding of fact thirty seven provides:

> Plaintiff did not offer any evidence that she was aware of the child's articulation disorder or that she had the child tested to determine whether or not he had problems. The Court finds that plaintiff's failure to recognize the articulation problems is yet another indication of plaintiff's lack of concern for the child.

While there is no evidence of record to dispute finding of fact thirty seven, there is also none to support it. Therefore, we may not consider finding of fact thirty seven in our review of the trial court's conclusion of law that plaintiff is unfit.

[6] The third issue is whether the findings of fact support the conclusion of law that plaintiff is unfit to have custody of the minor child.

Our Supreme Court in *Petersen v. Rogers*, 337 N.C. 397, 403, 445 S.E.2d 901, 905 (1994) held that "absent a finding that the 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." Plaintiff contends that there are no findings that plaintiff neglected or abandoned the child, and therefore, the law does not support an award of custody to intervenor Foster. However, *Peterson* clearly requires that the court only find either that the natural mother is unfit *or* has neglected the child in order to deny the natural mother custody. Here the trial court found that plaintiff was an unfit parent and, on that basis, awarded custody to intervenor Foster.

No decisions in North Carolina have defined precisely what findings are necessary for the trial court to conclude that a natural parent is unfit. Although *In re Poole*, 8 N.C. App. 25, 28, 173 S.E.2d 545, 548 (1970) was prior to *Peterson*, the *Poole* Court found that the natural mother should not be denied custody of her child where the only change of condition shown was that the mother had been adjudged in contempt for violating an order of the court. The order there had provided that she not associate with a certain individual, but failed to find that continued association with that individual was immoral or detrimental to the child. *Poole*, 8 N.C. App. at 28, 173 S.E.2d at 548.

Although no decisions have established the standard of review for the legal conclusion that a parent is unfit under *Peterson*, a finding of unfitness should be reviewed de novo on appeal by examining the totality of the circumstances. *See Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980); *In re P.E.P.*, 100 N.C. App. 191, 200, 395 S.E.2d 133, 138 (1990), *rev'd on other grounds*, 329 N.C. 692, 407 S.E.2d 505 (1991). Plaintiff contends that intervenor Foster's socioeconomic status, plaintiff's DWI convictions, and the minor child's below average performance level are insignificant or irrelevant to plaintiff's fitness as a parent. While we agree with plaintiff that intervenor Foster's socioeconomic status is irrelevant to a fitness determination for the reasons stated in *Jolly v. Queen*, 264 N.C. 711, 713-14, 142 S.E.2d 592, 595 (1965), we conclude that plaintiff's DWI convictions, and the child's developmental problems are significant and relevant. They are significant because they indicate plaintiff's inability to adequately care for the child and to provide for the child's welfare. Furthermore, these facts, when combined with the following findings of the trial court, illustrate plaintiff's unfitness as a parent: Plaintiff was found in contempt for failing

to submit to a timely drug screening and substance abuse counseling; plaintiff was found in contempt for failing to complete and submit to a home study; plaintiff was found in contempt for failing to authorize the release of her military and medical records; plaintiff, after being found in contempt for refusal to participate in an alcohol abuse assessment and counseling, was jailed due to her continued unwillingness to comply; plaintiff suffers blackouts and "flies off the handle;" plaintiff's willful violation of the court's orders indicates a lack of respect for authority that could be imparted upon the child, and indicates a lack of sincere desire to have custody of the child; plaintiff's failure to visit the child unless intervenor Foster provides transportation indicates a lack of true concern for the child; plaintiff had been openly hostile and rude to intervenor Foster; and plaintiff failed to provide intervenor Foster with information concerning the child's medical insurance. These facts paint a picture of a person who has had substance abuse problems, does not respect authority, is unable to recognize her child's developmental problems, and is incapable of caring for the child's welfare. On its face, this picture is quite different from the facts of *In re Poole.*

While we acknowledge that the trial court erred in considering finding of fact 37 in reaching its legal conclusion that plaintiff is unfit, we find that this error was harmless. Accordingly, we conclude that findings of fact 1 through 36 and 38 through 55 provide ample support for the legal conclusion that plaintiff is an unfit parent.

[7] The fourth issue is whether the trial court erred in conducting the hearing *in camera* when it advised the parties of its intention to do so and no party objected. A failure to object to the manner of the proceedings is generally a fatal flaw on appeal; however, plaintiff contends that the trial court committed plain error pursuant to N.C.R. App. P. 10(c)(4) by conducting the hearing *in camera* and not affording plaintiff the opportunity to cross- examine the only witness in the case.

Generally, the plain error doctrine is a limited appellate doctrine that allows a defendant to assert on appeal in criminal cases some errors that were not preserved by objection. N.C.R. App. P. 10(c)(4). This Court has refused to extend the doctrine to civil cases. *Surrat v. Newton*, 99 N.C. App. 396, 407-408, 393 S.E.2d 554, 560 (1990); *Alston v. Monk*, 92 N.C. App. 59, 66, 373 S.E.2d 463, 468 (1988), *disc. review denied*, 324 N.C. 246, 378 S.E.2d 420 (1989). We decline to extend the plain error doctrine to child custody cases.

[8] Plaintiff also contends that there are insufficient, adequately supported findings of fact as required by G.S. 50-13.5(i) (1995) to support the legal conclusion that plaintiff be allowed to visit the child once a month. We disagree.

G.S. 50-13.5(i) requires that "the trial judge prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interests of the child." In *Correll v. Allen*, 94 N.C. App. 464, 380 S.E.2d 580 (1989), this Court upheld the trial court's order which allowed the mother only one, monthly, supervised visitation for six months. We held that findings concerning the mother's hostility toward the custodial parent which justified a modification of the custody from the mother to the father also justified restrictions on visitation. 94 N.C. App. at 471, 380 S.E.2d at 585.

Under plaintiff's interpretation of the statute, a trial court would be required to make specific findings to support a visitation schedule whenever a party contended the frequency of visitation was not reasonable. This interpretation goes beyond the statute's requirements. Furthermore, a practical problem in awarding plaintiff more visitation concerns the number and location of the parties asserting visitation rights in this case. Intervenor Foster lives in South Carolina, the biological father lives in Forsyth County, North Carolina, plaintiff and intervenor Raynor live in Johnston County, North Carolina. All of the parties have visitation rights. More frequent visitation may put unreasonable stress upon the minor child who could be traveling hundreds of miles each month or could be subjected to visitors on every weekend.

[9] The final issue is whether the trial court erred in entering a custody determination without finding a substantial change of circumstances since the entry of a prior custody determination. Specifically, plaintiff contends that the 1 August 1994 custody determination awarding joint custody to plaintiff and defendant was a final permanent custody order, and therefore, the 9 August 1995 order awarding intervenor Foster custody erroneously failed to contain findings of fact and conclusions of law to show a change in circumstances justifying modification of custody as required by G.S. 50-13.7 and 50-13.5 (1995). In short, the legal issue is, does the properly supported legal conclusion of the trial court that the natural mother is an unfit parent satisfy the statutory requirement of finding a change in circumstances pursuant to G.S. 50-13.7 and 50-13.5. We believe it does.

No decisions in North Carolina have specifically addressed whether a finding of unfitness of the custodial parent or party satisfies the statutory requirement that the trial court find a change in circumstances in order to modify a prior custody determination. In *Bivens v. Cottle*, 120 N.C. App. 467, 469, 462 S.E.2d 829, 831 (1995) this Court concluded that there was no exception to the statutory requirement that "a change in circumstances be shown before a custody decree may be modified." However, *Bivens* does not reach the issue that a finding of unfitness constitutes a change in circumstances. *See* 120 N.C. App. at 469, 462 S.E.2d at 831.

Under the 1 August 1994 order plaintiff was found to be a fit and proper parent; therefore, a finding of unfitness in a subsequent order is a substantial change in circumstances. Furthermore, because the standard for finding unfitness is much higher than the standard for finding a change in circumstances, it would seem absurd for a finding of unfitness to not be considered a change of circumstances pursuant to G.S. 50-13.7 and 50-13.5. Accordingly, we are unpersuaded by this argument.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges MARTIN, John C., and SMITH concur.

STATE OF NORTH CAROLINA v. SAMUEL TERRMAINE BENJAMIN, JR.

No. COA95-1278

(Filed 17 December 1996)

1. Appeal and Error § 340 (NCI4th)— noncompliance with rule—discretion in the interest of justice—clear and specific record or transcript references

Although defendant did not comply with N.C. R. App. P. 10(c) in that defendant made an assignment of error to the denial of a motion to suppress without making a reference to the inculpatory statement, the legal basis of his argument, or a reference to the record, the Court of Appeals at its discretion and in the interest of justice addressed defendant's argument.

Am Jur 2d, Appellate Review §§ 648 et seq.

2. Evidence and Witnesses § 1237 (NCI4th)— inculpatory statements—pat-down search—traffic violation—Miranda warnings not given

The trial court did not err in denying defendant's motion to suppress defendant's inculpatory statement which was made subsequent to defendant being stopped for a traffic violation and after he was asked, "What is that?" during a pat-down search. Defendant's motion was made on the ground that his *Miranda* warnings were not given as soon as defendant was not free to leave. The fact that a defendant is not free to leave does not necessarily constitute custody for purposes of *Miranda*.

Am Jur 2d, Criminal Law §§ 791-795.

3. Searches and Seizures § 58 (NCI4th)— motion to suppress—traffic violation—pat-down search—narcotic immediately apparent—did not exceed permissible bounds

The trial court did not err in denying defendant's motion to suppress evidence on the grounds that the evidence was seized from defendant in an illegal search and seizure. It became immediately apparent to the arresting police officer that the containers in defendant's pocket held crack when the officer felt them through defendant's jacket subsequent to stopping defendant for a traffic violation and during a pat-down search given the officer's experience, narcotics training, the size, shape and mass of the objects, and defendant's response to the officer's question, "What is that?" It was at that moment that the officer had probable cause to seize the objects. There is no evidence of record to indicate that the officer manipulated the objects in a manner so as to make the search unlawful under *Dickerson*. Furthermore, a brief verbal inquiry as to the identity of the objects does not exceed the permissible bounds of a *Terry* search.

Am Jur 2d, Searches and Seizures § 161.

4. Appeal and Error § 418 (NCI4th)— assignments of error—abandoned

Assignments of error that defendant failed to bring forth or argue in his brief were deemed abandoned. N.C. R. App. P. 28(a).

Am Jur 2d, Appellate Review §§ 678 et seq.

Appeal by defendant from judgments entered 5 April 1995 by Judge Louis B. Meyer in Buncombe County Superior Court. Heard in the Court of Appeals 18 November 1996.

Around midnight on 20 November 1994 Officers Anderson and Johnson of the Buncombe County Sheriff's Department participated in a driver's license check point in an attempt to apprehend drunk drivers. In the vicinity of the check point, the officers noticed defendant's van sit through two or three cycles of a traffic light on Haywood Street; Haywood Street leads to an area known for drug trafficking. The officers got into their patrol car and approached defendant's van. The officers could not see through the windows of defendant's car, but they noticed that the van was rocking back and forth as if there was a great deal of movement inside the van. The van was stopped in a right turn only lane and continued to sit through two more changes of the light. On the third change of the light the van proceeded straight through a red light. Had the van turned right, it would have entered the license check point. After the officers activated their lights and siren the van continued straight for a short while and then pulled over into a parking lot. The officers noticed that there was still a lot of movement in the van.

Officer Anderson got out of the patrol car and approached the driver's side of the vehicle. He asked defendant, the driver, to get out of the vehicle and walk back to the patrol car. Officer Anderson directed defendant to place his hands on the patrol car so that he could pat him down in order to check for weapons. As Officer Anderson was patting defendant down, he felt that there were two hard plastic containers in the top, left, breast pocket of defendant's winter jacket. Because of his narcotics training, it was immediately apparent to him that this container was a vial of the type that is customarily used to hold illegal drugs. When Officer Anderson felt the container through defendant's jacket, he asked defendant, "What is that?" Defendant responded that it was "crack." Officer Anderson removed two containers from defendant's coat pocket and quickly finished his weapons search. Throughout the search defendant was not free to leave. Subsequently, the officers placed defendant under arrest. Laboratory test results determined the containers obtained from defendant held 53.6 grams of cocaine.

By true bills of indictment returned 9 January 1995 defendant was charged with trafficking in cocaine by transportation and possession. On 27 February 1995 defendant made a motion to suppress the evidence of the containers of cocaine and his inculpatory statement. On 5 April 1995 the trial court denied the motion to suppress. Defendant entered a guilty plea to trafficking by possession and transportation. Defendant appeals pursuant to G.S. 15A-979(b) (1988).

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas D. Zweigart, for the State.

Whalen, Hay, Pitts, Hugenschmidt, Master & Devereux, P.A., by Sean P. Devereux, for defendant-appellant.

EAGLES, Judge.

[1] The first issue here is whether defendant waived his right to appellate review of the denial of his motion to suppress his inculpatory statement. Defendant made an assignment of error to the denial of the motion to suppress without making a reference to the inculpatory statement, the legal basis of his argument, and making reference to the record; however, he did provide general references to the transcript of the hearing. N.C.R. App. P. 10(c) provides that an assignment of error is sufficient to preserve defendant's right to appeal if "it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." Although defendant has not complied with Rule 10(c), we address his argument at our discretion in the interest of justice. We also note that defendant has failed to make reference to his assignments of error in his brief as required by N.C.R. App. P. 28(b)(5).

[2] The second issue is whether the trial court erred in denying defendant's motion to suppress defendant's inculpatory statement made during the pat down search on the grounds that *Miranda* warnings were not given as soon as defendant was not free to leave. Defendant contends that he was in police custody for purposes of the Fifth Amendment of the United States Constitution when he was asked, "What is that?" during the pat-down search. He urges that once the investigative stop by police became more intrusive than allowed by *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), defendant should have been given his *Miranda* warnings and any answer he gave to the officers should have been suppressed. On this record, we disagree.

Generally, a defendant in custody must be made aware of his right not to incriminate himself and his right to counsel before his answers to police questions will be available to the State as evidence at trial. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444, 16 L. Ed. 2d at 706. The test to determine if defendant is in custody is

whether a reasonable person in defendant's position would believe that he was under arrest or the functional equivalent of arrest. *Stansbury v. California*, 511 U.S. 318, —, 128 L. Ed. 2d 293, 298 (1994). Furthermore, the initial determination of custody for purposes of *Miranda* is an objective one; the subjective views of the interrogating officers or the person being questioned are not relevant. *See id.* In *Berkemer v. McCarty*, 468 U.S. 420, 439-40, 82 L. Ed. 2d 317, 334-35 (1984) the United States Supreme Court held that a motorist subject to a traffic stop who is asked to leave his car is not in custody for purposes of *Miranda* and roadside questioning under those circumstances is permissible. *See also State v. Beasley*, 104 N.C. App. 529, 532, 410 S.E.2d 236, 238 (1991) (while defendant sitting in back of patrol car, questioning defendant about how much he had been drinking did not constitute custodial interrogation under *Miranda*). The Supreme Court also found that the noncoercive aspect of ordinary traffic stops prompted it to hold that a pat-down search pursuant to *Terry v. Ohio* does not invoke the *Miranda* rule even though the person may be detained and questioned concerning an officer's suspicions in a manner that may amount to a seizure under the Fourth Amendment. *Berkemer*, 468 U.S. at 439-40, 82 L. Ed. 2d at 334-35. It is only when the suspect's "freedom of action is curtailed to a 'degree associated with formal arrest' " that the safeguards of *Miranda* become applicable. *Id.* (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275 (1983) (per curiam)).

As discussed above, the fact that a defendant is not free to leave does not necessarily constitute custody for purposes of *Miranda*. After all, no one is free to leave when they are stopped by a law enforcement officer for a traffic violation. Any investigative action that the police must take at traffic stops in order to evaluate their safety and the circumstances surrounding the traffic violation, and that does not rise to the level of custodial interrogation, should not require *Miranda* warnings. Accordingly, we conclude that no reasonable person in defendant's position at the time defendant made the inculpatory statement would have thought that they were in custody for purposes of *Miranda*.

Defendant also contends that the failure to give *Miranda* warnings caused the drug containers and contents to be "fruits" of an illegal search. Because we have already determined that defendant was not in custody for purposes of requiring *Miranda* warnings, we find this argument unpersuasive.

[3] The third issue is whether the trial court erred in denying defendant's motion to suppress evidence on the grounds that the evidence was seized from defendant in an illegal search and seizure. We note that defendant does not contend that the officers did not have reasonable suspicion to initiate a weapons pat-down search as allowed under *Terry v. Ohio*. However, defendant does contend that it was not immediately apparent to Officer Anderson that the containers held crack when he felt them through defendant's jacket during the pat-down search; therefore, defendant opines that any investigative inquiries after that time exceeded the bounds of a search for weapons authorized by *Terry v. Ohio*. We disagree.

In *Terry v. Ohio* the United States Supreme 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 without a warrant to determine whether the person is carrying a weapon. *Terry*, 392 U.S. at 30-31, 20 L. Ed. 2d at 911. The purpose of a limited search under *Terry* is not to discover evidence of a crime, but to allow the officer to pursue his investigation in safety. *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617 (1972); *see State v. Beveridge*, 112 N.C. App. 688, 693, 436 S.E.2d 912, 915 (1993), *affirmed*, 336 N.C. 601, 444 S.E.2d 223 (1994). If evidence is obtained when an officer exceeds the permissible bounds of a *Terry* search, then it is inadmissible. *Id.* However, if an officer, while conducting a lawful *Terry* search for weapons, discovers contraband, it is proper for the officer to seize the item discovered. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 124 L. Ed. 2d 334, 346 (1993); *In re Whitley*, 122 N.C. App. 290, 293, 468 S.E.2d 610, 612, *disc. review denied*, 334 N.C. 437, 476 S.E.2d 132 (1996); *State v. Wilson*, 112 N.C. App. 777, 780, 437 S.E.2d 387, 388 (1993). A seizure of contraband found during a pat-down search for weapons is allowed under what has been termed the "plain feel" exception to the per se rule against unlawful searches and seizures. *Id.* The "plain feel" exception provides that when an officer conducts a lawful pat-down search for weapons and feels an object whose shape, size, and mass "makes its identity immediately apparent, there has been no invasion of 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." See *id.* In short, once it is immediately apparent to an officer conducting a lawful pat-down search for

weapons that the item he feels or sees is contraband, the officer then has probable cause to seize the item. *Id.*

This Court has grappled with the "plain feel" exception and analyzed various factual scenarios to determine in each case whether it was immediately apparent to the officer conducting the weapons pat-down search that the object he felt or saw was contraband. *See In re Whitley*, 122 N.C. App. at 293, 468 S.E.2d at 612; *Beveridge*, 112 N.C. App. at 695, 436 S.E.2d at 916; *Wilson*, 112 N.C. App. at 781-83, 437 S.E.2d at 389-90; *State v. Sanders*, 112 N.C. App. 477, 483, 435 S.E.2d 842, 846 (1993). This Court has followed or distinguished cases from *Dickerson* by considering whether the officer manipulated the object in such a manner that the officer's conduct went beyond the permissible boundaries of a legitimate *Terry* search, and therefore, was so intrusive as to violate the United States Constitution. *See id.* No North Carolina decisions have determined whether an unlawful search results when an officer makes a brief verbal inquiry as to the contents of an object that he feels while he is conducting a lawful *Terry* search. The analogous cases seem to indicate that an officer may make reasonable inquiries during a traffic stop and *Terry* pat-down search. *See Berkemer*, 468 U.S. at 439-40, 82 L. Ed. 2d at 334-35; *Adams*, 407 U.S. at 146, 32 L. Ed. 2d at 617; *Beasley*, 104 N.C. App. at 532, 410 S.E.2d at 238. Other jurisdictions have concluded that it is not improper to ask a suspect the nature of an object in his pocket during a lawful *Terry* search even after the officer has determined that the object is not a weapon. *State v. Scott*, 518 N.W. 2d 347, 350, *cert. denied*, — U.S. —, 130 L.Ed. 2d 421 (1994); *see State v. Toro*, 551 A.2d 170, 173 (1988), *cert. denied*, 570 A.2d 973 (1989); *State v. Harris*, 78 Cal. Rptr. 153 (1969); *Shy v. State*, 218 S.E.2d 599, 604 (1975).

Here Officer Anderson felt the objects on defendant's person during a legitimate pat-down search and, based on his experience, believed that the objects held contraband. Officer Anderson spontaneously asked defendant, "What is that?" When defendant promptly responded, "crack," Officer Anderson removed the two vials containing cocaine and promptly completed his pat-down for weapons. Given the officer's experience, narcotics training, the size shape and mass of the objects, and defendant's response to Officer Anderson's question, it became immediately apparent to Officer Anderson that the objects contained contraband. It was at that moment that Officer Anderson had probable cause to seize the objects. There is no evidence of record to indicate that Officer Anderson manipulated the

objects in a manner so as to make the search unlawful under *Dickerson*. Furthermore, we find that the brief verbal inquiry as to the identity of the objects did not exceed the permissible bounds of a *Terry* search. Had Officer Anderson seized the items after defendant had made no response to the officer's question, or defendant had answered that the object contained something other than contraband, our analysis would necessarily be far different. Here the trial court correctly concluded that there was the requisite probable cause to seize the crack vials. This assignment of error fails.

[4] Assignments of error that defendant has failed to bring forth or argue in his brief are deemed abandoned pursuant to N.C.R. App. P. 28(a).

Affirmed.

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

GUILFORD COUNTY BOARD OF COMMISSIONERS; GUILFORD COUNTY; JAMES ROBERT McNALLY AND DANNY LEE KELLY, ON BEHALF OF THEMSELVES AND TAXPAYERS SIMILARLY SITUATED, PLAINTIFFS v. E. WAYNE TROGDON; GUILFORD COUNTY BOARD OF EDUCATION; AND PEERLESS INSURANCE COMPANY, DEFENDANTS

No. COA95-499

(Filed 17 December 1996)

1. Schools § 162 (NCI4th)— pending merger of school district—extension of superintendent's contract by former board—severance pay agreement—invalidity

A former county board of education lacked the authority to extend the contract of the former superintendent of county schools to cover the 1993-94 school year pending a vote on merger of the county school district with two city school districts or to authorize the payment of severance pay of $275,000 if the former superintendent was not selected as the superintendent for the merged school system where legislation permitting a vote on school merger gave the new board of education the authority to make contract and hiring decisions for administrative personnel for the 1993-94 school year and beyond; the legislation manifested the legislature's intent to divest the former board of its statutory authority to make contract decisions for the 1993-94

school year; and the parties to the contract were on notice of the terms of the legislation at the time the contract was executed. Therefore, the county was entitled to recover the $275,000 paid to the former superintendent under the contract when the voters approved the merger.

Am Jur 2d, Schools § 126.

2. **Schools § 195 (NCI4th)— standing—taxpayers—school board funds—no action by new board**

The plaintiff taxpayers had standing to file a claim for recovery of school board funds where the new board had voted not to recover monies paid to defendant and it would have been useless for the taxpayers to demand that the new board institute legal actions.

Am Jur 2d, Schools §§ 1 et seq.

Appeal by defendants E. Wayne Trogdon and Peerless Insurance Company from judgment entered 10 February 1995 by Judge Judson D. DeRamus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 20 February 1996.

On 13 June 1989, defendant E. Wayne Trogdon signed a contract to serve as superintendent of the former Guilford County School System from 1 July 1989 through 30 June 1993. On 8 May 1991, the North Carolina General Assembly ratified Chapter 78 of the 1991 Session Laws (the Merger Act), effective upon ratification, which provided for the consolidation of the three school systems in Guilford County—the Greensboro City, High Point City, and Guilford County school systems. The Merger Act provided for a referendum vote by Guilford County voters in November 1991 to choose one of two merger plans to become effective 1 July 1993: either a merger into one system, or a formation of boundaries of the three systems so that the boundaries would be coterminous with the city boundaries of Greensboro, High Point, and the remainder of Guilford County. The former Guilford County Board of Education (the former Board) filed suit to challenge the legality of the Merger Act, but that challenge was struck down by this Court in *Guilford Co. Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C. App. 506, 430 S.E.2d 681 (1993).

After ratification of the Merger Act, the former Board and Dr. Trogdon signed a contract on 8 October 1991 which stated that Dr. Trogdon's employment would be extended an additional two years,

with a new expiration date of 30 June 1995. The agreement contained the following provision:

> In the event of the merger or consolidation of the Guilford County Public School System with any other school system prior to the expiration of this Contract, if the Superintendent is not selected and employed by mutual agreement (as provided hereinafter) as the superintendent of the merged school system, he will be compensated in full for the salary and all other benefits and compensation to which he would have been entitled under the remaining term of this Contract, in one lump sum payment, on the day prior to the effective date of the merger. If the Superintendent is selected as the superintendent of the merged school system, then the Superintendent shall be entitled to negotiate the terms and conditions of a new Contract as Superintendent with the appropriate Board of Education to provide additional compensation therefor.

In November 1991, Guilford County residents voted to merge the three school systems, and by the terms of the Merger Act, the former Board ceased to exist as of 1 July 1993.

On 19 June 1993, the former Board agreed to pay Dr. Trogdon $275,000 as "a full and complete mutually agreeable settlement of all claims between the parties rising out of the terms of [the October 1991 agreement]." The former Board issued a check to Dr. Trogdon in the amount of $275,000 on 30 June 1993. In separate letters dated 13 August 1993 and 20 August 1993, both the Guilford County Board of Commissioners and the new Board requested Dr. Trogdon return the funds. Dr. Trogdon refused.

Plaintiffs filed this action to recover the $275,000 on 22 October 1993. Both sides filed motions for summary judgment and defendant Peerless Insurance Company (Peerless) filed a counterclaim against plaintiffs. In an order filed 10 February 1995, the trial court denied summary judgment for defendants Trogdon and Peerless, dismissed Peerless' counterclaim with prejudice, and granted summary judgment for plaintiffs. The court ordered Dr. Trogdon to pay defendant Guilford County Board of Education $275,000 plus interest at the legal rate from 30 June 1993 and ordered Peerless to pay amounts due but not recovered from Dr. Trogdon. From this judgment, Dr. Trogdon and Peerless now appeal. (We note that defendant Guilford County Board of Education did not appeal and submitted a brief in support of the trial court's judgment.)

Jonathan V. Maxwell, County Attorney, and J. Edwin Pons, Deputy County Attorney, for plaintiff-appellees Guilford County Board of Commissioners and Guilford County.

Stern, Graham and Klepfer, by Jerry R. Everhardt and Robert H. Edmunds, Jr., for plaintiff-appellees James Robert McNally and Danny Lee Kelly.

Roberts Stevens & Cogburn, P.A., by James W. Williams and Wyatt S. Stevens, for defendant-appellant E. Wayne Trogdon.

Haywood, Denny, Miller, L.L.P., by George W. Miller, Jr., for defendant-appellant Peerless Insurance Company.

Tharrington Smith, by Michael Crowell, for defendant-appellee Guilford County Board of Education.

McGEE, Judge.

[1] Appellants first argue the judgment of the trial court should be reversed because the parties had a valid contract, the settlement was not an unconstitutional emolument, the former Board's actions complied with the terms of the Merger Act, and the contract did not require a pre-audit certificate. However, we find the former Board exceeded its authority in extending Dr. Trogdon's contract and affirm the judgment of the trial court. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (summary judgment upheld on appeal if it can be sustained on any grounds).

The Merger Act was ratified by our General Assembly 8 May 1991 and, by its terms, became effective on that date. 1991 N.C. Sess. ch. 78 § 31. (However, Part I of the Merger Act, the portion dealing with the procedures for merger of the systems, became effective on the date of the certification of the November 1991 referendum election results. 1991 N.C. Sess. Laws ch. 78 § 28(b).) Section 4(3) of the Merger Act, contained in Part I, states that a newly created Guilford County Board of Education (the new Board) would be responsible for "[m]aking contracts, hiring personnel and adopting policies for the 1993-94 and subsequent school years." By the terms of the Merger Act, employees covered under N.C. Gen. Stat. § 115C-325 (*i.e.*, teachers and their supervisors and principals, but specifically not superintendents) were guaranteed employment to the same extent as they were employed by the then existing three school systems. N.C. Sess. Laws ch. 78 § 13. Administrative, supervisory and operational staff

were to be hired based on need as determined by study, and equitable policies were to be established to consider those persons for positions in the new merged school system. N.C. Sess. Laws ch. 78 § 11. Therefore, under the terms of the Merger Act, only the new Board had the authority to make employment contracts for administrative personnel, such as a superintendent, for the 1993-94 school year and beyond.

However, appellants argue that despite the provision in the Merger Act declaring only the new Board would have the authority to make contracts covering the 1993-94 school year and beyond, the former Board still had authority to make the contract because Part I of the act was not effective until the November 1991 election, one month after the execution of the agreement with Dr. Trogdon. We disagree.

In *Rowe v. Franklin County*, 318 N.C. 344, 349 S.E.2d 65 (1986), our Supreme Court held a hospital's board of trustees could not enter into a binding employment contract with the plaintiff because the trustees lacked the authority to do so. In that case, the county commissioners, pursuant to statute, had created a board of trustees with the power to operate and hire personnel for the county hospital. On 23 May 1983, the commissioners and trustees met with representatives from two different non-profit, tax-exempt corporations to receive proposals from the corporations to take over operation of the hospital. Both proposals stated the administrator of the hospital would be an employee of the management company selected. The commissioners voted 6 June 1983 to hire one of the corporations to manage the hospital. On 15 June 1983, the trustees met and adopted a resolution stating their intent to enter into a management contract with the other corporation. They also purported to enter into a written three-year contract with the plaintiff to act as hospital administrator. The commissioners met later that same night and voted to revoke the trustees' purported contract with the other corporation. On 27 June 1983, the commissioners adopted a resolution repealing the trustees' authority to operate and manage the hospital. The commissioners voted to fire the plaintiff 1 July 1983.

In affirming summary judgment against the plaintiff, the Supreme Court held the trustees lacked the authority to enter into a binding employment contract. *Rowe*, 318 N.C. at 350, 349 S.E.2d at 69. The court reasoned that:

> Under the circumstances, the 6 June resolution choosing [a corporation to manage the hospital] clearly showed the commissioners' intent to exercise their authority to decide how the hospital would be managed in the future. By so resolving, the commissioners manifested their intent to divest the trustees of the delegated authority to make long-term management decisions on behalf of the hospital. Therefore, the resolution of 6 June 1983 impliedly repealed that part of the [earlier] resolution . . . which had delegated authority to the trustees to enter into long-term contracts regarding management of [the hospital]. Thus, on 15 June 1983 the trustees had no authority to enter into a long-term contract of employment with plaintiff.

Rowe, 318 N.C. at 348, 349 S.E.2d at 68. The court further held that because plaintiff was, or should have been, aware the trustees had no authority to enter into a contract, he could not recover under an argument that the trustees had apparent authority to enter into a contract. *Id.* at 350-351, 349 S.E.2d at 70. Therefore, even though the commissioners did not formally repeal the trustees' power to hire hospital personnel until after the trustees and plaintiff had entered into the purported employment contract, the trustees lacked authority to enter into the contract. *Id.* at 347-48, 349 S.E.2d at 68.

In this case, the General Assembly clearly intended by enacting the Merger Act, that if the voters chose to merge the school systems, the new Board would make hiring and contract decisions for the merged system. Although the former Board had been given power to extend or renew a current superintendent's contract under N.C. Gen. Stat. § 115C-271, the General Assembly, by enacting the Merger Act, "manifested their intent to divest" the former Board of its statutory authority to make contract decisions for the 1993-94 school year and beyond if the voters approved the merger. Here, the position of the former Board is analogous to the position of the trustees in *Rowe*. Therefore, the attempt by the former Board to enter into an employment contract for the 1993-94 and 1994-95 school years, which would be binding if the merger was approved, was made without actual authority and was unenforceable. *See Rowe, supra*. The voters did approve the merger. Because the General Assembly ratified the Merger Act in May 1991, even though the official effective date was November 1991, the General Assembly's adoption of the Merger Act impliedly repealed the former Board's ability to enter into an employment contract to be in effect after the effective date of the merger. Since the parties to the purported contract were on notice of the pro-

visions of the Merger Act, the October 1991 agreement was unenforceable upon the vote in favor of merger. Therefore, the trial court properly entered summary judgment for plaintiffs.

[2] Appellants also argue plaintiffs have no standing to bring this action. We disagree. Regardless of the issue of whether the Guilford County Board of Commissioners has standing, we hold the two taxpayer plaintiffs, McNally and Kelly, have standing. The right to sue for recovery of the school funds of a particular school administrative unit belongs to the school board governing that unit. *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951). However, "a taxpayer [may] bring a taxpayer's action on behalf of a public agency or political subdivision for the protection or recovery of the money or property of the agency or subdivision in instances where the proper authorities neglect or refuse to act." *Id.* To bring this type of action, taxpayers must show they are a taxpayer of the public agency or political subdivision and must further establish that either: 1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision; or 2) a demand on the proper authorities would be useless. *Id.* at 626, 65 S.E.2d at 126-27. Here, the record shows McNally and Kelly are Guilford County taxpayers. Further, because the new Board had already voted not to take legal action to recover the $275,000 from Dr. Trogdon, it would have been useless for the taxpayers to demand the new Board institute legal proceedings. Therefore, the taxpayers had standing to bring this action.

Because of our holding that the former Board did not have the authority to execute the October 1991 agreement with Dr. Trogdon, we do not address the issue of whether the agreement was an unconstitutional emolument, an illusory contract, or invalid for lack of a preaudit certificate. For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

Judges JOHNSON and MARTIN, John C. concur.

Judge Johnson participated in this opinion prior to 1 December 1996, the effective date of his retirement.

FRANCES G. JERNIGAN, PLAINTIFF v. N.C. DIVISION OF PARKS AND RECREATION, DEFENDANT

No. COA95-692

(Filed 17 December 1996)

1. State § 55 (NCI4th)— Industrial Commission—findings of fact irrelevant—surplusage

The Industrial Commission's finding of fact as to when a state park was notified of the plaintiff's accident was irrelevant and had no bearing on the plaintiff's case; therefore the finding was disregarded as surplusage.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 675 et seq.

2. State § 55 (NCI4th)— Commissioner is the arbiter—state park—protruding nail—conflicting testimony

As the arbiter of the credibility of witnesses and the weight given their testimony, the Industrial Commission was entitled to resolve the conflict in a witness's testimony. The witness, a park superintendent, testified to varying lengths of a nail which plaintiff tripped over while visiting the park.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 675 et seq.

3. State § 55 (NCI4th)— state park—protruding nail—absence of notice

The Industrial Commission's findings that park employees did not have notice the nail plaintiff tripped upon was protruding from the boardwalk was supported by the evidence.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 675 et seq.

4. State § 55 (NCI4th)— procedure for inspection—superintendent's testimony—state park

The Industrial Commission properly found that there was evidence of a firmly established opening routine and a reasonable procedure for inspecting the boardwalk where plaintiff's claim was that she tripped over a nail protruding from a boardwalk at a state park. The evidence in the record revealed employees walked down the boardwalk daily to open the bathhouse, and

that in the course of this routine the attendant on duty would conduct a general visual inspection of the park. Further, the superintendent of the park testified that in his eleven years of employment at the park, which had accommodated over 10,000,000 visitors during that time, there had been no reports of individuals tripping over nails or being injured on a nail.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 675 et seq.

5. State § 36 (NCI4th)— defendant not negligent—contributory negligence finding unnecessary

The Court of Appeals declined to address the Commission's finding regarding the contributory negligence of plaintiff because a finding of negligence on the part of plaintiff was not necessary to uphold the Commission's decision where it was properly determined that defendant, the park itself, had not acted in a negligent manner.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 151.

6. State § 35 (NCI4th)— Industrial Commission—findings of fact—State not negligent for failure to warn

There was evidence in the record to support the Industrial Commission's findings of fact and conclusions of law to the effect that defendant state park was neither negligent in its maintenance of a boardwalk nor in its failure to warn of the possibility of protruding nails therein where the plaintiff was injured after tripping over a protruding nail.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 145.

Appeal by plaintiff from Decision and Order filed 20 March 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 February 1996.

McLeod, Hardison & Harrop, by Donald E. Harrop, Jr., for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals a ruling of the North Carolina Industrial Commission (the Commission) denying her claim against defendant N.C. Division of Parks and Recreation for damages allegedly suffered upon tripping over a raised nail on a boardwalk at Fort Macon State Park on 9 November 1991. We affirm the Commission.

The standard governing our review of decisions of the Commission is quite limited. If there is any competent evidence in the record to support the Commission's findings of fact, they must be upheld; further, if the Commission's findings of fact support its conclusions of law and decision, they will not be overturned. *Smith v. N.C. Dept. of Nat. Resources*, 112 N.C. App. 739, 743, 436 S.E.2d 878, 881 (1993), *disc. review denied*, 336 N.C. 74, 445 S.E.2d 37 (1994).

[1] Plaintiff initially objects to several of the Commission's findings of fact. First, she contends there is no evidence to support its finding that:

> 4. . . . Mrs. Fields [plaintiff's sister] testified that she did not contact any park employee on Saturday to report the serious fall of her sister nor did she indicate to the park employee on Sunday anything more than just that her sister had fallen and was hurt as a result of the fall. There was nothing to prevent Mrs. Fields or any of the plaintiff's companions from reporting to the ranger on duty on the date of the accident what happened to the plaintiff in specific detail.

Plaintiff's objection is supported by the uncontradicted testimony of Edith Fields, not cited by the Commission, that she returned to the park on Saturday, the day of the accident, after taking her sister to the hospital, yet was unable to locate a park employee so as to report the accident. It was only when she again went to the park on Sunday that she located such an employee.

However, the cited findings of fact have no bearing on plaintiff's case. The Commission's finding that the park was notified the day following the accident rather than on the day it occurred is irrelevant to the outcome, as is that addressing whether plaintiff's companions described the accident "in specific detail" to the park employee on duty. Thus, assuming *arguendo* finding of fact number four is erroneous, it may be disregarded as surplusage and the Commission's Decision and Order nevertheless upheld.

[2] Plaintiff next objects to the Commission's finding that: "According to Mr. Murphy [the park attendant], the nail [upon which plaintiff tripped] was a little less than one-quarter inch high . . . ." This finding is supported by competent evidence. Admittedly James Patrick Murphy (Murphy) originally said the nail was half an inch high when asked by Park Superintendent Jody Merritt (Superintendent Merritt) to give information about the accident. However, when requested at his deposition to draw a representation of the distance the nail protruded from the boardwalk, Murphy drew a line slightly less than a quarter inch in length. The Commission, as the arbiter of the credibility of witnesses and the weight given their testimony, *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993), was entitled to resolve the conflict in Murphy's testimony and adopt the latter description of the length of the nail.

[3] Plaintiff also contends the Commission erred in finding that:

> 9. There was no evidence directly or indirectly which would indicate that the defendant or any of its employees or agents had notice, either directly or implied, of any protruding nail located on the bathhouse boardwalk prior to the plaintiff's fall.

Plaintiff argues park employees admitted seeing raised nails in the boardwalk on occasions prior to her fall. The record supports plaintiff's assertion, and the Commission made findings stating as much. However, it is apparent the finding at issue refers to the park employees' lack of notice that the *actual* nail plaintiff tripped upon was protruding from the boardwalk. Thus interpreted, the Commission's finding is supported by the record.

In addition, plaintiff assigns error to the following finding of fact:

> 10. The defendant had in place a means of reasonable inspection of the bathhouse early in the morning and walking down this boardwalk looking for unsafe conditions. It was not necessary for the defendant to have written procedures as to nail checking in effect in view of the fact of the firmly established opening routine by the rangers and the lack of any reported accidents to the defendant caused by protruding nails other than that of the plaintiff. The defendant conducted reasonable inspections for protruding nails as evidenced by only the plaintiff's reported fall in the context of 10,000,000 visitors during the tenure of park Superintendent Merritt.

Plaintiff denies there existed evidence of a "firmly established opening routine" and a reasonable procedure for inspecting the boardwalk. To the contrary, competent evidence in the record reveals that employees walked down the boardwalk daily to open the bathhouse, and that in the course of this routine the attendant on duty would conduct a general visual inspection of the park. If a nail was discovered sticking out of the boardwalk, the attendant would hammer it down or ask another employee to do so. Further, Superintendent Merritt testified that in his eleven years of employment at the park, which had accommodated over 10,000,000 visitors during that time, there had been no reports of individuals tripping over nails or being injured on a nail. These findings, sustained by evidence in the record, support the additional finding that the park had in place a reasonable system of identifying and remedying raised nails.

[4] Plaintiff insists, without citation, that "lack of prior injury does not prove lack of negligence." Certainly the use of "nonoccurrence evidence" to establish lack of negligence is problematical in any case, in that there may have been a number of similarly injured individuals injured who simply failed to come forward. *See* Paul R. Rice, *Evidence: Common Law and Federal Rules of Evidence* § 3.02 at 193 (2d ed. 1990). Moreover, some may have complained, but not to the individual testifying on the defendant's behalf. *Id.* at 194.

> Because each of these possibilities significantly lowers the relevance of nonoccurrence evidence, courts have required that the number of potential occurrences be sufficiently high to create a probability that someone would have complained to the person testifying about the nonoccurrence of complaints if a basis for a complaint, such as a defective condition, existed.

Id.

However, in the case *sub judice*, the presence of over 10,000,000 visitors in the park during the tenure of Superintendent Merritt establishes an extremely high probability that he would have been notified if protruding nails were indeed causing injuries among the park's clientele. The lack of such reports during Superintendent Merritt's employment thus was properly considered by the Commission to support its finding that the park had in place a reasonable means of inspecting the boardwalk for nails.

[5] Plaintiff next objects to the Commission's statement in finding of fact number eleven that plaintiff was contributorily negligent. *See*

Smith, 112 N.C. App. at 745, 436 S.E.2d at 882 (invitee has duty to use ordinary care to protect herself and discover obvious dangers). A finding of negligence on the part of plaintiff is not necessary to uphold the Commission's decision, however, because it properly determined defendant itself had not acted in a negligent manner. We therefore decline to address the Commission's finding regarding the contributory negligence of plaintiff.

[6] Finally, plaintiff objects to the Commission's conclusions of law. We believe each of the following conclusions of law by the Commission support its ultimate decision that defendant was not liable in negligence to plaintiff: first, that defendant had in place a reasonable routine to inspect the boardwalk for unsafe conditions, and had made a reasonable inspection of the boardwalk on the day of plaintiff's accident; second, that defendant was not negligent in failing to warn plaintiff of the danger of protruding nails.

This Court has determined that visitors to state parks are invitees. *See Smith*, 112 N.C. App. at 744, 436 S.E.2d at 882. As such, the park herein was under a duty to "exercise ordinary care in maintaining the premises in a reasonably safe condition, and to warn invitees of hidden dangers or unsafe conditions." *Id.* Unquestionably, raised nails may potentially cause pedestrians to trip, and defendant had knowledge nails occasionally protruded from the boardwalk. However, defendant responded to the danger in a reasonable manner by inspecting the boardwalk for hazards, including raised nails, on a regular basis, and by hammering down protruding nails as they were discovered. As discussed above, in light of the tremendous volume of visitors to the park, the superintendent's lack of knowledge of any accidents involving raised nails during his eleven year tenure is evidence that defendant indeed maintained the boardwalk in a reasonably safe condition.

Regarding plaintiff's claim that defendant had a duty to warn of "hidden" dangers, *see Smith*, 112 N.C. App. at 745, 436 S.E.2d at 882, we do not believe raised nails on a boardwalk by the ocean are the type of "hidden" danger concerning which patrons must be warned. "Slight depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets are so common that their presence is to be anticipated by prudent persons." *Evans v. Batten*, 262 N.C. 601, 602, 138 S.E.2d 213, 214 (1964); see *Stephen v. Swiatkowski*, 635 N.E.2d 997, 1003 (Ill. App. 1994) (nail protruding from board in home was open and obvious). Likewise, the tendency of nails to work their

way out of boardwalks and docks by the ocean is to be anticipated by pedestrians using those structures. While some individuals may trip on raised nails on beach boardwalks, the utility of a sign warning of the existence of such nails is highly questionable due to common knowledge of the same. Furthermore, although we have declined to address the Commission's conclusion that plaintiff was contributorily negligent in failing to see the nail, we note plaintiff admitted she was "familiar with piers and fishing/ocean environments, having fished most of her life."

In sum, there is evidence in the record to support the Commission's findings of fact and conclusions of law to the effect that defendant was neither negligent in its maintenance of the boardwalk nor in its failure to warn of the possibility of protruding nails therein.

Affirmed.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. KAREN BEST WEARY

No. COA96-199

(Filed 17 December 1996)

1. Corporations § 107 (NCI4th)— corporate malfeasance—independent contractor—corporate employer's agent

The trial court properly denied defendant's motion to dismiss the charge of corporate malfeasance where defendant, a phlebotomist and independent contractor, was acting as her corporate employer's agent. Defendant's employer contracted with the Mecklenburg County Child Support Enforcement Agency to provide phlebotomy services. Regardless of what her official title might have been the defendant, a four-year employee, was sent to the Agency's headquarters on behalf of the corporation. N.C.G.S. § 14-254.

Am Jur 2d, Corporations §§ 43, 2135.

Liability of corporate directors for negligence in permitting mismanagement or defalcations by officers or employees. 25 ALR3d 941.

Admissibility and probative value of admissions of fault by agent on issues of principal's secondary liability, where both are sued. 27 ALR3d 966.

2. Corporations § 107 (NCI4th)— corporate malfeasance—sufficiency of the evidence—client entry authorization form—false certification

The trial court properly denied defendant phlebotomist's motion to dismiss the charge of corporate malfeasance where defendant made an entry on a Client Authorization Form for a putative father which falsely certified that the person in the photograph and whose thumb print was affixed to the form was in fact the person from whom she drew blood. It was more than reasonable to infer that defendant's entry on the form was made with (1) the intent to deceive her employer into believing that the blood was taken from the putative father and (2) the intent to injure and defraud the mother of the child support due from the putative father.

Am Jur 2d, Corporations §§ 43, 1896; Fraud and Deceit §§ 424, 446.

Liability of corporate directors for negligence in permitting mismanagement or defalcations by officers or employees. 25 ALR3d 941.

3. Appeal & Error § 362 (NCI4th)— failure to include findings in record on appeal—aggravating factors

The Court of Appeals dismissed defendant's objection to the trial court's finding as a factor in aggravation that defendant took advantage of a position of trust or confidence to commit the offense where she failed to include Form AOC-CR-303, Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment, in the record on appeal.

Am Jur 2d, Criminal Law § 598; Fraud and Deceit § 81.

4. Criminal Law § 1164 (NCI4th Rev.)— sufficient evidence—aggravating factor—inducement of others—putative father—blood test—sufficiency of evidence

There was sufficient evidence to support the trial court's finding that defendant induced others to participate in the commission of the charged offenses where defendant, a phlebotomist, induced a putative father, who was under a court order

to submit to a blood test to determine paternity, to participate in a scheme to defraud the mother of his child; defendant procured blood from another male, who was unaware of defendant's fraudulent scheme; and defendant substituted the procured blood for the blood of the father.

Am Jur 2d, Criminal Law § 598.

Appeal by Defendant from Judgment entered 30 June 1995 by Judge Shirley L. Fulton in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 October 1996.

Michael F. Easley, Attorney General, by Newton G. Pritchett, Jr., Assistant Attorney General, for the State.

Marshall A. Swann for defendant.

WYNN, Judge.

The State charged defendant Karen Best Weary with obtaining property by false pretense and corporate malfeasance. At her trial, the evidence tended to show the following:

Defendant performed phlebotomy services as an independent contractor for Genetic Design, Inc., from 1989 through 1993. In September 1990, Genetic Design sent her to the Mecklenburg County Child Support Enforcement Agency to draw blood from Larry Melton, a putative father under court order to submit to a blood test to determine whether he was the father of a child born to Sheila Fleming. While preparing him for the procedure, defendant suggested to Melton that she could prevent him from being found as the father in exchange for $500. Melton agreed and defendant left the agency without drawing his blood.

Instead, defendant approached two young black males on the street and paid one of them $30 for three vials of his blood. She then wrote Melton's name on all three vials of blood and sealed them in a specimen kit along with a Client Authorization Form signed by Melton. This form contained Melton's vital information and defendant's certification that Melton was the person from whom she drew the blood. Defendant delivered the kit to Genetic Design. The blood specimens that were purported to be Melton's were tested and excluded him as the father. However, upon retesting in 1993, Melton was statistically determined to be the father of Ms. Fleming's child.

Defendant was charged with obtaining property by false pretense and corporate malfeasance in violation of N.C. Gen. Stat. § 14-254 (1993) in that she "did unlawfully, wilfully, and feloniously as the agent and contract employee of a corporation, Genetic Design, Inc., make a false entry in a report of the corporation . . . to-wit: a Client Authorization Form, with the intent to injure, defraud and deceive a person, to-wit: Sheila Fleming and Genetic Design, Inc." Contrary to her pleas, a jury returned verdicts of guilty as charged. After consolidating the offenses for judgment and finding that the aggravating factors outweighed the sole mitigating factor, the court suspended a ten year sentence given to defendant and placed her on five years supervised probation to commence after she served a term of six months. Defendant appeals.

I.

[1] Defendant first assigns error to the trial court's denial of her motion to dismiss the charge of corporate malfeasance on the grounds that the State failed to meet its burden of proving that (1) she was an "agent" of Genetic Design and (2) she intended to injure, defraud or deceive Ms. Fleming or Genetic Design. We disagree on both counts.

We note at the outset that a motion to dismiss requires the trial court to consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference which can be drawn from the evidence. *State v. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 827 (1985).

Defendant contends that since she was hired as an "independent contractor," she was not an "agent" of Genetic Design as contemplated by N.C.G.S. § 14-254. We disagree. An agent is defined as one who acts for or in place of another by authority of such other. *Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980). In the instant case, defendant had an employment contract with Genetic Design that included a salary, a traveling allowance and a description of her duties as a phlebotomist. She worked for the corporation for approximately four years. Furthermore, Genetic Design had a contract with Mecklenburg County Child Support Enforcement Agency to perform phlebotomy services and it sent defendant to the agency's headquarters on its behalf. On these facts, defendant clearly was acting as the corporation's "agent," regardless of what her official title might have been.

[2] Defendant's next contention is that there was insufficient evidence to show that her false entry on the Client Authorization Form was intended to injure, defraud or deceive any person. We again disagree with the defendant.

Direct proof of fraudulent intent is not necessary, it being sufficient if facts and circumstances are shown from which it may be inferred. *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 702 (1935). In the instant case, defendant's signature on the Client Authorization Form was her certification that the person in the photograph and whose thumb print was affixed to the form was in fact the person from whom she drew blood. It was more than reasonable to infer that defendant's entry on the form was made with (1) the intent to deceive Genetic Design into believing that the blood was taken from Larry Melton and (2) the intent to injure and defraud Sheila Fleming out of the child support due from Melton. Thus, we conclude that the trial court properly denied defendant's motion to dismiss the charge of corporate malfeasance.

II.

[3] Defendant next objects to the trial court's finding as factors in aggravation that she (1) took advantage of a position of trust or confidence to commit the offense and (2) induced others to participate in the commission of one or both of the charged offenses. We note at the outset that defendant failed to include Form AOC-CR-303, Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment, in the record on appeal. This is significant because the State notes in its brief that the record is unclear as to whether the trial court actually found that defendant took advantage of a position of trust or instead that she was hired to commit the crimes. Therefore, we dismiss defendant's first objection for failure to include a necessary part of the record on appeal. *See* N.C.R. App. P. 9(a)(3)(g); *State v. McMillian*, 101 N.C. App. 425, 399 S.E.2d 410, *disc. review denied*, 328 N.C. 335, 402 S.E.2d 842 (1991). However, we will address defendant's final assignment of error because the parties have stipulated that the trial court did find as a factor in aggravation that she induced others to participate in the commission of her crimes.

[4] At the sentencing hearing, the State's evidence indicated that it relied on the theory that defendant had induced Melton to participate in the commission of the crimes. Defendant, however, notes that the trial court stated the following: "I find as aggravating factors that you

induced others to participate in the commission of the crimes, specifically the two young men from whom you secured the blood to submit." Defendant contends that the trial court's finding that she induced the young male to participate in the crime was in error because there was no evidence that the young man was aware of the intended use of the blood that he donated. For the following reason, we conclude that defendant's claim is without merit.

In *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984), the defendant was convicted of attempted armed robbery. His codefendant, McNeair, pled guilty to accessory after the fact of the robbery. The defendant appealed the trial court's finding that he induced his codefendant to participate in the commission of the crime. He argued that by accepting McNeair's plea to accessory after the fact, the State had conceded that McNeair "was not involved in the actual commission of the offenses and was not aware of the commission of the crimes until after they had occurred." *Id.* at 299, 311 S.E.2d at 879. Our Supreme Court held that defendant's contention placed the emphasis on the wrong party: "The focus . . . is not on the role of the 'participants' in the crime, but on the role of the defendant in inducing others to participate or in assuming a role of leadership." *Id.* The Court went on to hold that "the evidence fully supports the trial court's finding that defendant occupied a position of leadership which resulted in McNeair's *involvement* in the crimes." *Id.* (Emphasis added).

In the instant case, defendant clearly *involved* the young male in the commission of her crimes by paying him $30.00 for three vials of his blood. As in *Lattimore*, the focus is on defendant's role in inducing the young male to donate his blood and not on whether he was aware of her illicit motive.

Furthermore, "[a]ll that is necessary is that *the record* support [each] factor by a 'preponderance of the evidence.' " *State v. Abee*, 60 N.C. App. 99, 103, 298 S.E.2d 184, 186 (1982), *modified on other grounds and aff'd*, 308 N.C. 379, 302 S.E.2d 230 (1983) (emphasis added). When a convicted felon is given a sentence in excess of the presumptive range, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. N.C. Gen. Stat. § 15A-1444(a1) (1988).

The record in this case shows that defendant also induced Larry Melton to participate in the scheme to defraud Sheila Fleming by

suggesting to him that drawing his blood and submission of that blood for a paternity test would subject him to years of paying child support and the possible loss of his family. We, therefore, conclude that there was sufficient evidence to support the trial court's finding that defendant induced others to participate in the commission of the charged offenses.

For the foregoing reasons, we find that defendant received a fair trial free from prejudicial error.

No error.

Judges GREENE and MARTIN, John C. concur.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE CO., PLAINTIFF-APPELLANT v. JANNIS C. CAVINESS, DEFENDANT-APPELLEE

No. COA96-163

(Filed 17 December 1996)

1. Declaratory Judgment Actions § 12 (NCI4th)— subject matter jurisdiction—pending personal injury action—UIM coverage—potential liability

The trial court had subject matter jurisdiction to enter its declaratory judgment on the amount of UIM coverage where there was no underlying judgment from the defendant's pending personal injury action. Plaintiff insurer instituted a declaratory judgment action seeking a determination of the amount of UIM coverage plaintiff's policy accorded the defendant where plaintiff had a pending personal injury against another party and that party's insurance policy limit had been exhausted. Although no final judgment had been entered in the underlying personal injury action, plaintiff was liable, to the limit of its UIM coverage, for the difference between the total damages awarded and the amount of the settlement in the underlying claim. The potential of defendant's liability constituted an actual controversy between the plaintiff and defendant; therefore, declaratory relief was appropriate. N.C.G.S. § 20-279.21(b)(4)

Am Jur 2d, Declaratory Judgments §§ 121-137.

2. Insurance § 528 (NCI4th)— UIM coverage—failure to make selection—amount of coverage

Absent completion of an approved selection or rejection form, an insured is, as a matter of law, entitled to one million dollars in UIM coverage pursuant to N.C.G.S. § 20-279.21(b)(4) (1991).

Am Jur 2d, Automobile Insurance § 322.

Appeal by plaintiff from order entered 16 November 1995 by Judge James C. Davis in Guilford County Superior Court. Heard in the Court of Appeals 22 October 1996.

Morris, York, Williams, Surles & Brearley, by R. Gregory Lewis, for plaintiff-appellant.

Law Offices of Stephen A. Lamb, by Stephen A. Lamb and Christine M. Lamb, and Law Offices of Todd E. McCurry, by Todd E. McCurry, for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff Metropolitan Property and Casualty Insurance (Metropolitan) appeals from order of the trial court granting judgment on the pleadings to defendant Jannis Caviness (Caviness).

It is undisputed that on 29 February 1992 Caviness was involved in an automobile accident with Linda Lee Nifong (Nifong) in High Point, North Carolina. At the time of the accident, Caviness was covered by an insurance policy issued to her by Metropolitan (Metropolitan policy). Nifong's insurance company, Unison Insurance Company, exhausted the limits of its liability coverage, $50,000, in payments to Caviness and the passengers in her car. Specifically, Caviness received $21,643.49.

Caviness then notified Metropolitan she was asserting a claim against the underinsured motorist (UIM) coverage in her policy. At no time prior to the accident did Caviness execute a selection/rejection form thereby establishing the limit of her UIM coverage. On 16 March 1992, however, Caviness executed the requisite form and selected coverage of $100,000 per person and $300,000 per accident.

On 30 November 1994 Metropolitan instituted the present declaratory judgment action seeking a determination of the amount of UIM coverage the Metropolitan policy accords Caviness. On 16

October 1995 Caviness, pursuant to N.C.R. Civ. P. 12(c), made a motion for judgment on the pleadings which the trial court granted on the same day. In its order, the trial court, relying on N.C. Gen. Stat. § 20-279.21(b)(4) (1991), concluded the Metropolitan policy provided one million dollars in UIM coverage from 25 January 1992 to 16 March 1992, at which time Caviness selected UIM coverage in the amounts detailed above.

On appeal Metropolitan contends the trial court erred by granting Caviness' motion for judgment on the pleadings because: (1) Caviness selected UIM coverage in the amount of $100,000; (2) section 279.21(b)(4) mandates, absent selection or rejection, that UIM coverage should be equal to the amount of liability coverage; (3) the pleadings disclose issues of fact; and (4) the trial court lacked subject matter jurisdiction.

I.

[1] We first consider Metropolitan's allegation the trial court lacked subject matter jurisdiction to enter the present declaratory judgment because there was no actual controversy between the parties.

If an actual controversy exists between parties, it is well settled that a declaratory judgment action is an appropriate mechanism for resolving the extent of coverage provided by an insurance contract. *Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 100-101, 365 S.E.2d 172, 174, *disc. review denied*, 322 N.C. 607, 370 S.E.2d 248 (1988). The "actual controversy" requirement is satisfied if "litigation appear[s] unavoidable." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (citations omitted). "Mere apprehension or the mere threat of an action or a suit is not enough." *Id.* at 234, 316 S.E.2d at 62.

In the present case, a personal injury action was pending against Nifong when the trial court granted judgment on the pleadings to Caviness. Although no final judgment had been entered in the underlying personal injury action, Metropolitan is liable, to the limit of its UIM coverage, for the difference between the total damages awarded and the amount of Nifong's settlement. N.C. Gen. Stat. § 20-279.21(b)(4) (1991). Therefore, an actual controversy exists between Caviness and Metropolitan. *See Smith v. Nationwide Mutual Ins. Co.*, 97 N.C. App. 363, 366-367, 388 S.E.2d 624, 626-627 (1990), *rev'd on other grounds*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

To hold otherwise, as urged by Metropolitan, would deprive Caviness of information necessary for an informed decision on whether to accept a settlement offer or to pursue the underlying personal injury action. *Smith*, 97 N.C. App. at 367, 388 S.E.2d at 627. Such a holding would also ignore the reality that the majority of insurance claims are settled out-of-court. *Id.* Accordingly, as "declaratory [] relief was intended to avoid precisely the 'accrual of avoidable damages to one not certain of [her] rights,' " *id.*, we conclude the trial court had subject matter jurisdiction to enter its declaratory judgment.

II.

[2] Because the trial court had the requisite subject matter jurisdiction, we now turn to the dispositive issue—whether, absent selection or rejection of UIM coverage by the insured, N.C. Gen. Stat. § 20-279.21(b)(4) mandates UIM coverage in an amount equal to the limit of liability coverage, or, alternatively, in the amount of one million dollars.

The 1991 version of section 20-279.21(b)(4) (1991 statute) governs the present action. The 1991 statute provides, in pertinent part:

> (b) Such owner's policy of liability insurance:
>
> . . . .
>
> (4) Shall . . . provide underinsured motorist coverage . . . <u>in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars [] as selected by the policy owner</u>.

N.C. Gen. Stat. § 20-279.21(b)(4) (Cum. Supp. 1991) (emphasis added). As codified, however, the 1991 statute is inherently ambiguous regarding the amount of UIM coverage to accord an insured absent a selection or rejection of such coverage. Put simply, when, as here, an insured fails to select or reject UIM coverage, the 1991 statute provides no more than a range of possible coverage limits—not less than liability coverage but not more than one million dollars.

Any ambiguity in the Financial Responsibility Act (Act), which includes section 20-279.21(b)(4), must be liberally construed to effectuate the Act's remedial purpose—protecting innocent victims of automobile accidents from financially irresponsible motorists.

Insurance Co. v. Insurance Co., 269 N.C. 341, 352, 152 S.E.2d 436, 444 (1967). *See also Hendrickson v. Lee*, 119 N.C. App. 444, 449, 459 S.E.2d 275, 278 (1995) (remedial legislation, like the Act, is to be liberally construed to effectuate its beneficial purpose). Toward that end, we note the underlying purpose of the Act, which remains unchanged even today, "is best served when [every provision of the Act] is interpreted to provide the innocent victim with the *fullest possible protection.*" *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989) (emphasis added).

In *Proctor*, our Supreme Court was confronted with a similar interpretative conundrum—the applicable version of section 20-279.21(b)(4) did not specify the amount of UIM coverage a policy must provide, but rather only indicated UIM coverage was " '*not to exceed*' the policy limits for automobile bodily injury liability as specified in the owner's policy." *Id.* at 223, 376 S.E.2d at 763 (emphasis added). The *Proctor* Court, in an attempt to accord the plaintiff with the greatest possible recovery, found the policy in question provided UIM coverage up to the limit of the liability coverage. *Id.* at 225-226, 376 S.E.2d at 764.

Admittedly, the *Proctor* Court cited a subsequent clarifying amendment as further support for their interpretation of the applicable version of section 20-279.21(b)(4). Metropolitan relies heavily on the *Proctor* Court's use of this "additional evidence" in arguing this Court should likewise consider the 1992 amendments to section 20-279.21(b)(4)[1] in construing the 1991 statute. Although we recognize that, under certain circumstances, clarifying amendments are useful interpretive aids, *see, e.g., Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 435, 470 S.E.2d 552, 555, *disc. review denied*, 343 N.C. 749, 473 S.E.2d 609 (1996), it is readily apparent that Metropolitan's proposed interpretation would accord the innocent victim of an underinsured tortfeasor the minimum level of protection under the 1991 statute. Such a holding clearly contravenes the policy of the Act which, as acknowledged by our Supreme Court, "is best served when the statute is interpreted to provide the innocent victim with the *fullest possible protection.*" *Proctor*, 324 N.C. at 225, 376 S.E.2d at 764 (emphasis added).

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1 The 1992 amendment to section 20-279.21(b)(4) provides, in pertinent part, that, "If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy." 1991 N.C. Sess. Laws (1992 Reg. Sess.) ch. 837, § 9.

Therefore, under *Proctor*, *Insurance Co.*, and *Hendrickson*, we conclude that absent completion of an approved selection or rejection form the insured is, as a matter of law, entitled to one million dollars in UIM coverage. Accordingly, we affirm the trial court's grant of judgment on the pleadings to Caviness.

Finally, we note, after careful review of the present record, that Metropolitan's remaining assignments of error are wholly without merit.

Affirmed.

Judges LEWIS and WALKER concur.

ROBERT A. McCLAIN AND MARCIA G. OSWALD, PLAINTIFFS v. MARY K. WALKER, A/K/A WALKER REALTY ASSOCIATES, RE/MAX REALTY ASSOCIATES, WILMER C. WALDROP, AND VIRGINIA WALDROP, DEFENDANTS

WILMER C. WALDROP AND VIRGINIA WALDROP, THIRD-PARTY PLAINTIFFS v. MARY K. WALKER AND PIERRE L. WALKER, EACH INDIVIDUALLY AND T/A AND D/B/A RE/MAX REALTY ASSOCIATES AND WALKER REALTY ASSOCIATES, THIRD-PARTY DEFENDANTS

No. COA96-188

(Filed 17 December 1996)

1. Trial § 38 (NCI4th)— summary judgment—no genuine issue of material fact

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C.R. Civ. P. 56(c).

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

2. Vendor and Purchaser § 41 (NCI4th)— breach of contract—factual issue regarding description of property—intention of parties—summary judgment improper

Summary judgment in favor of defendant sellers in a breach of contract claim arising from the sale of real estate was im-

proper where the plaintiff buyers' evidence established that an issue of fact existed regarding whether the parties intended for the description in the deed book to control their agreement.

Am Jur 2d, Vendor and Purchaser §§ 380-386.

3. Brokers and Factors § 61 (NCI4th)— fraud—unfair and deceptive trade practices—material misrepresentation—summary judgment improper

The trial court erred in granting defendant realtor's summary judgment motion on the plaintiff buyers' fraud and unfair and deceptive trade practices claim where the plaintiffs' forecast of evidence established that issues of fact existed regarding whether the realtor made material misrepresentations to or concealed material facts from the plaintiffs about the property by using the description of the original tract in the plaintiffs' offer to purchase after two portions of the original tract had been conveyed.

Am Jur 2d, Brokers §§ 83 et seq.

4. Brokers and Factors § 57 (NCI4th)— summary judgment improper—third-party claim—sellers potentially liable as a result of claim against realtor

Summary judgment against the defendant sellers was improper on their crossclaim and third-party claim for negligence against a real estate broker because the plaintiff buyers' breach of contract claim against the defendant sellers could expose the sellers to liability stemming from the realtor's alleged negligence.

Am Jur 2d, Brokers §§ 101 et seq.

Appeal by plaintiffs and third-party plaintiffs from orders entered 31 August 1995 by Judge Russell J. Lanier in Onslow County Superior Court. Heard in the Court of Appeals 23 October 1996.

Chestnutt, Clemmons & Thomas, P.A., by Gary H. Clemmons, for plaintiffs-appellants.

Ellis, Hooper, Warlick, Morgan & Henry, by John P. Swart, for defendants-appellees Waldrops.

Sumrell, Sugg, Carmichael & Ashton, by Scott C. Hart, for defendants-appellees Walkers.

WALKER, Judge.

In April, 1991, Wilmer and Virginia Waldrop (the Waldrops) listed their property for sale with Mary K. Walker (Walker), t/a and d/b/a Re/Max Realty Associates and Walker Realty Associates (Walker Realty). Soon thereafter, Walker brought Robert McClain (McClain), a prospective purchaser, to view the Waldrop property. At that time, Mr. Waldrop pointed out to McClain generally where the boundaries of the property were. On 24 April 1991, McClain and his wife made an offer to purchase the property for $250,000.00. The Offer to Purchase and Contract, prepared by Walker, stated the address of the property as "Rt. 1, Box 217AA, Maple Hill, N.C.," and the description of the property as "Metes & bounds as recorded In Deed Book 573, Page 636, Onslow County Registry." (R. at 55). According to McClain, when he asked why the house and other buildings on the property were not mentioned in the offer, Walker responded that the "metes and bounds description of property is the most accurate description of property that can be used in the real estate industry." (R. at 255).

The McClains' offer was accepted by the Waldrops subject to an appraisal of the property and a change in the occupancy date. The McClains applied for a VA loan which also required that the property be appraised. The VA appraisal was $120,000.00, and Walker told McClain that this appraisal value was low because it only included the house and five acres, and not the entire tract. As a result of the VA appraisal, on 11 June 1991, Walker prepared a second offer to purchase the property in the amount of $235,000.00. This offer, which recited the same address and description as the first offer, was also accepted by the Waldrops.

Prior to the date of the second offer, the Waldrops conveyed two tracts that were included in the description of the original tract recorded in Deed Book 573, Page 636. A 1.0 acre tract, known as the "Dorn tract," was sold on 23 May 1984, and a 1.93 acre tract, known as the "Thorne tract," was sold on 10 May 1991. However, despite the fact that the Waldrops sold these two tracts, the description in both of the McClains' offers to purchase remained the same. McClain maintains that he was never informed by Walker or the Waldrops that the description contained in his offers did not include the Dorn and Thorne tracts, and that he believed he purchased all the property described in Deed Book 573, Page 636.

The McClains filed this action against Walker individually, Walker Realty, and the Waldrops for breach of contract, fraud, and unfair and

deceptive trade practices. The Waldrops filed a crossclaim and third-party complaint against Mary and Pierre Walker individually and Walker Realty alleging negligence in the preparation of the second offer to purchase and seeking contribution or indemnity. Subsequently, the trial court ordered the McClains to provide a more definite statement in support of their claims of fraud and unfair and deceptive trade practices by the Waldrops. In their statement, the McClains excluded any fraud or unfair and deceptive trade practices claims against the Waldrops. After a hearing, the trial court granted summary judgment in favor of the Waldrops on the McClains' breach of contract claim and in favor of Walker and Walker Realty on the McClains' fraud and unfair and deceptive trade practices claims. The trial court also granted summary judgment in favor of the Walkers and Walker Realty on the Waldrops' crossclaim and third-party complaint.

The McClains contend the trial court erred in granting summary judgment arguing that an issue of fact exists regarding whether the Waldrops, through their selling agent, Walker, breached their contract with the McClains to sell the property described in Deed Book 573, Page 636, and also that Walker knowingly made material misrepresentations to or concealed material facts from the McClains about this property by using the description of the original Waldrop tract in the McClains' offers to purchase after the Dorn and Thorne tracts had been conveyed. Additionally, the Waldrops contend the trial court erred by granting summary judgment on their crossclaim and third-party complaint because an issue of fact exists as to whether Walker was negligent in the preparation of the second offer to purchase.

[1] Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Builders Supply Co. v. Eastern Associates*, 24 N.C. App. 533, 536, 211 S.E.2d 472, 474-75 (1975). In passing on a motion for summary judgment, the trial court "must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Snipes v. Jackson*, 69 N.C. App. 64, 72, 316 S.E.2d 657, 661, *appeal dismissed and cert. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984).

[2] At summary judgment, the evidence presented, when viewed in the light most favorable to the McClains, established that an issue of fact exists regarding whether the parties intended for the description in Deed Book 573, Page 636 to control their agreement.

> Where issues surrounding the interpretation of the terms of a contractual agreement are concerned, the generally accepted rule is that the intention of the parties controls, and the intention can usually be determined by considering the subject matter of the contract, language employed, the objective sought and the situation of the parties at the time when the agreement was reached. . . . [I]f the terms employed are subject to more than one reasonable meaning, the interpretation of the contract is a jury question.

Robertson v. Hartman, 90 N.C. App. 250, 252-53, 368 S.E.2d 199, 200 (1988). Thus, summary judgment on the McClains' breach of contract claim against the Waldrops was improper.

[3] To survive Walker's motion for summary judgment on the claims for fraud and unfair and deceptive trade practices against her and Walker Realty, the McClains only needed to forecast evidence that (1) Walker made a definite and specific representation to McClain that was materially false; (2) Walker made the representation with knowledge of its falsity; and (3) the McClains reasonably relied on the representation to their detriment. *See Kent v. Humphries*, 50 N.C. App. 580, 588, 275 S.E.2d 176, 182, *modified and aff'd*, 303 N.C. 675, 281 S.E.2d 43 (1981). When viewed in the light most favorable to the McClains, the evidence presented established that issues of fact exist regarding whether Walker made material misrepresentations to or concealed material facts from the McClains about the property by using the description of the original Waldrop tract in the McClains' offers to purchase after the Dorn and Thorne tracts had been conveyed. Because the McClains' evidence supported their fraud claim against Walker, it also supported their unfair and deceptive trade practices claims. *Id.* at 589, 275 S.E.2d at 183. Thus, summary judgment on these issues was also improper.

[4] We next address the Waldrops' crossclaim and third-party complaint. Walker, as the Waldrops' selling agent, owed a duty to the Waldrops to exercise the reasonable care and skill ordinarily used by others engaged in a similar undertaking, or face liability for all damages caused by her negligence. *Carver v. Lykes*, 262 N.C. 345, 354-55,

137 S.E.2d 139, 147 (1964). Because the McClains' breach of contract claim against the Waldrops could expose them to liability stemming from Walker's alleged negligence, the Waldrops' claim against the Walkers for negligence must survive. Thus, summary judgment on this issue was also improper.

Reversed.

Judges LEWIS and SMITH concur.

FRANK P. COOKE, JR., AS ADMINISTRATOR OF THE ESTATE OF DOROTHY COOKE, AND FRANK P. COOKE, INDIVIDUALLY, PLAINTIFFS v. JEFFREY TIM GRIGG AND JEANNIE LYNN BEAVER, DEFENDANTS

No. COA96-125

(Filed 17 December 1996)

1. Evidence and Witnesses § 1974 (NCI4th)— report contained circumstances contributing to collision—no objection on hearsay grounds—plaintiff not prejudiced

The trial court did not err by admitting and publishing to the jury the highway patrol officer's accident report without striking out that portion of the report entitled "circumstances contributing to the collision" in which the patrolman checked a box marked "unable to determine" as to defendant driver where (a) the plaintiffs did not object on a hearsay ground and this ground was not apparent from the context; and (2) the patrolman did not express an opinion as to how the collision occurred but actually disavowed any assessment of the defendant's fault.

Am Jur 2d, Evidence § 1359.

2. Automobiles and Other Vehicles § 721 (NCI4th)— plaintiffs' contentions not vital and decisive—no error

The court did not fail to give "equal stress" to the parties' contentions as required by N.C. R. Civ. P. 51(a) by its refusal to state plaintiffs' contention that defendant operated his vehicle after suffering from blackout and dizzy spells in the past without regard to the consequences a potential blackout would have on his driving because the court's instruction on plaintiffs' con-

tention about defendant's failure to keep his vehicle under proper control was inclusive of the refused instruction.

Am Jur 2d, Automobiles and Highway Traffic § 1120.

3. Automobiles and Other Vehicles § 536 (NCI4th)— driver's incapacities unforeseeable—defendant not predisposed to blackouts

There was sufficient evidence that the defendant driver's sudden incapacitation was unforeseeable so that this issue was properly submitted to the jury where the defendant presented evidence which tended to show that, although he had experienced "blackouts" over six years prior to the accident, none of these occurred while he was driving a car. Further, there was medical testimony that the defendant passed out as the result of a "syncopal spell" and that, prior to the accident, there was no reason to believe that defendant was predisposed to have recurrent blackout episodes without warning.

Am Jur 2d, Automobiles and Highway Traffic § 773.

Appeal by plaintiffs from judgment entered 21 July 1995 by Judge Raymond A. Warren in Gaston County Superior Court. Heard in the Court of Appeals 9 October 1996.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for plaintiffs-appellants.

Burton & Sue, L.L.P., by Walter K. Burton and James D. Secor, III, for defendant-appellee Grigg.

LEWIS, Judge.

On 5 July 1994, Dorothy Cooke was fatally injured in an automobile accident with defendant Jeffrey Tim Grigg when Grigg's vehicle suddenly crossed a median and struck Cooke's vehicle. The evidence showed that, at the time of the accident, Grigg "blacked out" and lost control of his vehicle.

On 23 November 1994, plaintiffs filed this wrongful death action against Grigg and Jeannie Lynn Beaver, the vehicle owner. The case was tried with a jury at the 18 July 1995 Civil Session of Gaston County Superior Court, Judge Raymond A. Warren presiding. During the trial, plaintiffs took a voluntary dismissal of their claims against defendant Beaver. The jury found that Dorothy Cooke's death was not

caused by the negligence of defendant Grigg. On 21 July 1995, the court entered judgment in favor of defendant Grigg. Plaintiffs appeal from the judgment.

[1] First, plaintiffs contend that the trial court erred by admitting and publishing to the jury the highway patrol officer's accident report without striking out that portion of the report entitled "circumstances contributing to the collision." In this portion of the report, the patrolman checked a box marked "unable to determine" as to defendant Grigg. Plaintiffs assert that this was inadmissible opinion testimony.

Both of the cases cited by plaintiffs, *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198, *disc. review denied*, 322 N.C. 610, 370 S.E.2d 257 (1988), and *Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993), dealt with hearsay objections to police accident reports. Here, plaintiffs did not object on a hearsay ground and this ground was not apparent from the context. Thus, the hearsay issue has not been preserved for our review. *See* N.C.R. App. P. 10(b)(1) (1996); *State v. Howell*, 335 N.C. 457, 471, 439 S.E.2d 116, 124 (1994).

However, *Wentz* also deals with the admissibility of a patrolman's opinion in his accident reports, *see Wentz*, 89 N.C. App. at 39, 365 S.E.2d at 201, an issue properly preserved by plaintiffs. In *Wentz*, the Court concluded that the patrolman did not express an opinion as to how the collision occurred either in the reports or in his testimony and that he actually disavowed any assessment of the plaintiff's fault. *Id.* at 40, 365 S.E.2d at 201-202. For this reason, the court held that the plaintiff was not prejudiced by the reports. *Id.*

Here, we find the response "unable to determine" also is not an expression of an opinion by the patrolman. At most, this response only indicates the patrolman's lack of an opinion as to defendant Grigg's role. Plaintiffs' first assignment of error is without merit.

[2] Plaintiffs also contend that the court failed to give "equal stress" to the parties' contentions as required by N.C.R. Civ. P. 51(a). We disagree.

The court instructed the jury that plaintiffs contended that defendant was negligent by failing to use ordinary care by failing to keep his vehicle under proper control. Plaintiffs also asked the trial judge to state their contention that defendant Grigg operated his vehicle after suffering from blackout and dizzy spells in the past without regard to the consequences a potential blackout would have on

his driving. He refused ruling that his statement of plaintiffs' contention regarding defendant Grigg's failure to keep his vehicle under proper control was adequate because it was inclusive of the other requested contention. We agree.

Furthermore, in the cases relied upon by plaintiffs, *Dobson v. Honeycutt*, 78 N.C. App. 709, 338 S.E.2d 605 (1986), and *Daniels v. Jones*, 42 N.C. App. 555, 257 S.E.2d 120, *disc. review denied*, 298 N.C. 567, 261 S.E.2d 120 (1979), the trial court failed to summarize the plaintiffs' contentions as to vital and decisive issues in the case. *See Dobson*, 78 N.C. App. at 713-14, 338 S.E.2d at 607-608; *Daniels*, 42 N.C. App. at 559, 257 S.E.2d at 122-23. This type of omission did not occur here. Plaintiffs' second assignment of error is without merit.

[3] In their third assignment of error, plaintiffs contend that defendant produced insufficient evidence that the sudden incapacitation experienced by defendant Grigg was unforeseeable and that, therefore, the defense of sudden incapacitation should not have been submitted to the jury. We disagree.

A party asserting the defense of sudden incapacitation has the burden to produce evidence showing that the incapacitation was unforeseeable. *Mobley v. Estate of Johnson*, 111 N.C. App. 422, 424-25, 432 S.E.2d 425, 427 (1993). At trial, defendant Grigg presented evidence which tended to show that, although he had experienced "blackouts" over six years prior to the accident, none of these occurred while he was driving a car but under very different circumstances. In addition, since these "blackouts" occurred over six years prior to the accident, there was evidence to support the conclusion that it was not foreseeable that defendant Grigg would experience a blackout on the day of the accident.

There was also medical testimony to support the conclusion that the symptoms defendant Grigg experienced just prior to "blacking out" that day were too vague and nonspecific to put him on immediate notice that he was going to lose consciousness. Several of the symptoms he experienced prior to blacking out were different from those he had experienced prior to the blackouts over six years earlier. In addition, his doctor testified that defendant Grigg passed out as the result of a "syncopal spell" and that, prior to the accident, there was no reason to believe that defendant Grigg was predisposed to have recurrent blackout episodes without warning.

As there was sufficient evidence that defendant Grigg's sudden incapacitation was unforeseeable, plaintiffs' third assignment of error is without merit.

No error.

Judges WALKER and MARTIN, Mark D. concur.

LARRY E. HAND, PLAINTIFF v. CONNECTICUT INDEMNITY CO., DEFENDANT

LARRY E. HAND, PLAINTIFF v. CANAL INSURANCE COMPANY, DEFENDANT

No. COA95-1437

(Filed 17 December 1996)

Insurance § 582 (NCI4th)— interstate motor carrier—truck accident—injury to employee—employee exclusion clauses in carrier's liability policies

Federal law, which required as a condition for an I.C.C. permit or certificate that the interstate carrier provide insurance or other security sufficient to pay for a judgment against the carrier for injuries to an individual resulting from the negligent operation of motor vehicles, 49 U.S.C. § 10927, did not require coverage of an injured employee as an "individual" and did not render the employee exclusion clauses in the carrier's motor vehicle insurance policies invalid as to an employee injured in a truck accident even though the carrier was exempt from the N.C. Financial Responsibility Act and federal law did not require the carrier to have workers' compensation insurance.

Am Jur 2d, Automobile Insurance §§ 279 et seq.

Appeal by plaintiff from order signed 4 October 1995 and from judgment entered 6 October 1995 by Judge W. Steven Allen in Guilford County Superior Court. Heard in the Court of Appeals 8 October 1996.

Gordon & Nesbit, P.L.L.C., by L. G. Gordon, Jr. and Thomas L. Nesbit; and David Botchin, for plaintiff.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Dewey W. Wells and Mary S. Pollard, for defendant Connecticut Indemnity Co.; Henson & Henson, L.L.P., by Perry C. Henson, for defendant Canal Insurance Company.

LEWIS, Judge.

Upon motion of plaintiff and by order filed 8 February 1996, this Court has consolidated these appeals, both of which arise out of the same accident and present a single, identical issue for review.

In 1993, Larry E. Hand worked as a truck driver for S.C.A.T.S. Carriers, Inc. ("SCATS"), an interstate motor carrier. On 17 March 1993, Hand was seriously injured in a highway accident which occurred while he and the driver of the truck, also a SCATS employee, were making deliveries for SCATS. SCATS did not have workers' compensation insurance coverage. However, it did have two motor vehicle liability insurance policies, one issued by Connecticut Indemnity Co. ("Connecticut") and one issued by Canal Insurance Company ("Canal").

Hand filed these declaratory judgment actions against Canal and Connecticut seeking a finding that he was covered under the policies. The trial court granted summary judgment for Canal and Connecticut. Plaintiff appeals.

The sole issue on appeal is whether, as a matter of law, federal law renders the employee exclusion clauses in the Canal and Connecticut policies invalid and unenforceable against plaintiff.

All parties agree that, at the time of the accident, the insurance coverage issued by Canal and Connecticut to SCATS was required by 49 U.S.C. § 10927 (1993) and that the SCATS vehicle was exempt from the North Carolina Motor Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. section 20-279.1 *et. seq.*, because it was operated under an Interstate Commerce Commission ("ICC") permit or certificate. *See* N.C. Gen. Stat. § 20-279.32 (1993).

49 U.S.C. § 10927 required, as a condition for an ICC permit or certificate, that an interstate carrier such as SCATs provide "a bond, insurance policy, or other type of security . . . sufficient to pay . . . for each final judgment against the carrier for bodily injury to, or death

of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit . . . ." 49 U.S.C. § 10927 (1993) (repealed by the ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 804 (1995)).

Citing *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 313 S.E.2d 856, *disc. review denied*, 311 N.C. 306, 317 S.E.2d 682 (1984), plaintiff asserts that 49 U.S.C. § 10927 required coverage of an injured employee as an "individual." We disagree. *Smith* dealt with the application of the North Carolina Financial Responsibility Act which plaintiff admits does not apply to the SCATS vehicle. *See Smith*, 67 N.C. App. at 633, 313 S.E.2d at 858. In addition, 49 U.S.C. § 10927 did not contain a provision similar to N.C. Gen. Stat. section 20-279.21(e), the controlling provision in *Smith*. *See id.* at 634, 313 S.E.2d at 859. We also note that the employee exclusions contained in the Canal and Connecticut policies conformed to the 49 C.F.R. § 387.15 approved endorsement form which includes an employee exclusion clause. *See* 49 C.F.R. § 387.15 (October 1994).

The facts of this case reveal an unfortunate gap. In this context, the federal laws require liability insurance but not workers' compensation insurance. North Carolina law requires workers' compensation insurance but has no provision covering workers who are injured on the job when bankrupt employers have not secured insurance.

It is a matter the legislature could correct, or better still, the industry could rectify. There could be a mechanism whereby the industry could provide for employees who are injured on the job with uninsured and bankrupt companies. The legal profession assesses its members (even judges) to provide for innocent clients who fall victim to the malefactions of unworthy attorneys. Some provision should be made to cover such blameless victims as the plaintiff.

Since we conclude that 49 U.S.C. § 10927 did not invalidate or limit the employee exclusion clauses in the policies issued by defendants, the trial court's orders granting summary judgment for defendants are affirmed.

Judges WALKER and MARTIN, Mark D. concur.

WILLIAM TED GOSSETT, ROBERT M. ABEE AND WIFE, JUDY C. ABEE, PETITIONERS v. CITY OF WILMINGTON, NORTH CAROLINA, ACTING THROUGH ITS CITY COUNCIL, RESPONDENT

No. COA96-306

(Filed 17 December 1996)

Zoning § 114 (NCI4th)— special use district proceedings are quasi-judicial—erroneous dismissal of writ of certiorari

The denial of plaintiffs' special use district application by the Wilmington City Council was reviewable in the superior court pursuant to a writ of certiorari since the City of Wilmington's special use district proceedings are quasi-judicial rather than legislative because the Wilmington City Charter enacted by the legislature specifically provides for judicial review by certiorari of the City Council's special use district zoning decisions.

Am Jur 2d, Certiorari §§ 16, 17, 19, 22; Municipal Corporations, Counties, and Other Political Subdivisions § 144; Zoning and Planning § 1025.

Appeal by petitioners from order entered 2 January 1996 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 20 November 1996.

Kenneth A. Shanklin, for petitioners-appellants.

Thomas C. Pollard, City Attorney for City of Wilmington, for respondent-appellee.

WYNN, Judge.

Petitioners own a tract of land zoned for residential use within the City of Wilmington ("the City") upon which they proposed to construct forty condominium units. The property in question lies within the South 17th Street Land Use Plan which requires that all rezoning requests to develop land occur through a petition and application under the Special Use Districts provisions (Article XI) of the City Ordinances of Wilmington ("Wilmington Code"). Section 19-122 of the Wilmington Code provides:

> If a property owner . . . believes that development of the property in a specific manner will lessen adverse effects upon surrounding properties or otherwise make the rezoning more in accordance

> with the policies for growth and development . . . he may apply for rezoning to the appropriate special use district and shall simultaneously apply for a special use permit specifying the nature of his proposed development.

Petitioners, in compliance with the Wilmington Code, applied to have a 3.84 acre site rezoned from an R-15 Residential District to a Multi-Family Residential-Medium Density Special Use District in order to construct the proposed condominiums. The City's Planning Commission approved petitioners' Special Use District Application by a vote of six to zero. The application was then presented to the City Council at a public hearing. Despite the recommendation of the Planning Commission, the City Council rejected petitioners' application and by a vote of five to two denied the requested rezoning.

Petitioners sought review of the City Council's actions by filing a petition for a writ of certiorari in superior court. In response, the City moved to dismiss on the grounds that the court lacked subject matter jurisdiction contending that consideration of a rezoning application is a legislative action and a petition for a writ of certiorari is restricted to the review of administrative or quasi-judicial actions, and not legislative actions. The court granted the City's motion to dismiss and petitioners appeal.

The determining issue on appeal is whether the City of Wilmington's special use district proceedings are quasi-judicial in nature thereby allowing review in superior court via a writ of certiorari. Finding that they are, we reverse.

The Wilmington Code provides that "[a] properly submitted application for a special use district incorporates a petition for rezoning and an application for a special use permit into one proceeding and thus constitutes special use district proceedings." Wilmington, N.C., Code § 19-124(b) (1984). Since "the writ of certiorari will lie to review only those acts which are judicial or quasi judicial in their nature" and "does not lie to review or annul any judgment or proceeding which is legislative, executive, or ministerial rather than judicial," *In re Markham*, 259 N.C. 566, 569, 131 S.E.2d 329, 332, *cert. denied*, 375 U.S. 931, 11 L. Ed. 2d 263 (1963), this Court must determine whether the City's special use district proceedings are quasi-judicial or legislative acts. To do so we need look no further than the City's Charter, enacted by the legislature of this state, which provides:

> If the petitioner elects to petition for special use district zoning, the petitioner must specify the actual use or uses intended for the property specified in the petition, and the intended use or uses must be permitted in the corresponding general use district either by right or by special use. If the petition is for special use district zoning, the city council is to approve or disapprove the petition on the basis of the uses requested. If the petition is approved, the city council shall issue a special use permit authorizing the requested use or uses with such reasonable conditions as the city council determines to be desirable in promoting public health, safety and [the] general welfare. *Every decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari.*

Wilmington Code, § 23.6 (emphasis added).

Since the North Carolina Legislature enacted the Wilmington City Charter including the cited provision allowing for judicial review by certiorari of the city council's special use district zoning decisions, we hold that it effectively determined the City's special use district zoning proceedings to be quasi-judicial. Thus, the superior court had subject matter jurisdiction over petitioner's petition for a writ of certiorari and acted erroneously in dismissing it. Accordingly, we reverse.

Reversed and remanded.

Judges GREENE and MARTIN, John C. concur.

LEE MILLER, JR. v. PAUL RANDOLPH AND RANDOLPH ENTERPRISES OF PITT COUNTY, INC.

No. COA96-291

(Filed 17 December 1996)

Limitations, Repose, and Laches § 55 (NCI4th)— breach of employment contract—three-year statute of limitations

The trial court committed reversible error in dismissing plaintiff's civil action against his employer to recover a commission and bonus under his contract of employment by applying N.C.G.S. § 1-55(1), which provided a six-month statute of limita-

tions for civil actions involving written transfers of future or unearned employment compensation claims, rather than N.C.G.S § 1-52(1), the three-year statute of limitations for breach of contract actions.

Am Jur 2d, Master and Servant §§ 74, 84.

Employee's rights with respect to compensation or bonus where he continues in employer's service after expiration of contract for definite term. 53 ALR2d 384.

Comment note on promise by employer to pay bonus as creating valid and enforceable contract. 43 ALR3d 503.

Appeal by plaintiff from order entered 17 January 1996 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 20 November 1996.

Everett, Warren, Harper & Swindell, by Stephen D. Kiess, for plaintiff-appellant.

Horne and Brown, L.L.P., by Stephen F. Horne, II, for defendant-appellee.

MARTIN, John C., Judge.

Plaintiff commenced this action on 11 July 1995. In his complaint and amended complaint, plaintiff alleged he had entered into an employment contract with defendants to work as site construction manager. Pursuant to this employment contract, plaintiff's compensation included a weekly salary of $400, a commission of one percent (1%) of the sales price of any new house upon which plaintiff worked, and an additional bonus upon completion of the tenth house upon which plaintiff worked.

Plaintiff alleged that he began work in January, 1994, and assisted in the construction of thirteen new homes, all of which were eventually sold. He alleged that his employment with defendant was terminated in September 1994, and that defendants did not pay him the commission and bonus to which he was entitled.

Defendants moved to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, contending the action was barred by the six month statute of limitations contained in G.S. § 1-55(1). Defendant's motion to dismiss was granted. Plaintiff appeals.

Plaintiff contends the trial court committed reversible error by ruling that this civil action was time barred by G.S. § 1-55(1), the six-month statute of limitations for civil actions involving written transfers of future or unearned employment compensation claims, rather than G.S. § 1-52(1), the three-year statute of limitations for breach of contract actions. We agree.

The trial court applied G.S. § 1-55(1) to the allegations of the complaint and dismissed the action because it was brought more than six months after plaintiff entered into the contract of employment. G.S. § 1-55(1) provides for a six-month statute of limitations "[u]pon a contract, . . . or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitations shall commence from the date of the execution of such instrument." Defendants contend the trial court ruled correctly because G.S. § 1-55(1) should be properly construed as applying to "a contract . . . affecting . . . wages or any interest therein . . . ." We disagree.

A correct reading of G.S. § 1-55(1) makes clear that "unearned" is a modifier for both "salaries" and "wages," so that the statute is properly read as applying to "a contract . . . affecting . . . unearned salaries or unearned wages . . . ." Application of G.S. § 1-55(1) requires three elements: (1) an instrument transferring or assigning some right to or interest in (2) unearned or future employment compensation (3) to a third party. None of these elements appear in the allegations of plaintiff's complaint or amended complaint; the provisions of G.S. § 1-55(1) do not apply to this breach of contract action.

Limitations of actions for breach of contract are governed by G.S. § 1-52(1), the three-year statute of limitations, which applies to actions "[u]pon a contract, obligation or liability arising out of a contract, express or implied, . . ." with exceptions not pertinent to this case. The statute begins to run when the claim accrues; for a breach of contract action, the claim accrues upon breach. *See Abram v. Charter Medical Corp. of Raleigh*, 100 N.C. App. 718, 398 S.E.2d 331 (1990), *disc. review denied*, 328 N.C. 328, 402 S.E.2d 828 (1991) (three-year statute of limitations for contract actions); *Burkhimer v. Gealy*, 39 N.C. App. 450, 250 S.E.2d 678, *disc. review denied*, 297 N.C. 298, 254 S.E.2d 918 (1979) (breach of contract action regarding "commissions, overrides, infringement of territory, and fringe benefits," held three-year statute of limitations applies beginning from date of

breach for contract actions); *Glover v. First Union National Bank*, 109 N.C. App. 451, 428 S.E.2d 206 (1993) (three-year statute of limitations for employment-related retirement benefits claim).

Plaintiff alleged "defendants entered into an employment contract with plaintiff . . ."; that plaintiff's employment was terminated in September 1994; and that "[d]efendants did not pay plaintiff the commissions due on 12 of the homes upon which plaintiff worked; defendants never paid plaintiff the agreed upon bonus beginning with the 10th house upon which plaintiff worked." Although the date of breach is not necessarily the date of termination, *Burkhimer*, 39 N.C. App. 450, 250 S.E.2d 678, this action was clearly brought within three years of defendants' breach of their contract with plaintiff, and thus plaintiff's claim is not barred by the statute of limitations. The judgment dismissing this action is reversed and this cause is remanded to the trial court for further proceedings.

Reversed and remanded.

Judges GREENE and WYNN concur.

MATTHEW ALLEN WORSHAM, PLAINTIFF v. RICHBOURG'S SALES AND RENTALS, INC., DEFENDANT/THIRD-PARTY PLAINTIFF v. THE McKENZIE COMPANY OF PINEHURST, THIRD-PARTY DEFENDANT

No. COA96-421

(Filed 17 December 1996)

Judgments § 27 (NCI4th)— dismissed appeal— written judgment constitutes entry

The Court of Appeals dismissed plaintiff's appeal because judgment had not been entered where the parties and the trial court mistakenly believed that the court's decision announced in open court on 4 October 1994, but never reduced to writing, constituted entry of judgment. Judgments subject to entry on or after 1 October 1994 are governed by amended Rule 58 of the Rules of Civil Procedure which provides that entry of judgment occurs when it is reduced to writing, signed by the judge, and filed with the clerk of court. N.C.G.S. § 1A-1, Rule 58.

Am Jur 2d, Judgments § 78.

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

What constitutes entry of judgment within meaning of Federal Rules of Civil Procedure 58. 10 ALR Fed. 709.

Appeal by plaintiff from judgment rendered 4 October 1995 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 25 November 1996.

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

Yates, McLamb & Weyher, L.L.P., by Derek M. Crump and Travis K. Morton, for defendant-appellee Richbourg's Sales and Rentals, Inc.

Templeton & Raynor, P.A., by Kenneth R. Raynor and Marcey P. Rose, for third-party defendant-appellee The McKenzie Company of Pinehurst.

JOHNSON, Judge.

Plaintiff instituted this action on 20 December 1993 by filing a complaint seeking to recover for injuries that he incurred as a result of the alleged negligence of defendant Richbourg Sales and Rentals, Inc. (defendant). Defendant filed an answer and third-party complaint, seeking indemnification from third-party defendant, the McKenzie Company of Pinehurst. After the third-party defendant filed an answer, the matter was tried before a jury on 4 October 1994. At the close of all of the evidence, defendant renewed its motion for a directed verdict. The court granted the motion, and plaintiff filed written notice of appeal on the following day.

The record on appeal does not contain a written judgment signed by the court. The transcript shows that after allowing the motion, the court indicated to the parties that it did not think a written order signed by the court was necessary, as long as the court's ruling in open court was noted by the clerk. The parties' attorneys concurred with the court. By so thinking, the court and the attorneys were in error.

Had this matter been tried prior to 1 October 1994, the court and parties would have been correct because a notation by the clerk in the minutes of a court's decision announced in open court at that

time constituted entry of judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (1990). Judgments, however, subject to entry on or after 1 October 1994, are governed by amended Rule 58 of the Rules of Civil Procedure which provides that entry of judgment occurs "when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (Cum. Supp. 1995); 1993 N.C. Sess. Laws ch. 594, s.1. The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. *Kirby Building Systems v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990), *reh'g denied*, 328 N.C. 275, 400 S.E.2d 453 (1991). The entry of judgment is the event which vests this Court with jurisdiction. *Searles v. Searles*, 100 N.C. App. 723, 398 S.E.2d 55 (1990). Not only is it not complete for purposes of appeal, but a judgment is also not enforceable between the parties until it is entered. *Id.* Because the judgment from which plaintiff attempts to appeal has not been entered by the trial court, this appeal must be dismissed. *Id.* Once judgment is entered, plaintiff may again appeal.

Appeal dismissed.

Judges WALKER and McGEE concur.

Judge Johnson participated in this opinion prior to his retirement on 1 December 1996.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 DECEMBER 1996

BAKER v. DEESE No. 96-259	Catawba (92CVS2943)	Affirmed
BROWN v. MARINAKIS No. 96-191	Forsyth (91CVD304)	Affirmed in part; and Reversed in part
BRYN v. FORD No. 95-1119	Pamlico (94CVS169)	Affirmed
CALDWELL v. YELVINGTON No. 96-176	Haywood (92CVD952)	Affirmed
CASSADA v. LAY No. 96-692	Buncombe (95CVS407)	No Error
COVINGTON v. COVINGTON No. 94-1389	Durham (93CVD1538)	Affirmed in part; Reversed in part
DAVIS v. DAVIS No. 96-296	Orange (92CVD44)	Affirmed
FOSTER v. HARRELL No. 96-129	Carteret (95CVS592)	Reversed in part; Affirmed in part
HATHOR v. ASKIN No. 95-396	Wake (93CVD5812)	Affirmed
HUZA v. FLANDERS FILTERS No. 96-425	Pitt (95CVS1417)	Affirmed
IN RE BROADY No. 96-733	Northampton (95J24)	Affirmed
IN RE DUQUESNE No. 96-97	Harnett (90JUV051)	Affirmed
IN RE PERRY No. 96-805	Mecklenburg (94J1013)	Affirmed
KRAUSS v. WAYNE COUNTY DSS No. 96-664	Wayne (94CVD2529)	Affirmed
LAING v. LEWIS No. 96-506	New Hanover (95CVS3063)	Appeal Dismissed

Case	County	Disposition
LEMCO MILLS v. INDUSTRIAL RISK INSURERS No. 95-445	Alamance (93CVS192)	Reversed and Remanded
LEWIS v. WATAUGA HOSPITAL No. 93-1133	Watauga (90CVS46)	Reversed and Remanded
METTS v. TURNER No. 96-640	Jones (94CVS73)	Dismissed
MORANCO ENGINEERING CO. v. RANKIN No. 96-55	Rowan (95CVS887)	Affirmed in part; Appeal dismissed in part
PADILLA v. LUSTH No. 96-458	Orange (89CVD542)	Dismissed
PLUMMER v. KEARNEY No. 96-156	Ind. Comm. (967761)	Affirmed
SPENCER v. HICKORY SPRINGS MFG. CO. No. 96-302	Ind. Comm. (270014)	Affirmed
STATE v. ADAMS No. 96-728	Gaston (94CRS32287) (95CRS24234)	No Error
STATE v. BALLEW No. 96-589	Gaston (95CRS5080)	No Error
STATE v. BROWN No. 96-334	Mecklenburg (94CRS49703)	No Error
STATE v. CANERY No. 96-420	Cumberland (94CRS19515) (94CRS19516)	No Error
STATE v. CUPPLES No. 96-426	Cumberland (95CRS6786) (95CRS6787)	No Error
STATE v. GADDIE No. 96-448	Mecklenburg (94CRS66023)	No Error
STATE v. GALAN No. 96-271	New Hanover (93CRS17974)	No Error
STATE v. GARNER No. 96-737	Duplin (95CRS5084) (95CVS5085) (95CRS5087) (95CVS5088)	No Error

STATE v. HOWARD No. 96-774	Mecklenburg (95CRS078897)	New Trial
STATE v. LOCKLEAR No. 96-450	Robeson (91CRS22841) (92CRS23551) (92CRS23518)	Appeal Dismissed
STATE v. LOFTON No. 96-710	Wayne (95CRS8100)	No Error
STATE v. MOORES No. 96-818	Guilford (94CRS33295)	No error in trial. Denial of motion affirmed.
STATE v. RHODES No. 95-1078	Cherokee (93CRS1962) (93CRS1963) (95CRS860)	No error in part; Reversed and remanded for resentencing in part
STATE v. SALTER No. 96-684	New Hanover (95CRS30299)	No Error
STATE v. SCOTT No. 96-878	Robeson (95CRS7682)	Vacated and remanded for resentencing
STATE v. SETTLE No. 96-965	Forsyth (95CRS26243)	No Error
STATE v. SHEPARD No. 96-924	Beaufort (95CRS5846) (95CRS5847) (95CRS6107) (95CRS6121) (92CRS7518) (93CRS3318) (94CRS5368) (94CRS5369) (94CRS5370) (94CRS5371) (94CRS5372) (94CRS5373) (94CRS5374) (94CRS5375) (94CRS5376) (94CRS5377) (94CRS5378) (94CRS5379) (94CRS5380) (94CRS5381)	Appeal Dismissed

STATE v. SLONE No. 96-194	Davidson (94CRS20774)	No Error
STATE v. SMITH No. 96-624	Guilford (95CRS30000) (95CRS30001)	No Error
STATE v. WALKER No. 96-242	Guilford (95CRS42712)	No Error
STATE v. WATERS No. 96-672	Beaufort (95CRS1533)	No Error
STATE v. WILLIAMS No. 96-498	Caswell (95CRS228)	No Error
STATE v. WILSON No. 96-759	Union (95CRS10526) (95CRS10527)	No Error
STATE v. WYNN No. 96-659	Wilson (5CRS10501)	No Error
STEELE v. LEWIS & DAGGETT No. 96-177	Wilkes (95CVS1152)	Affirmed
TAYLOR v. WALTON LEAGUE OF AMERICA No. 95-770	Stokes (94CVS192)	Reversed
UNITED FOODS v. STURGILL No. 96-216	Wilson (94CVS665)	Appeal Dismissed

APPENDIX

ORDER ADOPTING AMENDMENT
TO THE RULES
OF APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendment to the Rules of Appellate Procedure

Rules 3(c), 8(a), 9(b)(5), 11(c), 12(c), 14(a), 15(b), 18(c), 21(c), 21(f), 23(e), 25(a), 26(b), 26(g), Appendix A and Appendix D are hereby amended to read as in the following pages. All amendments shall become effective as follows:

To rules 3, 9, 11, 12 and 25 and Appendixes A and D, immediately upon their adoption.

To rules 8, 14, 15, 18, 21, 23, and 26, on 1 July 1997.

Adopted by the Court in Conference this 6th day of March, 1997. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

Orr, J
For the Court

RULE 3

APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(c) **Time for Taking Appeal.** Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties for the duration of any period of noncompliance with the service requirement of Rule 58 of the Rules of Civil Procedure~~, and~~ or by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision~~, and~~ . The full time for appeal commences to run and is to be computed from the date of compliance with the service requirement of Rule 58 of the Rules of Civil Procedure or from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment n.o.v., whether or not with conditional grant or denial of new trial;

(2) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion under Rule 59 to alter or amend a judgment;

(4) a motion under Rule 59 for a new trial.

If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

RULE 8

STAY PENDING APPEAL

I. ***Stay in Civil Cases.*** When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the Writ of Supersedeas may be made to the appellate

court in the first instance. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

RULE 9

THE RECORD ON APPEAL

(b) ***Form of Record; Amendments.*** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the ~~docketing~~ filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

RULE 11

SETTLING THE RECORD ON APPEAL

(c) ***By Judicial Order or Appellant's Failure to Request Judicial Settlement.*** Within 21 days (35 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely ~~files~~ serves amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have ~~filed~~ served, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or

only one set of appellees proceeding jointly have so ~~filed~~ <u>served</u>, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so ~~filed~~ <u>served</u>, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

RULE 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(c) ***Copies of Record on Appeal.*** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. ~~By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.~~

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

RULE 14

APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

(a) ***Notice of Appeal; Filing and Service.*** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. <u>For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chairman of the Industrial Commission.</u> The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of

entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

RULE 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. 7A-31

(b) ***Same; Filing and Service.*** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. <u>For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission.</u> A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

RULE 18

TAKING APPEAL; RECORD ON APPEAL—COMPOSITION AND SETTLEMENT

(c) ***Composition of Record on Appeal.*** The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record, which shall appear as the first page thereof;

(2) a statement identifying the commission or agency from whose judgment, order or opinion appeal is taken, the session at which the judgment, order or opinion was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency, including a Form 44 for all cases which originate from the Industrial Commission,to be filed with the agency to present and define the matter for determination;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(8) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of

approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(10) assignments of error to the actions of the agency, set out as provided in Rule 10.

RULE 21

CERTIORARI

(c) ***Same; Filing and Service; Content.*** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chairman of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(f) ***Petition for Writ in Post Conviction Matters—Death Penalty Cases.*** A petition for writ of certiorari to review orders of the trial court ~~denying~~ on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within 60 days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within 30 days of service of the petition.

RULE 23

SUPERSEDEAS

(e) ***Temporary Stay.*** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted shall remain in effect until the period for filing a petition for certiorari in the United

States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

RULE 25

PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) ***Failure of Appellant to Take Timely Action.*** If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been ~~docketed~~ filed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

RULE 26

FILING AND SERVICE

(b) ***Service of All Papers Required.*** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal. For cases which arise from the Industrial Commission, a copy shall be served on the Chairman of the Industrial Commission.

(g) ***Form of Papers; Copies.*** Papers presented to either appellate court for filing shall be letter size (8-1/2 x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8-1/2 x 14"). All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than ~~5~~ 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

APPENDIX A

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	Time (days)	From date of	Rule Ref.
Requesting judicial settlement of record	10	last day within which an appellee served could ~~file~~ serve objections, etc.	11(c) 18 (d)(3)

APPENDIX D. FORMS

2. APPEAL ENTRIES

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9~~(b)~~ (a) showing appeal duly taken by ~~written~~ oral notice under App. Rule 3~~(a)~~ (b) or 4(a)~~;~~ and

~~2) judicial approval of the undertaking on appeal required by App. Rule 6; and~~

~~3)~~2) the entry required by App. Rule 9~~(b)~~ (a) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice after the term of court, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

~~Per Tables 1, 2, and 3 of Appendix C,~~ Such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional and serves as authentication of the substance of the entries.

> (Defendant) gave due notice of appeal to the (Court of Appeals)(Supreme Court). ~~Appeal bond in the sum of $ adjudged to be sufficient.~~ (Defendant) shall have 10 days in which to order the transcript, or, in the alternative, 35 days in which to serve a proposed record on appeal on the appellee. (Plaintiff) is allowed ~~15~~ 21 days thereafter within which to serve objections or a proposed alternative record on appeal.

This day of , 19 .

s/
Judge Presiding

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS
ACCOUNTANTS
ACTIONS AND PROCEEDINGS
ADMINISTRATIVE LAW
AGRICULTURE
APPEAL AND ERROR
ARBITRATION AND AWARD
ARREST AND BAIL
ATTORNEYS AT LAW
AUTOMOBILES AND OTHER VEHICLES

BANKS AND OTHER FINANCIAL INSTITUTIONS
BROKERS AND FACTORS

CONSTITUTIONAL LAW
CONTRACTS
CORPORATIONS
COSTS
COURTS
CRIMINAL LAW

DAMAGES
DECLARATORY JUDGMENT ACTIONS
DISCOVERY AND DEPOSITIONS
DIVORCE AND SEPARATION

EMINENT DOMAIN
ESTOPPEL
EVIDENCE AND WITNESSES

FRAUD, DECEIT, AND MISREPRESENTATION
FRAUDS, STATUTE OF

GAS AND OIL

HEALTH
HIGHWAYS, STREETS, AND ROADS
HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS
HOUSING, AND HOUSING AUTHORITIES AND PROJECTS
HUSBAND AND WIFE

INDIGENT PERSONS
INSURANCE
INTENTIONAL INFLICTION OF MENTAL DISTRESS

JUDGMENTS
JURY

LABOR AND EMPLOYMENT
LANDLORD AND TENANT
LIBEL AND SLANDER
LIMITATIONS, REPOSE, AND LACHES

MALICIOUS PROSECUTION
MONOPOLIES AND RESTRAINTS OF TRADE
MORTGAGES AND DEEDS OF TRUST
MUNICIPAL CORPORATIONS

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA
NEGLIGENCE

PARENT AND CHILD
PARTIES
PLEADINGS
PROCESS AND SERVICE
PRODUCTS LIABILITY
PUBLIC OFFICERS AND EMPLOYEES

RAPE AND ALLIED SEXUAL OFFENSES
RECORDS OF INSTRUMENTS, DOCUMENTS, OR THINGS
RETIREMENT

SALES
SCHOOLS
SEARCHES AND SEIZURES
SECURED TRANSACTIONS
SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS
SOCIAL SERVICES AND PUBLIC WELFARE
STATE

TAXATION
TRIAL

UNFAIR COMPETITION OR TRADE PRACTICES

VENDOR AND PURCHASER

WILLS
WORKERS' COMPENSATION

ZONING

ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS

§ 16 (NCI4th). Survival of actions to and against personal representative

A cause of action for negligent medical treatment of a decedent, unrelated to the death, survived the death of the decedent. **Schronce v. Coniglio,** 216.

ACCOUNTANTS

§ 19 (NCI4th). Negligence generally

Summary judgment for defendant in a negligence action arising from personal income tax preparation was improper where plaintiff alleged that defendant breached the standard of care owed by an accountant by failing to verify information regarding plaintiff's bank accounts and offered affidavits from those experienced in accounting that plaintiff had breached the standard of care. **Bartless v. Jacobs,** 521.

Summary judgment for defendant on a contributory negligence claim in an action arising from personal income tax preparation was improper where plaintiff's affidavits raised an issue of fact in that he alleged that he would not have been able to understand the tax returns even if he had read them. **Ibid.**

ACTIONS AND PROCEEDINGS

§ 18 (NCI4th). Discontinuance of actions; commencement on revival of summons

Rule 4 does not require delivery of a summons to the sheriff within 30 days of its issuance or a showing of good faith or excusable neglect for failure to promptly deliver the summons to the sheriff in order for the summons to serve as the basis for the issuance of an alias or pluries summons. **Robinson v. Parker,** 164.

ADMINISTRATIVE LAW

§ 10 (NCI4th). Agency powers and duties to adopt or promulgate rules or regulations

A severability clause set out in the Halifax County Smoking Control Rules was not given effect where the rules were invalid as making distinctions reserved for the legislature. The result of attempting to excise particular provisions would be a regulatory scheme crafted by the judicial branch of government. **City of Roanoke Rapids v. Peedin,** 578.

AGRICULTURE

§ 24 (NCI4th). Commercial fertilizer

The trial court did not err by entering summary judgment for defendants where plaintiffs brought an action arising from the use of fertilizer on a corn crop which had an atypically low yield and the tested fertilizer sample was not obtained from an approved source. **Barber v. Continental Grain Co.,** 310.

APPEAL AND ERROR

§ 89 (NCI4th). Interlocutory orders; what constitutes order affecting substantial right generally

A motion to dismiss an appeal as interlocutory was denied where respondent had refused to consent to a psychological evaluation for his children as a part of a child

APPEAL AND ERROR—Continued

protective services investigation, contending that his objection was based upon his religious beliefs, and the trial court found that respondent had interfered with the investigation without lawful excuse and prohibited further interference. **In re Browning,** 190.

§ 94 (NCI4th). Appealability of particular orders; examinations and depositions

An order finding a proposed deponent in contempt for failure to appear for a deposition and the underlying order upon which the contempt order was based were immediately appealable. **Wilson v. Wilson,** 371.

§ 106 (NCI4th). Appealability of particular orders; orders relating to alimony and child support

The trial court's order setting aside a judgment modifying child support and granting a new trial on the issue of whether there had been a substantial change of circumstances was not immediately appealable. **Banner v. Hatcher,** 439.

§ 107 (NCI4th). Appealability of particular orders; child custody; paternity

An order denying defendant's motion to vacate a previous order which was, in effect, a final determination of child custody was an appealable final judgment on the merits. **Tataragasi v. Tataragasi,** 255.

§ 118 (NCI4th). Appealability of particular orders; summary judgment denied

Denial of a partial summary judgment for defendants in an action arising from an alleged false imprisonment by officers was appealable where defendants had raised immunity. **Moore v. Evans,** 35.

Defendant engineering company's appeal from the trial court's partial denial of summary judgment as to plaintiff worker's claim that defendant breached a statutory duty to plaintiff was dismissed as interlocutory. **Tinch v. Video Industrial Services,** 391.

The denial of a summary judgment for defendant school board was immediately appealable although interlocutory where the basis for the motion was governmental immunity. **Hallman v. Charlotte-Mecklenburg Bd. of Educ.,** 435.

§ 121 (NCI4th). Appealability of particular orders; summary judgment; multiple claims or parties; appeal dismissed

Plaintiff worker's appeal from the trial court's order granting summary judgment in favor of defendant video company as to plaintiff's Woodson claim based on alleged willful and wanton misconduct was dismissed as interlocutory where the only claim left for trial is plaintiff's claim that defendant engineering company's breach of a statutory duty caused plaintiff's injuries. **Tinch v. Video Industrial Services,** 391.

§ 122 (NCI4th). Appealability of particular orders; danger of inconsistent verdicts; right to trial before same trier of fact

Plaintiff's appeal of a summary judgment for defendant in a negligence action against an accountant arising from personal income tax preparation was not interlocutory where the trial court certified that there was no just reason for delay and plaintiff's claim for professional negligence and defendant's counterclaim for unpaid fees are sufficiently intertwined so that a fair adjudication of one cannot be had without a contemporaneous presentment of the other. **Bartlett v. Jacobs,** 521.

APPEAL AND ERROR—Continued

§ 150 (NCI4th). Preserving constitutional issues

Plaintiffs' constitutional arguments regarding testing requirements for instituting suit under the Fertilizer Law were not addressed where no constitutional claim appeared in plaintiffs' pleadings or in any other documentation filed with the trial court prior to its ruling. **Barber v. Continental Grain Co.,** 310.

§ 157 (NCI4th). Appeal permitted without prior motion, objection, or request generally

The plain error rule does not apply to child custody cases, and it was thus not plain error for the trial court to conduct a hearing in camera in a child custody case. **Raynor v. Odom,** 724.

§ 175 (NCI4th). Mootness of other particular questions

Mootness did not preclude review of the merits where the Department of Human Resources voluntarily ceased its challenged practice of postponing the disqualification period of food stamp recipients in the face of plaintiff's appeal and in the face of the USDA's concordant decision to cease its similarly challenged practice. **Thomas v. N.C. Dept. of Human Resources,** 698.

§ 209 (NCI4th). Content of notice of appeal

Plaintiff's attempted appeal of a summary judgment was dismissed where plaintiff had designated in his notice of appeal a directed verdict as the order from which appeal was being taken; Appellate Rule 3(d), which requires that a party specify the judgment or order from which appeal is taken, is jurisdictional. **Smith v. Moody,** 203.

§ 340 (NCI4th). Assignments of error generally; form and record references

The Court of Appeals addressed defendant's argument in the interest of justice even though defendant did not comply with Appellate Rule 10(c). **State v. Benjamin,** 734.

Plaintiff did not properly preserve an issue for appeal where she did not include the issue within an assignment of error. **Raynor v. Odom,** 724.

§ 362 (NCI4th). Omission of necessary part of record; indictment, verdict, and judgment

The Court of Appeals dismissed defendant's objection to the trial court's finding as a factor in aggravation that defendant took advantage of a position of trust or confidence where she failed to include the Felony Judgment Findings of Factors in Aggravation and Mitigation of Punishment in the record on appeal. **State v. Weary,** 754.

§ 367 (NCI4th). Record on appeal; amendments and additions

Plaintiffs' argument regarding compliance with the Fertilizer Law and collecting samples as a precondition to claims arising from the use of fertilizer was not discussed where their motion to amend the record to include assignments of error upon which the argument was based was denied. **Barber v. Continental Grain Co.,** 310.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

Plaintiffs abandoned the issue of the propriety of summary judgment for defendants on plaintiffs' claim for punitive damages. **Helms v. Holland,** 628.

Assignments of error that defendant failed to bring forth or argue in his brief were deemed abandoned. **State v. Benjamin,** 734.

APPEAL AND ERROR—Continued

Assignments of error not specifically brought forth or argued are deemed abandoned. **Raynor v. Odom,** 724.

§ 426 (NCI4th). Form and content of brief; page limitations

The cost of printing defendant's brief was taxed to defendant's attorney where violations of appellate rules allowed defendant to gain additional pages of text in the brief. **Roberts v. First-Citizens Bank and Trust Co.,** 713.

§ 447 (NCI4th). Issues first raised on appeal

Plaintiff could not argue on appeal a theory not raised in the trial court. **Richardson v. BP Oil Co.,** 509.

§ 486 (NCI4th). Findings or judgments on findings generally

No prejudice resulted in the trial court's finding which misstated the date of service of plaintiff's summons and complaint or in the trial court's finding which incorporated documents by reference. **Starco, Inc. v. AMG Bonding and Ins. Services,** 332.

Where plaintiff failed to object to the introduction of affidavits and reports during an in camera hearing, plaintiff could not thereafter object to findings based on that evidence. **Raynor v. Odom,** 724.

§ 510 (NCI4th). Frivolous appeals in appellate division

A request for sanctions for a frivolous appeal was denied. **Howerton v. Grace Hospital, Inc.,** 199.

ARBITRATION AND AWARD

§ 39 (NCI4th). Confirmation of award

Where defendant homeowners insurer moved for confirmation of the appraisers' report in an arbitration proceeding, the trial court could not simply deny the motion but was required to confirm the award, to vacate the award, or to modify the award and confirm the award as modified. **Hooper v. Allstate Ins. Co.,** 185.

ARREST AND BAIL

§ 69 (NCI4th). Arrest by law enforcement officer without a warrant; other identifying characteristics showing probable cause

SBI agents had probable cause to arrest defendant for trafficking in cocaine where the evidence revealed that the agents determined that defendant conformed to the drug courier profile, they confirmed that he was the person about whom they had received a tip, defendant made prolonged eye contact with the officers after deboarding and quickly heading toward an airport exit, an agent noticed a round rigid cookie shaped object under defendant's clothes while asking for identification, the agents were aware of defendant's past criminal conduct, and defendant attempted to flee when the agents seized his bag and again when they tried to arrest him. **State v. Hendrickson,** 150.

§ 136 (NCI4th). False arrest; actions against arresting officers

The trial court properly denied an officer's motion for partial summary judgment in his individual capacity with respect to claims of false imprisonment and malicious prosecution arising from an arrest where there was a genuine issue of material fact as to whether the officer had probable cause to arrest plaintiff. **Moore v. Evans,** 35.

ATTORNEYS AT LAW

§ 55 (NCI4th). Compensation; reasonableness of fee

The trial court erred by not making findings of fact as to whether plaintiffs' attorney's fees were reasonable in an action arising from a condominium assessment. **Brookwood Unit Ownership Assn. v. Delon,** 446.

§ 78 (NCI4th). Conflict of interest

The findings and conclusions made by the Disciplinary Hearing Commission of the North Carolina State Bar in disbarring appellant for a conflict of interest were supported by sufficient evidence. **N.C. State Bar v. Maggioli,** 22.

AUTOMOBILES AND OTHER VEHICLES

§ 433 (NCI4th). Liability of motor vehicle operator; injuries occurring as passenger exits vehicle

The jury could properly find that defendant breached his duty of care where the evidence tended to show that defendant offered the seven-year-old plaintiff a ride to his grandparents' home, plaintiff rode in the open bed of defendant's truck, defendant failed to stop at the grandparents' home but maintained a constant speed as he passed the home, and plaintiff jumped from the truck as it passed the home and was injured. **Jacobsen v. McMillan,** 128.

§ 115 (NCI4th). Mandatory prehearing license revocation

The revocation of defendant's driver's license under G.S. 20-16.5 and the subsequent conviction of defendant for DWI did not violate the prohibition against double jeopardy. **State v. Rogers,** 364.

§ 130 (NCI4th). Surrender of license

In an action involving revocation of a driver's license as a result of driving while impaired, the trial court erred by holding that petitioner's second conviction did not constitute a moving violation during a period of license suspension where petitioner had been stopped for driving while impaired but had been unable to locate his license card, the magistrate had issued an order revoking petitioner's license, and petitioner had been stopped for driving while impaired again the next morning. Revocation or suspension is the termination of the privilege to drive; the revocation on the first stop took effect immediately upon issuance of the magistrate's order. **Eibergen v. Killens,** 534.

§ 227 (NCI4th). Registration and title; salvage or scrap vehicles

The trial court properly denied defendants' motion for judgment notwithstanding the verdict in an action arising from the sale of a previously wrecked van where defendants had argued that they were in compliance with the statutory process due to a DMV inspector's examination of the van and verification of the cost of repair parts and the use of those parts in the repair of the van. **Wilson v. Sutton,** 170.

§ 536 (NCI4th). Condition of driver; illness or loss of consciousness

There was sufficient evidence that the defendant driver's sudden incapacitation was unforeseeable so that this issue was properly submitted to the jury although defendant had experienced blackouts six years prior to the accident. **Cooke v. Grigg,** 770.

AUTOMOBILES AND OTHER VEHICLES—Continued

§ 721 (NCI4th). Instructions to jury; giving equal stress to contentions of parties

The court did not fail to give equal stress to the parties' contentions by its refusal to state plaintiffs' contention about defendant's operation of his vehicle after suffering from blackout and dizzy spells in the past where the court's instruction on plaintiffs' contention about defendant's failure to keep his vehicle under proper control was inclusive of the refused instruction. **Cooke v. Grigg,** 770.

§ 766 (NCI4th). Instructions; sudden emergency brought about by own negligence

Defendant was not entitled to a sudden emergency instruction where the evidence showed that she lost control of her automobile on a rainy day after striking a puddle of water on the road. **Banks v. McGee,** 32.

§ 813 (NCI4th). Driving under influence of impairing substance; requirement of alcohol test

Though the arresting officer's failure to administer a second Alco-sensor test may have rendered the evidence inadmissible at trial, the results of the test could be used by the officer to form probable cause. **State v. Rogers,** 364.

§ 834 (NCI4th). Driving under influence of impairing substance; legality of arrest; effect of probable cause

An officer had probable cause to arrest defendant for driving while impaired where defendant stopped his vehicle in an intersection after being directed to turn by the officer, the officer detected a strong odor of alcohol on defendant's breath, and the officer administered an Alco-sensor test to defendant which revealed an alcohol concentration of .13. **State v. Rogers,** 364.

§ 849 (NCI4th). Driving under influence of impairing substance; proof of highway and public vehicular area

A town's adoption of an ordinance making it a misdemeanor for persons to park on the premises of a specific car wash unless using the car wash facilities did not convert the car wash parking lot from a "public vehicular area" to "private property" within the meaning of the driving while impaired statute. **State v. Robinette,** 212.

BANKS AND OTHER FINANCIAL INSTITUTIONS

§ 41 (NCI4th). Depositor's right to make withdrawal

A temporary restraining order prohibiting defendant bank from disbursing any funds to plaintiff from his checking account expired, by operation of law under Rule 65(d), after ten days, defendant bank thus had no authority to continue to freeze plaintiff's funds after the ten days had passed, and the trial court erred by granting summary judgment for defendant bank on plaintiff's claims for negligence, breach of contract, and conversion. **Taylor v. Centure Bank,** 661.

BROKERS AND FACTORS

§ 57 (NCI4th). Real estate brokers; actions by sellers

Summary judgment against defendant sellers was improper on their cross claim and third-party claim for negligence against a real estate broker. **McClain v. Walker,** 765.

BROKERS AND FACTORS—Continued

§ 61 (NCI4th). Real estate brokers; actions by purchasers; sufficiency of evidence

The trial court erred in granting defendant realtor's summary judgment motion on plaintiff buyers' fraud claim based upon defendant's use of the description of the original tract in plaintiffs' offer to purchase after two portions of the original tract had been conveyed. **McClain v. Walker,** 765.

CONSTITUTIONAL LAW

§ 2 (NCI4th). Effect of federal law

The Court of Appeals acted within its authority in interpreting the Food Stamp Act and in validating the USDA's conflicting regulation where Congress had not divested the state courts of jurisdiction. **Thomas v. N.C. Dept. of Human Resources,** 698.

§ 12 (NCI4th). Separation of powers, generally

The NCDHR violated the separation of powers provision of the N.C. Constitution by applying a decision of the Court of Appeals—that USDA and NCDHR regulations permitting postponement of the food stamp disqualification period for fraud conflicted with the Food Stamp Act—only to the plaintiff in that case and not to others similarly situated. **Thomas v. N.C. Dept. of Human Resources,** 698.

§ 85 (NCI4th). Fundamental rights and liberties; state and federal aspects; other rights and liberties

The trial court did not err by granting defendant's 12(b)(6) motion to dismiss a § 1983 action arising from defendant-university's failure to reappoint plaintiff to the faculty. Plaintiff had no property right in the position. **Ware v. Fort,** 613.

§ 98 (NCI4th). State and federal aspects of due process

Alleged statements by county employees that "someone" who works in a commercial building has AIDS were insufficient to support 42 U.S.C. § 1983 claims by employees of businesses in the building for a violation of their federal due process rights. **Chapman v. Byrd,** 13.

§ 119 (NCI4th). State and federal aspects of religious freedom generally

A trial court order prohibiting further interference with a child protective services evaluation was affirmed where respondent had refused to consent to a psychological evaluation of his children on religious grounds. **In re Browning,** 190.

§ 172 (NCI4th). Former jeopardy; punishment for violation of administrative rule or regulation

The revocation of defendant's driver's license under G.S. 20-16.5 and the subsequent conviction of defendant for DWI did not violate the prohibition against double jeopardy. **State v. Rogers,** 364.

§ 304 (NCI4th). Effectiveness of assistance of counsel; failure to make particular motions

Defendant's conviction for possession of cocaine was not obtained without effective assistance of counsel based on his second attorney's withdrawal of a motion, filed by the first attorney, to compel disclosure of an informant's identity where defendant was acquitted of possession with intent to sell or deliver and therefore suffered no prejudice from the absence of testimony corroborating his denial of selling cocaine. **State v. Johnson,** 462.

CONSTITUTIONAL LAW—Continued

Defendant's conviction for possession of cocaine was not obtained without effective assistance of counsel based on failure to move for dismissal for violation of constitutional speedy trial rights where defendant was not denied the right to a speedy trial. **Ibid.**

§ 369 (NCI4th). Prohibition on cruel or unusual punishment; miscellaneous challenges

The imposition of a mandatory sentence of life imprisonment for first-degree sexual offense by a defendant who was thirteen when the crime was committed was neither cruel nor unusual punishment under the Constitutions of North Carolina and the United States. **State v. Green,** 269.

CONTRACTS

§ 26 (NCI4th). Conditional and implied promises

The trial court properly granted summary judgment for defendant on a breach of implied contract claim in a medical malpractice action arising from the delivery of a baby where defendant, a doctor involved in the birth, had felt assured after talking with plaintiff's attorney that she was not a potential defendant and provided information to the attorney, and an action was ultimately brought against her. The uncontroverted facts support a finding of mutual assent and consideration sufficient to warrant the conclusion that an implied contract was formed and that plaintiffs breached the contract by bringing the suit. An attorney's carefully chosen words do not necessarily prevent the formation of an implied contract not to sue. **Creech v. Melnik,** 502.

CORPORATIONS

§ 107 (NCI4th). Officers and agents; liability for malfeasance

The trial court properly denied defendant's motion to dismiss a charge of corporate malfeasance where defendant, a phlebotomist and independent contractor, was acting as her corporate employer's agent. **State v. Weary,** 754.

The trial court properly denied defendant phlebotomist's motion to dismiss a charge of corporate malfeasance based upon her drawing of blood from a third person rather than from a putative father. **Ibid.**

COSTS

§ 10 (NCI4th). Allowance of costs in court's discretion; apportionment of costs

A superior court judge did not err by denying plaintiffs' motion under G.S. 1A-1, Rule 60 for relief from an order requiring payment of costs of an action without a hearing where plaintiffs waived any right to a hearing. **Hockaday v. Lee,** 425.

§ 33 (NCI4th). Attorneys' fees; actions to collect debts

The trial court did not err by awarding attorneys' fees to defendant-bank where the bank was unsuccessful in a deficiency action against plaintiff on a non-purchase money note. **Trull v. Central Carolina Bank & Trust,** 486.

A trial court's award of attorneys' fees arising from the attempted collection of a note was not precluded under Merritt v. Edwards Ridge, 323 N.C. 330, because the note at issue was not a purchase money note. **Ibid.**

COSTS—Continued

The trial court did not abuse its discretion in its calculation of attorneys' fees in an action arising from the collection of a non-purchase money note where defendant lost a deficiency action. **Ibid.**

The trial court did not err in calculating attorneys' fees in an action to collect a non-purchase money note by including fees incurred in the foreclosure action. **Ibid.**

An award of attorneys' fees to defendant-bank in an action on a non-purchase money note was not a windfall in that the statutory 15% exceeded the actual attorneys' fees because the promissory note at issue provided for "reasonable attorneys' fees" and is therefore subject G.S. 6-21.2(2), which predetermines that 15% is a reasonable amount. **Ibid.**

The trial court could properly consider and rule upon defendant's motion for attorney fees pursuant to Rule 11(a) and G.S. 6-21.5 after plaintiff voluntarily dismissed its claims without prejudice. **VSD Communications, Inc. v. Lone Wolf Publishing Group,** 642.

§ 37 (NCI4th). Attorneys's fees; other particular actions or proceedings

The trial court did not err in an action in which counsel fees were awarded under G.S. 6-19.1 by concluding that the position of the Coastal Resources Commission in issuing a development permit without an easement for use of public trust waters and submerged lands was not substantially justified and that there were no special circumstances that would make the award of counsel fees unjust. **Walker v. N.C. Coastal Resources Comm.,** 1.

An administrative hearing under G.S. 150B-22 et seq. is not a civil action and an award for counsel fees and costs applicable to the administrative review portion of a case involving the issuance of a CAMA development permit without an easement for use of public trust waters was reversed. **Ibid.**

The trial court's award of attorney's fees under G.S. 6-19.1 was reversed; in cases involving the State Personnel Commission the Legislature has preempted application of G.S. 6-19.1 to matters before the Commission that arise prior to judicial review. Those matters are specifically provided for by G.S. 126-41. **Morgan v. N.C. Dept. of Transportation,** 180.

COURTS

§ 16 (NCI4th). Grounds for personal jurisdiction; promise to perform, or performance of, services within state; goods shipped from, or received in, state

Defendant Arizona bonding company's activities fell within the long-arm statute, and it had sufficient minimum contacts with this state to permit the exercise of in personam jurisdiction over it. **Starco, Inc. v. AMG Bonding and Ins. Services,** 332.

§ 19 (NCI4th). Stay of proceeding to permit trial in foreign jurisdiction

An appeal from the denial of a motion for a stay of state court proceedings was dismissed as interlocutory where plaintiffs filed a complaint in a federal court which included state claims. **Howerton v. Grace Hospital, Inc.,** 199.

§ 137 (NCI4th). Enforcement of federal rights in state courts generally

The Court of Appeals was not required to defer to the USDA's interpretation of the Food Stamp Act but could declare a USDA regulation invalid as being in conflict with the Act. **Thomas v. N.C. Dept. of Human Resources,** 698.

CRIMINAL LAW

§ 429 (NCI4th Rev.). Argument of counsel; failure to offer any evidence

Defendants' right to due process in a cocaine trafficking prosecution was not denied where defendant did not present evidence and the prosecutor argued that the people who could have told the jury the most about the case did not testify. **State v. Wilder,** 136.

§ 448 (NCI4th Rev.). Argument of counsel; comment on jury's duty

There was no gross impropriety requiring intervention ex mero motu during the prosecutor's closing argument in a prosecution for first-degree sexual offense involving an eight-year-old where the prosecutor argued that there were only twelve people in the world who could protect the victim from the twenty-six-year-old bully. **State v. Woody,** 296.

§ 475 (NCI4th Rev.). Argument of counsel; miscellaneous

The prosecutor's closing argument in a prosecution for trafficking in cocaine did not rise to the level of gross impropriety where the prosecutor's remarks were clearly improper in that they implied that by pleading not guilty in order to put the State to its burden of proving the charge against him, the defendant was really guilty. **State v. Wilder,** 136.

§ 890 (NCI4th Rev.). Coercive effect of additional instructions upon jury's failure to reach verdict

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by recharging the jury on its own motion; the trial court's instructions were not an attempt to coerce the jury, but rather to impress upon the jury the importance of reaching a verdict. **State v. Woody,** 296.

§ 1093 (NCI4th Rev.). Structured Sentencing Act; prior record level

The trial court did not err when it determined defendant's prior record level by assigning points for a prior conviction which was consolidated for judgment with a conviction already used to constitute defendant as an habitual felon. **State v. McCrae,** 664.

§ 1158 (NCI4th Rev.). Aggravating factors under Fair Sentencing Act; conduct or condition of victim; unprovoked attack

The trial court did not err when sentencing defendant to a greater than presumptive term for second degree rape and first degree burglary by finding the nonstatutory aggravating factor that defendant knew that the victim's husband was away on military duty. **State v. Davis,** 93.

§ 1159 (NCI4th Rev.). Aggravating factors under Fair Sentencing Act; sleeping victim

The trial court did not err when sentencing defendant to a greater than presumptive term for second degree rape and first degree burglary by finding the nonstatutory aggravating factor that the victim was asleep in her bed just prior to the attack. **State v. Davis,** 93.

§ 1164 (NCI4th Rev.). Fair Sentencing Act; statutory aggravating factors; position of leadership or inducement of others to participate generally

There was sufficient evidence to support the trial court's finding that defendant phlebotomist induced others to participate in the charged offenses where defendant

CRIMINAL LAW—Continued

induced a putative father to participate in a scheme to defraud the mother of his child. **State v. Weary,** 754.

§ 1291 (NCI4th Rev.). Mitigating factors under Fair Sentencing Act; acknowledgement of wrongdoing; repudiation of inculpatory statements

The trial court did not err when sentencing defendant for rape, burglary, and assault by failing to find as a mitigating factor that defendant voluntarily acknowledged his wrongdoing as defendant moved to suppress his confession and thereby repudiated it. **State v. Davis,** 93.

DAMAGES

§ 51 (NCI4th). ***Sufficiency of evidence to establish mitigation of damages***

Plaintiffs were entitled to recover as damages for defendant trustee's wrongful cancellation of their deed of trust the reasonable attorney fees and expenses they incurred in pursuing an action in bankruptcy court seeking secured creditor status and lien priority in an attempt to mitigate their damages. **Smith v. Martin,** 592.

§ 113 (NCI4th). Actual or compensable damages; medical expenses

The rebuttable presumption of reasonableness of medical expenses established by G.S. 8-58.1 when testimony of the amount of such expenses by the injured party or his guardian is accompanied by records or copies of those charges is a mandatory rather than a permissive presumption. **Jacobsen v. McMillan,** 128.

Plaintiff has the burden of proving that claimed medical expenses were reasonably necessary and reasonable in amount. **Ibid.**

Even though the minor plaintiff established the statutory presumption that $50,000 in medical expenses were reasonable in amount, the jury did not err as a matter of law in awarding only $20,000 for medical expenses since the jury could have found that all of the treatment was not reasonably necessary. **Ibid.**

DECLARATORY JUDGMENT ACTIONS

§ 3 (NCI4th). ***Availability of remedy generally***

The trial court correctly determined that an action was not proper under the Declaratory Judgment Act where plaintiff alleged that defendant was negligent; the remedy is not available for determination of issues of fact alone and a negligence action, with unresolved issues of fact, cannot properly be decided under the Declaratory Judgment Act. **Strickland v. Town of Aberdeen,** 430.

§ 12 (NCI4th). ***Availability of remedy; insurance matters***

The trial court had subject matter jurisdiction to enter its declaratory judgment on the amount of UIM coverage where there was no underlying judgment from the defendant's pending personal injury action. **Metropolitan Property and Casualty Ins. Co. v. Caviness,** 760.

DISCOVERY AND DEPOSITIONS

§ 21 (NCI4th). Depositions on oral examination generally

The Davidson County District Court lacked jurisdiction to enter an order requiring a proposed deponent to appear for a deposition, and the contempt order based on

DISCOVERY AND DEPOSITIONS—Continued

his failure to obey that underlying order was void, where the proposed deponent resided, was employed, and transacted his business in Guilford County, since he could be compelled to appear at a deposition only in Guilford County. **Wilson v. Wilson,** 371.

§ 53 (NCI4th). Request for admission; lack or insufficiency of response

The trial court did not err in an action arising from an insurance company's failure to defend employment discrimination claims by not granting summary judgment for defendant based on admissions which had been deemed admitted due to nonresponse to a request for admissions in a prior action which was voluntarily dismissed where the voluntary dismissal was in part to avoid the effect of the deemed admissions. **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.,** 232.

DIVORCE AND SEPARATION

§ 119 (NCI4th). Distribution of marital property; classification of property; marital property generally

The trial court did not err in an equitable distribution action by determining that a tract of land and a mobile home were marital property where defendant met her burden of showing that the property was marital and that it was acquired by one of the spouses during the marriage before the separation and was presently owned at the time of the separation. Although the property had been conveyed to plaintiff by his son and daughter-in-law during the marriage and reconveyed to plaintiff and his son after the separation, the trial court observed that plaintiff's testimony was only marginally credible and plaintiff's son did not testify concerning the circumstances surrounding the transfer. **Riggs v. Riggs,** 647.

The trial court did not err in an equitable distribution action by classifying a certificate of deposit as marital property where plaintiff contended that a portion of the funds were his traceable, separate funds at the date of separation, but the only evidence he produced was a savings withdrawal slip. Plaintiff failed to produce any documentation of a deposit of the required amount into any CD or account and there was no other documentation tracing the origin of the funds in the CD. **Ibid.**

The trial court erred in an equitable distribution action by determining that a debt on a Visa card held in defendant's name was marital debt where the trial court did not make any findings to support its determination except to classify it as a marital debt. The only evidence regarding the debt was defendant's statement on cross-examination that she had no documentation to show what purchases were charged to the account. **Ibid.**

§ 134 (NCI4th). Distribution of marital property; marital residence

The trial court did not err in an equitable distribution action by classifying the marital residence as marital property where the residence was paid for with marital funds, although an agreement to purchase the property was entered into before the marriage and the property was acquired in plaintiff's name. **Riggs v. Riggs,** 647.

§ 155 (NCI4th). Equitable division of property; maintenance or development of property after separation

The trial court did not err by allowing defendant's motion to dismiss in an action to require defendant to pay one-half of the cost of repairs to marital property where a prior district court order had given plaintiff fourteen days to purchase defendant's

DIVORCE AND SEPARATION—Continued

one-half interest or vacate the home, plaintiff elected to purchase the home, and repairs were required for the mortgage loan. Defendant did not have an obligation to share in payment for the repairs. **Coggins v. Vonhandschuh,** 405.

§ 357 (NCI4th). Custody granted to third party; grandparent

While grandparents may not initiate suits for visitation when no custody proceeding is ongoing and the minor child's family is intact, grandparents may initiate a custody action pursuant to G.S. 50-131.1(a) when no custody proceeding is ongoing, but they must overcome the constitutionally protected paramount right of parents to the custody, care, and control of their children. **Sharp v. Sharp,** 357.

§ 370 (NCI4th). Modification of custody order; parent's cohabitation with another

The evidence and findings did not support the trial court's conclusion that the father's homosexual relationship constitutes a substantial change in circumstances which warrants a change of custody of the children from the father to the mother. **Pulliam v. Smith,** 144.

§ 372 (NCI4th). Modification of custody order; miscellaneous circumstances

A finding of unfitness of the custodial parent satisfies the statutory requirement that the trial court find a change in circumstances in order to modify a prior child custody order where the custodial parent was found to be a fit and proper custodian in the prior order. **Raynor v. Odom,** 724.

§ 378 (NCI4th). Visitation; findings required

There were sufficient adequately supported findings of fact to support the trial court's legal conclusion that plaintiff mother be allowed to visit her child only once a month. **Raynor v. Odom,** 724.

§ 383 (NCI4th). Grandparents' visitation rights

A single parent living with his or her child constitutes an "intact family" which is insulated from grandparent visitation actions under G.S. 50-13.1(a). **Fisher v. Gaydon,** 442.

Grandparents failed to show that custody of their grandchild was "in issue" or "being litigated" so as to give them standing under G.S. 50-13.2(b1) to seek visitation. **Ibid.**

§ 491 (NCI4th). Uniform Child Custody Jurisdiction Act; jurisdiction when simultaneous proceedings occur in other states generally

The trial court did not err by exercising subject matter jurisdiction in a child custody proceeding, even though defendant father had initiated a custody proceeding in Turkey, where Turkey did not exercise jurisdiction in substantial conformity with the UCCJA. **Tataragasi v. Tataragasi,** 255.

§ 494 (NCI4th). Uniform Child Custody Jurisdiction Act; North Carolina is child's home state

Personal jurisdiction over a nonresident defendant was not required under the UCCJA where this state is the home state of the children. **Tataragasi v. Tataragasi,** 255.

DIVORCE AND SEPARATION—Continued

§ 497 (NCI4th). Uniform Child Custody Jurisdiction Act; child abused, neglected, or abandoned in North Carolina

The trial court had emergency jurisdiction under the UCCJA to determine the custody of children whose father had filed a custody action in Turkey where the children were physically present in this state and the trial court found that defendant had repeatedly abused the children. **Tataragasi v. Tataragasi,** 255.

EMINENT DOMAIN

§ 34 (NCI4th). What constitutes "taking" of property generally

The DOT's removal of plaintiff's outdoor advertising sign from property purchased by the DOT did not entitle plaintiff to compensation under G.S. 136-111 because, at the time the sign was removed, plaintiff did not have a leasehold interest in the land on which its sign was located. **National Advertising Co. v. N.C. Dept. of Transportation,** 620.

§ 36 (NCI4th). Invasion of property right by a party with authority to condemn

Even if the DOT purchased land under the threat of condemnation, the DOT was not required to pay just compensation for removable personal property located on the land when the owner of the personal property had no interest in the purchased land. **National Advertising Co. v. N.C. Dept. of Transportation,** 620.

§ 92 (NCI4th). Just compensation generally

The DOT was not proceeding pursuant to its power of eminent domain but was simply exercising its rights as a property owner when it removed plaintiff's outdoor advertising sign from land it had purchased, and the DOT was thus not obligated to pay just compensation for a "taking" of the sign under the federal and state constitutions. **National Advertising Co. v. N.C. Dept. of Transportation,** 620.

ESTOPPEL

§ 13 (NCI4th). Conduct of party to be estopped generally

Plaintiff retired law enforcement officer's allegation that the State represented that reemployment following retirement would not affect his benefits but changed this policy subsequent to his retirement by making him subject to a statutory postretirement earnings cap did not establish an equitable estoppel claim against the State. **Miracle v. N.C. Local Gov't. Employees' Retirement System,** 285.

§ 25 (NCI4th). Nonsuit and summary judgment

The trial court did not err in a medical malpractice action arising from the birth of a child by granting summary judgment for defendant on equitable estoppel where plaintiffs' attorney initially assured defendant-doctor that she was not a potential defendant, she talked with the attorney on several occasions about the case, and an action was eventually brought against her. The doctor relied on plaintiffs' attorney's representation and provided assistance which made it possible for plaintiffs to maintain a successful suit against the hospital and other defendants. **Creech v. Melnik,** 502.

EVIDENCE AND WITNESSES

§ 43 (NCI4th). Presumptions of fact

The presumption that a public officer has performed his duty cannot be used as proof of an independent and material fact. **Wilson v. Sutton,** 170.

§ 173 (NCI4th). Admissibility of particular evidentiary facts; state of mind of victim

The trial court did not err in a prosecution for first-degree sexual offense involving defendant's eight-year-old daughter by allowing the State to introduce evidence as to whether she loved the defendant. **State v. Woody,** 296.

§ 653 (NCI4th). Suppression of evidence; motions to suppress; order

There was only harmless error in the denial of defendant's motion to suppress cocaine seized from his person in an airport where the trial court found that defendant's bag had been seized by one agent when it was really another agent who seized the bag. **State v. Hendrickson,** 150.

§ 724 (NCI4th). Prejudicial error in admission of evidence; other criminal activity in which defendant not implicated

There was no prejudice in a conviction for possession of cocaine in the admission of evidence of drug activity which did not involve defendant at the location at which defendant was arrested where defendant was acquitted of the offense of possession with intent to sell or deliver cocaine. **State v. Johnson,** 462.

§ 961 (NCI4th). Exceptions to hearsay rule; statements for purposes of medical diagnosis or treatment generally

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by admitting a doctor's testimony concerning statements made by the victim to the doctor. **State v. Woody,** 296.

§ 1237 (NCI4th). Confessions and other inculpatory statements; what constitutes custodial interrogation; statements made during general investigation at crime scene

Defendant's inculpatory statement was not the result of custodial interrogation where it was made after defendant was stopped for a traffic violation and after he was asked, "What is that?" during a pat-down search. **State v. Benjamin,** 734.

§ 1252 (NCI4th). Confessions and other inculpatory statements; right to counsel; what constitutes invocation of right; extent of invocation

The trial court did not err in a prosecution for rape, burglary, and assault by denying defendant's motion to suppress his confession where, after defendant was advised that the decision to have an attorney present was his to make, nothing in his words or actions indicated his unwillingness to answer further questions in the absence of counsel, nor could be interpreted as a request for counsel. **State v. Davis,** 93.

§ 1974 (NCI4th). Accident reports

The trial court did not err by admitting and publishing to the jury the highway patrol officer's accident report without striking out that portion of the report entitled "circumstances contributing to the collision" in which the patrolman checked a box marked "unable to determine" as to defendant driver. **Cooke v. Grigg,** 770.

EVIDENCE AND WITNESSES—Continued

§ 1932 (NCI4th). Testimony relating to contents of documents; cross-examination

The written statement of an eight-year-old victim of first-degree sexual offense was authenticated by the testimony of the victim and a detective. **State v. Woody,** 296.

§ 2517 (NCI4th). Qualifications of witnesses; knowledge of particular facts

The trial court did not err in a prosecution for first-degree sexual offense involving defendant's eight-year-old daughter by allowing her to testify to defendant's age. **State v. Woody,** 296.

§ 2907 (NCI4th). Redirect examination; discretion of court

The trial court did not abuse its discretion in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by allowing the State on redirect examination of the daughter to ask about a gun in defendant's possession where the daughter had been asked on direct examination whether she was afraid of defendant and whether he had ever threatened her. **State v. Woody,** 296.

§ 3195 (NCI4th). Corroboration and rehabilitation; written statements

The trial court did not err in a prosecution for first-degree sexual offense involving defendant's eight-year-old daughter by allowing the State to combine the victim's trial testimony with a prior written statement. **State v. Woody,** 296.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 14 (NCI4th). Concealment of material fact

Plaintiffs' forecast of evidence was insufficient to support their claim against defendant real estate brokers for fraud in failing to disclose that the county health department had determined that property purchased by plaintiffs was not suitable for use as a family care facility. **Helms v. Holland,** 628.

§ 15 (NCI4th). Concealment of material fact; duty to speak

The trial court properly granted summary judgment for defendants on plaintiff's claim of fraud in negotiating a commercial lease since defendants had no duty to inform plaintiff that they were negotiating with another party. **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.,** 383.

§ 20 (NCI4th). Detrimental reliance; duty of inquiry as to property

Plaintiffs did not justifiably rely upon any statements by defendant real estate brokers that property purchased by them was suitable for use as a family care facility where they would have discovered that septic deficiencies precluded such use of the property if they would have complied with an inspection provision of the contract of sale. **Helms v. Holland,** 628.

FRAUDS, STATUTE OF

§ 3 (NCI4th). Estoppel to assert statute; waiver

Defendants were not equitably estopped from asserting the statute of frauds since they had no duty to disclose their intentions regarding plaintiff's proposed lease or their negotiations with another prospective tenant. **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.,** 383.

FRAUDS, STATUTE OF—Continued

Quasi-estoppel did not bar defendants' statute of frauds defense since there was no evidence that defendant accepted benefits of the alleged lease agreement with plaintiff. **Ibid.**

§ 5 (NCI4th). Sufficiency of writing, generally

Defendants' admissions in their answer and in their vice president's deposition did not substitute for a writing under the statute of frauds. **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.**, 383.

An internal form and a draft lease were insufficient to satisfy the statute of frauds. **Ibid.**

§ 32 (NCI4th). Pleading

Defendants adequately pled the statute of frauds as a defense to a claim for breach of a lease where they alleged that no written agreement to enter the lease was ever executed by the parties. **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.**, 383.

GAS AND OIL

§ 7 (NCI4th). Gasoline and oil regulation generally

Plaintiff service station franchisee failed to show that his fuel supply agreement with the franchisor was breached and therefore constructively terminated under the Petroleum Marketing Practices Act by the franchisor's assignment of its interest in the agreement on the ground that the assignee is charging plaintiff higher prices for gasoline than he would have been charged by the franchisor. **Richardson v. BP Oil Co.**, 509.

Plaintiff franchisee's lease of a service station from the franchisor (BP) was not constructively terminated under the Petroleum Marketing Practices Act by the franchisor's sale of the service station and assignment of the lease because the lease included language that plaintiff "desires to lease a facility owned or leased by BP." **Ibid.**

There was no "nonrenewal" of a service station franchise agreement prohibited by the Petroleum Marketing Practices Act because, as a condition for the renewal of that agreement by the franchisor's assignee after the expiration of the original term of the agreement, the minimum gasoline sales requirements and the monthly rent amount were increased where there was no evidence that the assignee did not act in good faith. **Ibid.**

HEALTH

§ 27.1 (NCI4th). Regulation of diseases and health; other regulations

Summary judgment should not have been granted for defendants, and should have been granted for plaintiffs, in an action for a declaratory judgment challenging the validity of the Halifax County Smoking Control Rules. The rules were invalid as representing distinctions reserved to legislative policymaking in that such distinctions involved the balancing of factors other than health, such as economic hardship and difficulty of enforcement. **City of Roanoke Rapids v. Peedin**, 578.

HIGHWAYS, STREETS, AND ROADS

§ 31 (NCI4th). Outdoor advertising generally

The federal Highway Beautification Act does not require the DOT to pay just compensation for its removal of an advertising sign from property which it purchases. **National Advertising Co. v. N.C. Dept. of Transportation,** 620.

Just compensation for removed outdoor advertising signs is not required by 42 U.S.C. 4652 when a state's case law precludes compensation on the ground that the signs are removable personal property. **Ibid.**

§ 32 (NCI4th). Outdoor Advertising Control Act, generally

The Outdoor Advertising Control Act does not require the payment of just compensation for signs removed by the DOT. **National Advertising Co. v. N.C. Dept. of Transportation,** 620.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 12 (NCI4th). Certificate of need; application; criteria for review

A certificate of need applicant may rely on the financial resources of another entity for its funding. **Retirement Villages, Inc. v. N.C. Dept. of Human Resources,** 495.

Applicants for a certificate of need are not required to submit financial information about themselves when the project is to be funded by another entity, but the application must contain evidence of a commitment to provide the funds by the funding entity. **Ibid.**

A letter from a bank indicating its interest in lending a funding entity money for a project to add nursing beds and a letter from a second funding entity's president stating that the entity would lend the applicant funds for working capital did not show a commitment by the funding entities to provide the necessary funds for the project as required by a statutory criterion. **Ibid.**

An application for a certificate of need for additional nursing home beds was insufficient where it contained no clear statement of the assumptions or methodology used by the applicant in projecting patient origin. **Ibid.**

An application for a certificate of need for additional nursing home beds failed to define clearly the type of services it intended to provide as required by a statutory criterion. **Ibid.**

HOUSING, AND HOUSING AUTHORITIES AND PROJECTS

§ 74 (NCI4th). Unit ownership and condominiums; assessments and liens

The trial court did not err in awarding plaintiffs attorney's fees in excess of fifteen percent of plaintiffs' judgment in an action arising from a condominium assessment. **Brookwood Unit Ownership Assn. v. Delon,** 446.

HUSBAND AND WIFE

§ 50 (NCI4th). Alienation of affections generally; elements of action

Plaintiff's claim for alienation of affections was facially plausible where the evidence tended to show that plaintiff and his wife continued to have an amorous relationship after their separation, but it began to deteriorate shortly after the wife became involved with defendant, and plaintiff's claim for criminal conversation was

HUSBAND AND WIFE—Continued

facially plausible where plaintiff alleged sexual intercourse between his wife and defendant after separation but during marriage. **Brown v. Hurley,** 377.

INDIGENT PERSONS

§ 19 (NCI4th). Supporting services generally; psychologists and psychiatrists

The trial court did not err in a prosecution for first-degree sexual offenses, attempted first-degree rape, and first-degree burglary by denying the thirteen-year-old defendant's motion for a court-appointed neuropsychiatrist or neuropsychologist where an examination on competency to stand trial at Dix Hospital produced a report stating that defendant was competent to stand trial, with an attached evaluation in which a psychologist noted the possibility or organic brain disorder. **State v. Green,** 269.

§ 78 (NCI4th). Neglect and abuse complaints; reporting

A trial court order prohibiting further interference with a child protective services evaluation was affirmed where respondent had refused to consent to a psychological evaluation of his children on religious grounds. The protection of neglected and abused children is undeniably a compelling state interest and respondent's rights as custodian of the children are secondary and must give way to protection of the children. **In re Browning,** 190.

§ 98 (NCI4th). Nontestimonial identification procedures

There was no plain error in a district court's decision to transfer a juvenile to superior court for trial as an adult where the court relied on the juvenile defendant's confession which defendant contended was the result of an illegal nontestimonial identification proceeding. Evidence that the confession occurred after defendant learned that the victim had identified him in a photo lineup was too tenuous to show that the confession was the direct result of the lineup. **State v. Green,** 269.

§ 99 (NCI4th). Transfer to superior court for trial as adult generally

The challenge of a juvenile defendant to G.S. 7A-610 was without merit where defendant contended that the statute was vague and overbroad based on language requiring the district court to determine whether the needs of the juvenile or the best interests of the State would be served by the transfer. **State v. Green,** 269.

The decision to transfer a juvenile to superior court for trial as an adult lies solely within the discretion of the district court judge and district court judges in making that decision need only to state the reasons for the transfer and need not make findings of fact to support the conclusion that the needs of the juvenile or the best interests of the State would be served by the transfer. **Ibid.**

A district court judge considered a juvenile defendant's rehabilitative potential in deciding whether to transfer the juvenile to superior court for trial as a adult. **Ibid.**

A district court judge did not abuse her discretion by relying on a juvenile defendant's history of assaultive behavior when transferring him to superior court for trial as an adult where evidence of unadjudicated acts came from a juvenile court psychologist based on information she received directly from defendant and his mother. **Ibid.**

A district court judge did not abuse her discretion in transferring a juvenile defendant to superior court for trial as an adult by relying on the victim being a stranger to defendant, the strength of the probable cause evidence, the serious nature of the

INDIGENT PERSONS—Continued

offenses, the community's need to be aware of and protected from this type of serious criminal activity, and defendant's acknowledgement that he has a temper. **Ibid.**

The district court judge did not err in transferring a juvenile defendant to superior court for trial as an adult by relying on defendant's confession where defendant only moved to suppress the confession in superior court. **Ibid.**

The trial court did not err in a prosecution for first-degree sexual offense, attempted first-degree rape, and first-degree burglary by denying defendant's motion to dismiss and in not instructing the jury on the common law doctrine of doli incapax where defendant was thirteen years old at the time of the offenses. **Ibid.**

INSURANCE

§ 120 (NCI4th). Duty to defend

The trial court erred in an action to determine insurance coverage by denying defendant Fireman's Fund's motion for summary judgment on all but one claim in an action involving employment related claims. **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.,** 232.

§ 383 (NCI4th). Automobile insurance; Reinsurance Facility

An insurer writing insurance in North Carolina is not permitted to use its own policy forms on policies ceded to the Reinsurance Facility but must use only those forms filed by or on behalf of the Reinsurance Facility. **St. Paul Fire and Marine Ins. Co. v. N.C. Motor Veh. Reins. Fac.,** 450.

§ 389 (NCI4th). Role and authority of Commissioner of Insurance in relation to filings by Rate Bureau

The filing date adjustment is part of the overall proposed filing which may be disapproved by the Commissioner. **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

§ 393 (NCI4th). Automobile insurance rates; necessity that Commissioner give specifics with respect to failure of filings to comply with statutory requirements

A rate case is remanded where the Commissioner failed to resolve conflicts in the evidence concerning trends that would most accurately predict the prospective loss and expense experience and failed to specifically show he had given consideration to the material and substantial evidence of the Rate Bureau. **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

§ 400 (NCI4th). Automobile insurance rates; income from invested capital

The Commissioner of Insurance erred in considering investment income from capital and surplus in his ratemaking calculations. **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

There was substantial evidence in the record to support the Commissioner's decision as to the calculation of investment income from unearned premium, loss, and loss expense reserve funds where the Rate Bureau's amount of reserves subject to investment was incorrect because the Bureau had excluded prepaid expenses and agents' balances from the calculations of the reserves available for investment. **Ibid.**

INSURANCE—*Continued*

§ 403 (NCI4th). Automobile insurance rates; other types of evidence

"Due consideration" as required by G.S. 58-36-10 does not mandate that a numerical adjustment to automobile rates reflect the effects of dividends and deviations, and this rate case is remanded where the appellate court was unable to determine from the record how the Commissioner selected 4.96% as the amount used for dividends and deviations. **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

The Commissioner's use of statutory accounting principles rather than generally accepted accounting principles to determine underwriting profit for automobile insurance purposes was supported by substantial and material evidence. **Ibid.**

It was not error for the Commissioner to use a normative 2 to 1 premium-to-surplus ratio rather than the historical ratio. **Ibid.**

The evidence supported the Commissioner's method of calculating general and other acquisition expenses by allocating expenses between the voluntary and Reinsurance Facility markets by premium volume rather than exposures. **Ibid.**

§ 421 (NCI4th). Automobile insurance; scope of review of rate case

In reviewing rate orders of the Commissioner of Insurance, the test is whether the Commissioner's conclusions of law are supported by material and substantial evidence in light of the whole record. **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

Rates fixed by the Commissioner of Insurance are prima facie correct. **Ibid.**

§ 528 (NCI4th). Underinsured coverage; extent of coverage

Absent completion of an approved selection or rejection form, an insured was entitled to one million dollars in UIM coverage pursuant to G.S. 20-279.21(b)(4). **Metropolitan Property and Casualty Ins. Co. v. Caviness,** 760.

§ 582 (NCI4th). Effect of provisions of owner's automobile liability policy making particular exclusions from coverage

Federal law did not render the employee exclusion clauses in an interstate carrier's motor vehicle insurance policies invalid as to an employee injured in a truck accident. **Hand v. Connecticut Indemnity Co.,** 774.

§ 895 (NCI4th). General liability insurance; what damages are covered

The trial court erred by granting partial summary judgment for plaintiffs and should have granted summary judgment for defendants in an action against a builder which arose from the sale of a residence in an area subject to severe flooding where coverage exists only if the builder's acts constituted unfair competition. Given the context of the policies, it is reasonable to construe the term "unfair competition" as a reference to the common law tort of unfair competition. The builder's actions do not parallel any of the definitions of common law unfair competition. **Henderson v. U.S. Fidelity & Guaranty Co.,** 103.

§ 896 (NCI4th). General liability insurance; what constitutes "occurrence" within meaning of policy; duty to defend

The trial court did not err by granting partial summary judgment for defendants on the issue of whether their insurance policies provide coverage where plaintiffs brought an action against a builder which arose from the sale of a residence in an area subject to severe flooding. **Henderson v. U.S. Fidelity & Guaranty Co.,** 103.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 2 (NCI4th). Sufficiency of claim

Allegations by nine employees of businesses in a commercial building that defendant county EMS officials repeated false rumors that "someone" in the commercial building has AIDS and that plaintiffs suffered severe emotional distress as a result of those statements were sufficient to state a claim for the intentional infliction of emotional distress against the officials and the county. **Chapman v. Byrd,** 13.

JUDGMENTS

§ 27 (NCI4th). Judgment upon jury verdict or rendered in open court

Plaintiff's appeal was dismissed because judgment had not been entered where the trial court's decision was announced in open court on 4 October 1994 but was never reduced to writing. **Worsham v. Richbourg's Sales and Rentals,** 782.

§ 38 (NCI4th). Propriety and effect of order signed and entered out of session where decision made during session

An emergency superior court judge had jurisdiction to enter an order requiring plaintiffs to pay deposition expenses and expert witness fees as part of the costs of the underlying action where the judge made and announced his decision in open court and before adjournment, although the order taxing specific amounts was signed later. **Hockaday v. Lee,** 425.

§ 132 (NCI4th). Construction, operation, and compliance generally

The terms "maintenance" and "golf tournaments" in a 1980 consent judgment between the original owner and the members of a country club were used in their generic sense and unambiguous so that the trial court was not authorized to consider parol evidence and to place limitations on those terms. **Bicket v. McLean Securities, Inc.,** 548.

A consent judgment provision giving country club members a right to use all existing golf courses and to reserve starting times ahead of resort guests applied only to golf courses in existence at the time of entry of the consent judgment. **Ibid.**

The trial court properly found that a consent judgment giving country club members exclusive use of a clubhouse would forbid the country club owner from leasing the clubhouse to a proprietary, commercial or political entity. **Ibid.**

The cessation of the existence of the original corporate owner of a country club rendered ambiguous a provision of a consent judgment relating membership transfer fees to the "current initiation fee" being charged to purchasers of property from the corporation, and the trial court was authorized to consider parol evidence to determine the intent of the parties. **Ibid.**

The trial court erred in its interpretations of provisions of a 1980 consent judgment relating to country club memberships and the use of privately-owned golf carts. **Ibid.**

The trial court did not err in concluding that the formula used by a country club's owner to calculate permissible annual increases in membership dues and fees pursuant to the Consumer Price Index complies with the provisions of a 1980 consent judgment. **Ibid.**

§ 133 (NCI4th). Principles of construction

When the provisions of a consent judgment are unambiguous, the trial court is limited to an interpretation in keeping with the express language of the document and without consideration of parol evidence. **Bicket v. McLean Securities, Inc.,** 548.

JUDGMENTS—Continued

§ 211 (NCI4th). Effect of no appeal being taken from prior judgment

Plaintiff was collaterally estopped from relitigating the priority of the trustee's actions in voiding and not reporting foreclosure sales because there was confusion regarding the file numbers and order of bidding where the clerk of court determined that the trustee properly voided and postponed the sales, and plaintiff did not appeal the clerk's order. **C. C. Mangum, Inc. v. Brown,** 658.

§ 445 (NCI4th). Newly discovered evidence generally

A party cannot seek relief from a judgment under Rule 60(b)(2) where such party had the opportunity, through the exercise of due diligence, to make a motion for a new trial pursuant to Rule 59(a)(4). **Jacobsen v. McMillan,** 128.

§ 654 (NCI4th). Right to interest; effect of tender of amount less than judgment

The trial court erred in its calculation of prejudgment interest against an insurance company on a construction claim where the trial court decreased the amount of principal being taxed with interest to account for unconditional payment offers where defendant had offered to pay undisputed portions of the alleged debt without prejudice to plaintiff's rights to further prosecute its claim against defendant. **Members Interior Construction v. Leader Construction Co.,** 121.

JURY

§ 137 (NCI4th). Voir dire examination; questions regarding race or homosexuality

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by not allowing an inquiry as to whether a prospective juror had any prejudice or bias against people of different races being married to each other. **State v. Woody,** 296.

LABOR AND EMPLOYMENT

§ 75 (NCI4th). Retaliatory discharge for filing workers' compensation claim

The trial court erred in its determination that the Commissioner of Labor failed to forward a copy of a dismissed employee's Retaliatory Employment Discrimination Act complaint to defendant employer within twenty days following receipt in accordance with G.S. 95-242(a). **Commissioner of Labor v. House of Raeford Farms,** 349.

The trial court erred in dismissing plaintiff Commissioner of Labor's Retaliatory Employment Discrimination Act complaint on the ground that the Commissioner had exceeded the 90-day time period in G.S. 95-242(a) for making a determination as to the merit of a complaint since the complaint processing time periods of the statute are directory and not jurisdictional. **Ibid.**

§ 77 (NCI4th). Discharge barred by public policy

The termination of plaintiff bank employee for refusing to violate a statute by cashing out a certificate of deposit being used for collateral on a loan without notice to the debtor constituted a public policy exception to the employment-at-will doctrine. **Roberts v. First-Citizens Bank and Trust Co.,** 713.

LABOR AND EMPLOYMENT—Continued

§ 173 (NCI4th). Eligibility for unemployment benefits; appeal from superior court review

An appeal to the Court of Appeals from a judgment by the superior court affirming a decision of the Employment Security Commission was remanded to the Commission where the findings of the Commission were in conflict and thus could not support its conclusion. **Bagwell & Bagwell, Inc. v. Blanton,** 538.

LANDLORD AND TENANT

§ 20 (NCI4th). Assignment and subletting generally

Plaintiff franchisee's lease of a service station from the franchisor (BP) was not constructively terminated under the Petroleum Marketing Practices Act by the franchisor's sale of the service station and assignment of the lease because the lease included language that plaintiff "desires to lease a facility owned or leased by BP." **Richardson v. BP Oil Co.,** 509.

LIBEL AND SLANDER

§ 12 (NCI4th). Statements affecting business, trade, or profession

Defendants' alleged statements that "someone" in a certain commercial building has AIDS were not statements "of or concerning" the nine employees of businesses in the building and could not provide the basis for a defamation action by those employees. **Chapman v. Byrd,** 13.

LIMITATIONS, REPOSE, AND LACHES

§ 55 (NCI4th). Contract actions generally

The trial court erred in dismissing plaintiff's civil action against his employer to recover a commission and bonus under his contract of employment by applying the G.S. 1-55(1) six-month statute of limitations for civil actions involving written transfers of future or unearned employment compensation claims rather than the G.S. 1-52(1) three-year statute of limitations for breach of contract actions. **Miller v. Randolph,** 779.

§ 125 (NCI4th). Postponement or suspension of statute; absence and nonresidence

The statutes of limitations for plaintiffs' claims against defendant based upon conduct in this state while defendant was a resident of this state were not tolled by G.S. 1-21 after defendant left this state where defendant was amenable to personal jurisdiction pursuant to service by publication. **Tierney v. Garrard,** 415.

§ 157 (NCI4th). Effect of cause of action arising outside the state

A nonresident plaintiff's claim against a foreign airline which has a place of business in this state for injuries received while in airspace over California or Arizona was time barred under the "borrowing statute," G.S. 1-21, where plaintiff's claim was barred by the California and Arizona statutes of limitation, and plaintiff was not a resident of this state at the time his claim accrued. **Laurent v USAir, Inc.,** 208.

MALICIOUS PROSECUTION

§ 19 (NCI4th). Sufficiency of evidence; probable cause

The trial court properly denied an officer's motion for partial summary judgment in his individual capacity with respect to claims of malicious prosecution and false imprisonment arising from an arrest where there was a genuine issue of material fact as to whether the officer had probable cause to arrest plaintiff. **Moore v. Evans,** 35.

MONOPOLIES AND RESTRAINTS OF TRADE

§ 21 (NCI4th). Anticompetitive covenants; validity of particular agreements

A provision of a distributorship agreement for a metal finishing product prohibiting defendant distributor from directly or indirectly manufacturing or creating a competing product by using the composition, technology and process utilized by plaintiff manufacturer was not an improper covenant not to compete or a contract in restraint of trade but was valid and enforceable as reasonably related to the legitimate business interest of protecting the manufacturer's confidential information. **ChemiMetals Processing v. McEneny,** 194.

MORTGAGES AND DEEDS OF TRUST

§ 19 (NCI4th). Priorities; contemporaneous and successive mortgages

Subordination agreements and clauses which subordinate loan obligations secured by a deed of trust to future loans must include terms which state the maximum amount of the future loan and the maximum rate of interest permitted on the loan. **Smith v. Martin,** 592.

§ 60 (NCI4th). Unauthorized or erroneous cancellation

Defendant trustee had no power to cancel a deed of trust and is liable as a matter of law for the principals' damages flowing from the unauthorized cancellation where defendant cancelled the deed of trust without the principals' permission and without the underlying note being paid. **Smith v. Martin,** 592.

MUNICIPAL CORPORATIONS

§ 110 (NCI4th). Sufficiency of compliance of annexation report with requirement for provision of sewer and water

There was sufficient evidence in a declaratory judgment action challenging an annexation ordinance for the trial court to find that the annexation report adequately provided for the extension of water mains as required by statute. **Parkwood Assn., Inc. v. City of Durham,** 603.

§ 112 (NCI4th). Sufficiency of compliance of annexation report with requirement for provision of police and fire protection

The trial court did not err in holding that defendant-city had provided sufficient evidence in an annexation report that it would provide the annexed area with a nondiscriminatory level of police and fire protection. **Parkwood Assn., Inc. v. City of Durham,** 603.

MUNICIPAL CORPORATIONS—Continued

§ 115 (NCI4th). Sufficiency of compliance of annexation report with requirement for provision of public transportation and parks

The trial court did not err in a declaratory judgment action challenging an annexation ordinance by excluding evidence of allegedly inaccurate statements in the annexation report regarding the extension of bus service. **Parkwood Assn., Inc. v. City of Durham,** 603.

§ 122 (NCI4th). Attack on annexation or annexation proceedings; scope of judicial review

Petitioners' arguments in an action challenging an annexation ordinance dealt with procedures and plans not required by statute; G.S. 160A-50(f) limits the reviewing court's consideration to whether the procedures and plans required by law have been followed and adopted and whether the annexed area involved is one that the law approves for annexation. **Parkwood Assn., Inc. v. City of Durham,** 603.

§ 445 (NCI4th). Effect of procuring liability insurance; extent of waiver

The trial court erred by denying defendant-municipality's motion to dismiss an action alleging the negligent fighting of a fire by the city fire department; the exception to the common law doctrine of governmental immunity established by G.S. 160-485(a) was not meant to abrogate any statutory defenses available to a municipality. **Askew Kawasaki, Inc. v. City of Elizabeth City,** 453.

§ 446 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance; torts of employees

A police officer and a police chief were not entitled to governmental or official immunity on claims of false imprisonment and malicious prosecution arising from an arrest where the city had purchased liability insurance. **Moore v. Evans,** 35.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 42 (NCI4th). Property subject to forfeiture

The trial court erred in sentencing defendant for possession of cocaine by ordering forfeiture of $460 seized from defendant's person at his arrest where defendant was acquitted of possession with intent to sell and deliver. G.S. 90-112(a)(2) is a criminal as opposed to a civil forfeiture statute; criminal forfeiture must follow criminal conviction. **State v. Johnson,** 462.

§ 141 (NCI4th). Sufficiency of evidence; actual or constructive possession; proximity to controlled substances or material

The trial court did not err by denying defendant's motion to dismiss charges of trafficking in cocaine for insufficient evidence where the evidence showed that an officer observed defendant throw an object into bushes when the car in which he was a passenger was stopped by police, a neighbor discovered a bag which matched the description given by an officer, the bag was later determined to contain cocaine, defendant entered his house and remained for approximately 30 seconds while the officer was waiting for backup, and several non-law enforcement individuals were seen searching the bushes where defendant had thrown the package after the police left the area. **State v. Wilder,** 136.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA—Continued

§ 196 (NCI4th). Lesser included offenses of possession with intent to sell, deliver, or distribute; offenses involving cocaine

The trial court did not err in a prosecution for trafficking in cocaine by not instructing the jury on the lesser included offense of possession of cocaine. **State v. Wilder**, 136.

§ 216 (NCI4th). Sentencing and punishment; restitution

The trial court did not err when sentencing defendant for possession of cocaine by ordering defendant to pay restitution to the SBI for the cost of analyzing the cocaine. **State v. Johnson**, 462.

NEGLIGENCE

§ 6 (NCI4th). Negligent infliction of emotional distress

Allegations by employees of businesses in a commercial building that defendant county EMS officials falsely stated that someone working in the commercial building had AIDS and that plaintiffs suffered severe emotional distress as a result of those statements were sufficient to state a claim for negligent infliction of emotional distress. **Chapman v. Byrd**, 13.

§ 95 (NCI4th). Duty of care; degree and standard

When defendant offered the seven-year-old plaintiff a ride to his grandparents' home, he voluntarily assumed the duty to exercise due care in delivering plaintiff safely to his grandparents' home. **Jacobsen v. McMillan**, 128.

§ 95 (NCI4th). Sufficiency of particular evidence; duty of care; degree and standard

Plaintiff could not establish a prima facie case for negligence where the facts of the case disclosed no duty that defendant town owed plaintiff other than the duty to utilize ordinary care in transmitting the money submitted to it to the insurer, the duty that the town embarked upon. **Strickland v. Town of Aberdeen**, 430.

§ 102 (NCI4th). Sufficiency of evidence of negligent misrepresentation

Plaintiffs had no claim against defendant real estate brokers for negligent misrepresentation that property purchased by plaintiffs was suitable for use as a family care facility. **Helms v. Holland**, 628.

§ 106 (NCI4th). Premises liability; duty of reasonable care and to notify of unsafe condition

The trial court should not have granted summary judgment for defendants in a slip and fall action where plaintiff's evidence established that the floor of the restaurant was wet when plaintiff slipped and that there were no warning signs placed on the floor in the area where plaintiff fell and defendants' evidence not only conflicted with plaintiff's evidence but conflicted among its three employees. **Smith v. Cochran**, 222.

§ 134 (NCI4th). Sufficiency of allegations or claims for negligent misrepresentation

Plaintiffs did not justifiably rely upon statements by defendant real estate brokers that property purchased by plaintiffs was suitable for use as a family care facility and thus had no claim for negligent misrepresentation where they would have discovered

NEGLIGENCE—Continued

that septic deficiencies precluded such use of the property if they had complied with an inspection provision of the contract of sale. **Helms v. Holland,** 628.

PARENT AND CHILD

§ 24 (NCI4th). Factors to be considered in determining custody; sufficiency of evidence

The trial court did not err in its consideration of temporary custody orders and prior contempt orders in determining the issue of child custody. **Raynor v. Odom,** 724.

The trial court's finding of fact in a child custody case were supported by a preschool screening report, affidavits, an articulation evaluation, and a speech therapy plan. **Ibid.**

The trial court's consideration of a finding which was not supported by evidence in determining child custody was harmless error where the court had other evidence to support its legal conclusions. **Ibid.**

§ 26 (NCI4th). Finality of child custody order; modification

A finding of unfitness of the custodial parent satisfies the statutory requirement that the trial court find a change in circumstances in order to modify a prior child custody order where the custodial parent was found to be a fit and proper custodian in the prior order. **Raynor v. Odom,** 724.

§ 28 (NCI4th). Right to visitation

There were sufficient adequately supported findings of fact to support the trial court's legal conclusion that plaintiff mother be allowed to visit her child only once a month. **Raynor v. Odom,** 724.

PARTIES

§ 21 (NCI4th). Real party in interest; parties defendant generally

An appeal was dismissed as to defendants Johnson and Gilbert where defendant Scott shot and killed her husband; defendants Johnson and Gilbert brought a civil action against Scott; Scott entered into a confidential settlement agreement which limited Johnson and Gilbert's right to collect to Scott's homeowner's insurance policy with plaintiff insurance company; plaintiff filed a declaratory judgment to determine its obligation and plaintiff's motion for summary judgment was granted. The declaratory judgment action involves only plaintiff and Scott; Johnson and Gilbert have no interest in the subject matter of the litigation. **U.S. Fidelity and Guaranty Co. v. Scott,** 224.

PLEADINGS

§ 14 (NCI4th). Notice theory of pleading

Although a plaintiff contended that the designation of the pleading in a negligence action as a petition for declaratory judgment was immaterial surplusage and should have been disregarded, the allegations of a mislabeled claim must still reveal a claim under some legal theory. **Strickland v. Town of Aberdeen,** 430.

§ 63 (NCI4th). Imposition of sanctions in particular cases

The trial court properly found that plaintiff's pleadings in an action for alienation of affections and criminal conversation were well-grounded in law, well-grounded in

PLEADINGS—Continued

fact, and not interposed for an improper purpose, and the court therefore properly denied defendant's Rule 11 motion for sanctions. **Brown v. Hurley,** 377.

The trial court did not err in concluding that plaintiff apartment guide magazine publisher's action against its competitor for defamation, unfair trade practices, and malicious interference with contract was not well-grounded in fact, was not legally sufficient, and was interposed for an improper purpose, therefore entitling defendant to reasonable attorney fees as a sanction under Rule 11(a). **VSD Communications, Inc. v. Lone Wolf Publishing Group,** 642.

§ 64 (NCI4th). Attorneys' fees as sanction; amount

The trial court could properly consider and rule upon defendant's motion for attorney fees pursuant to Rule 11(a) and G.S. 6-21.5 after plaintiff voluntarily dismissed its claims without prejudice. **VSD Communications, Inc. v. Lone Wolf Publishing Group,** 642.

§ 117 (NCI4th). Conversion of motions

A defendant's motion to dismiss under G.S. 1A-1, Rule 12(b)(6) was converted to a Rule 56 motion for summary judgment because the trial court considered evidence outside the pleadings. **Strickland v. Town of Aberdeen,** 430.

§ 121 (NCI4th). Motion for judgment on pleadings; consideration of matters outside pleadings; relationship to motion for summary judgment

A motion for judgment on the pleadings will be treated as a motion for summary judgment where matters outside the pleadings are considered. **Helms v. Holland,** 628.

§ 369 (NCI4th). Where amendment would assert new claim or defense

Plaintiffs' motion to amend their complaint to add a claim for breach of express warranty was properly denied where the amendment would have been futile. **Barber v. Continental Grain Co.,** 310.

§ 390 (NCI4th). Amendment made at trial where motion to amend was made before trial

The trial court did not err by denying plaintiff's motion to amend its complaint at the close of its case in chief where plaintiff failed to cause its pretrial motion to amend to be heard, so that defendant could have justifiably concluded that plaintiff had abandoned this issue. **Members Interior Construction v. Leader Construction Co.,** 121.

§ 405 (NCI4th). Amendments to conform pleadings to evidence; effect of evidence cited as basis for amendment being applicable to other theories

The trial court did not err by denying plaintiff's motion to amend its complaint at the close of its case in chief where the allegedly extraneous evidence introduced by plaintiff also supports operational facts alleged in the complaint, so that it cannot be said that defendant understood that the alleged extraneous evidence was aimed at establishing a violation of G.S. 58-63-15(11) rather than proving an issue actually raised by the pleadings. **Members Interior Construction v. Leader Construction Co.,** 121.

PROCESS AND SERVICE

§ 59 (NCI4th). Necessity that summons be delivered to sheriff within prescribed time in order to serve as basis for alias or pluries summons

Rule 4 does not require delivery of a summons to the sheriff within 30 days of its issuance or a showing of good faith or excusable neglect for failure to promptly deliver the summons to the sheriff in order for the summons to serve as the basis for the issuance of an alias or pluries summons. **Robinson v. Parker,** 164.

§ 74 (NCI4th). Service in foreign country

Plaintiff wife made a good faith attempt to obtain service of process on defendant husband in Turkey pursuant to the Hague Convention where the documents were returned unserved because they had not been translated into Turkish, and this good faith effort allows a court to apply the Rule 4 standard in analyzing the propriety of service of process. **Tataragasi v. Tataragasi,** 255.

Service of process by mail on the defendant in Turkey in a child custody action was not improper because the summons and complaint were addressed and mailed by plaintiff's attorney rather than by the clerk of court where defendant received actual notice; furthermore, service was effectively made under Rule 4(j3) where it was accepted by defendant's housekeeper. **Ibid.**

PRODUCTS LIABILITY

§ 9 (NCI4th). Theories of liability; privity

A seller's testing and inspection of safety gloves sold to plaintiff's employer did not render the seller a "manufacturer" of the gloves, and an action by the buyer's employee against the seller for breach of implied warranty was barred by a lack of privity. **Nicholson v. American Safety Utility Corp.,** 59.

§ 18 (NCI4th). Plaintiff's contributory negligence; misuse of product

Assuming that contributory negligence bars a product liability action based upon either negligence or breach of warranty, G.S 99B-4(3) requires that the contributory negligence be in the use of the allegedly defective product. **Nicholson v. American Safety Utility Corp.,** 59.

Plaintiff electrical lineman's product liability action against the manufacturer and seller of safety gloves was not barred by plaintiff's contributory negligence where defendants' contention that plaintiff relied exclusively upon his gloves and failed to employ other safety measures to protect himself from electrocution did not relate to his use of the allegedly defective gloves. **Ibid.**

§ 28 (NCI4th). Industrial and business equipment generally

Summary judgment was improperly entered for defendants in plaintiff electrical lineman's product liability action against the manufacturer and seller of safety gloves worn by plaintiff when he was injured by electricity from an energized line based upon negligence in failing to properly test the gloves and to convey adequate warning of potential deficiencies in the gloves. **Nicholson v. American Safety Utility Corp.,** 59.

Summary judgment was improperly entered for defendant manufacturer in plaintiff electrical lineman's action for breach of implied warranty of safety gloves. **Ibid.**

PUBLIC OFFICERS AND EMPLOYEES

§ 41 (NCI4th). Public employees; State Personnel Commission

An unsuccessful applicant for employment by the Department of Human Resources did not have a right to a contested case hearing and appeal to the State Personnel Commission on the issue of whether the most qualified applicant was chosen. **Dunn v. N.C. Dept. of Human Resources,** 158.

The trial court's award of attorney's fees under G.S. 6-19.1 was reversed; in cases involving the State Personnel Commission, the Legislature has preempted the application of G.S. 6-19.1 to matters before the Commission that arise prior to judicial review. **Morgan v. N.C. Dept. of Transportation,** 180.

§ 41 (NCI4th). State Personnel Commission

The State Personnel Commission erred in an action arising from the designation of a state job as policymaking exempt by applying federal constitutional standards under the First Amendment and by determining that the legal question was whether party affiliation is an appropriate requirement for the position. The constitutional issue was not raised by either party and the Commission should have limited its review to the issues presented by the parties. **N.C. Dept. of Transportation v. Hodge,** 515.

§ 42 (NCI4th). Employees subject to personnel system, generally

The State Personnel Commission erred in an action arising from the designation of petitioner's job as policymaking exempt by determining that the Highway Beautification Program was a division of DOT. **Powell v. N.C. Dept. of Transportation,** 542.

§ 43 (NCI4th). Employees subject to personnel system; exceptions and exemptions

The State Personnel Commission erred in an action arising from the designation of petitioner's job as Director of the Highway Beautification Program as policymaking exempt where there was no substantial evidence to support the conclusion that petitioner had decision-making authority of such scope as would enable her to make or impact policies on a department-wide, agency-wide, or division-wide level at DOT. **Powell v. N.C. Dept. of Transportation,** 542.

The State Personnel Commission erred in an action arising from the designation of the Chief Auditor of DOT as a policymaking exempt position by determining that the Internal Audit Section of DOT was a division of a principal state department. All of the evidence shows that the Internal Audit Section remained a section and was not a division even after a reorganization, and the record also does not show that this section functioned as a principal subunit of a principal department. **N.C. Dept. of Transportation v. Hodge,** 515.

The position of Chief Auditor of DOT was properly designated as policymaking exempt. A policymaking position as defined by statute is a position delegated with the authority to impose the final decision as to a settled course of conduct to be allowed within the department, agency, or division. Respondent had that authority and it is illogical to construe the statute as requiring that persons in policymaking positions have absolute decision-making autonomy. **Ibid.**

§ 47 (NCI4th). Public employees; veterans preference

The veteran's preference did not apply to an applicant for reemployment by the Department of Human Resources where the applicant had previously worked for the Department after leaving military service but had left the Department to pursue private employment. **Dunn v. N.C. Dept. of Human Resources,** 158.

RAPE AND ALLIED SEXUAL OFFENSES

§ 107 (NCI4th). Sufficiency of evidence to show fellatio, cunnilingus, analingus or anal intercourse

There was sufficient evidence of first-degree sexual offense where evidence presented by the State showed that defendant forced the victim to engage in fellatio with him; defendant's argument that the victim engaged in fellatio with him and that he performed no sexual act with her is meritless. **State v. Woody,** 296.

§ 123 (NCI4th). Sufficiency of evidence; attempt to commit first-degree sexual offense

The trial court did not err in a prosecution for first-degree sexual offense involving the defendant's eight-year-old daughter by denying defendant's motion to instruct the jury on the lesser included offense of attempted first-degree sexual offense. **State v. Woody,** 296.

§ 132 (NCI4th). Effect of disjunctive charge

There was no plain or constitutional error in a prosecution for first-degree sexual offense and attempted first-degree rape where the trial court charged the jury in the disjunctive on the use of a deadly weapon or the infliction of serious personal injury, which raises both offenses from second to first-degree. **State v. Green,** 269.

RECORDS OF INSTRUMENTS, DOCUMENTS, OR THINGS

§ 1 (NCI4th). Public records generally; "public records" defined

Exhibits admitted into evidence at a criminal defendant's original murder trial and in the possession of the clerk of court once again became "records of criminal investigations" which were exempt from disclosure under the Public Records Act when they were returned to the district attorney for use in the reinvestigation and retrial of defendant for the murders. **Times-News Publishing Co. v. State of N.C.,** 175.

RETIREMENT

§ 10 (NCI4th). Local Governmental Employees' System

Summary judgment was improperly entered for defendants on claims that the retroactive application of the statutory cap on postretirement earnings of a law enforcement officer who retired before the effective date of the statute violated the officer's rights under the Contract Clause of Art. I, § 10 of the U.S. Constitution, his due process rights under the Fourteenth Amendment to the U.S. Constitution, or his rights under the Law of the Land Clause of the N.C. Constitution. **Miracle v. N.C. Local Gov't. Employees' Retirement System,** 285.

SALES

§ 13 (NCI4th). Sales contract; delegation and assignment

Plaintiff service station franchisee failed to show that his fuel supply agreement with the franchisor was breached and therefore constructively terminated under the Petroleum Marketing Practices Act by the franchisor's assignment of its interest in the agreement on the ground that the assignee is charging plaintiff higher prices for gasoline than he would have been charged by the franchisor. **Richardson v. BP Oil Co.,** 509.

SCHOOLS

§ 162 (NCI4th). Superintendents

A former county board of education lacked the authority to extend the contract of the former superintendent of county schools to cover the 1993-94 school year pending a vote on merger of the county school district with two city school districts or to authorize the payment of severance pay of $275,000 if the former superintendent was not selected as the superintendent for the merged school system. **Guilford County Bd. of Comrs. v. Trogdon,** 741.

§ 172 (NCI4th). Liability insurance; waiver of tort immunity

The trial court did not err by dismissing an action against a school board arising from an assault on a student on a school bus for lack of jurisdiction on the basis that defendant was immune where there was an exclusion in defendant's insurance policy for actions arising from the ownership, maintenance, operation, use, loading or unloading of an automobile. **Vester v. Nash/Rocky Mount Bd. of Educ.,** 400.

Summary judgment should have been granted for defendant Board of Education in an action alleging that plaintiff had injured her right ankle while walking on school grounds where defendant Board had established that it was not insured for claims in the amount sought by plaintiff. The Board's participation in a risk management agreement is not tantamount to the purchase of liability insurance and does not constitute waiver of governmental immunity. **Hallman v. Charlotte-Mecklenburg Bd. of Educ.,** 435.

§ 195 (NCI4th). Standing

Plaintiff taxpayers had standing to file a claim for recovery of school board funds where the new board had voted not to recover monies paid to defendant. **Guilford County Bd. of Comrs. v. Trogdon,** 741.

SEARCHES AND SEIZURES

§ 1 (NCI4th). Prohibition against unreasonable searches and seizures

Under North Carolina's Constitution, no good faith exception exists which might save the fruits of a search made pursuant to an invalidated warrant. **State v. Smith,** 565.

§ 28 (NCI4th). Exceptions to warrant requirement; exigent circumstances

No exigent circumstances were argued, nor should have been, in a prosecution for conspiracy and trafficking in cocaine, given that investigators exercised near absolute control over the contraband, conducted extensive surveillance over the transaction, and received constant reports from an informant. **State v. Smith,** 565.

§ 58 (NCI4th). Observation of objects in plain view; reasonable belief that item is contraband or evidence of a crime

Crack cocaine was lawfully seized from defendant after defendant was stopped for a traffic violation where it became immediately apparent to the arresting officer that containers in defendant's pocket held crack cocaine when the officer felt them through defendant's jacket during a pat-down search. **State v. Benjamin,** 734.

§ 77 (NCI4th). Investigatory stops of motor vehicles, generally

An officer had a reasonable, articulable suspicion that defendant was committing the crime of driving while impaired in his presence and thus properly detained defendant for an Alco-sensor test. **State v. Rogers,** 364.

SEARCHES AND SEIZURES—Continued

§ 80 (NCI4th). Stop and frisk procedures; reasonable suspicion of criminal activity

The trial court did not err in denying defendant's motion to suppress cocaine seized from his person in an airport by concluding that SBI agents had reasonable suspicion based on articulable facts that defendant was engaged in criminal activity at the time of the seizure. **State v. Hendrickson,** 150.

§ 82 (NCI4th). Stop and frisk procedures; reasonable suspicion that person may be armed

The trial court erred in a prosecution for possession with intent to sell and deliver cocaine by denying defendant's motion to suppress cocaine found on his person in a warrantless search in the breezeway of an apartment building during a drug raid. **State v. Rhyne,** 84.

§ 85 (NCI4th). General warrants prohibited

The trial court erred in a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine by denying defendant's motion to suppress evidence obtained through an anticipatory search warrant. **State v. Smith,** 565.

§ 118 (NCI4th). Affidavits to support search warrants based on controlled drug buys

The trial court erred in a prosecution for conspiracy to traffic in cocaine and trafficking in cocaine by denying defendant's motion to suppress evidence obtained through an anticipatory search warrant. Anticipatory warrants must set out on their face explicit, clear, and narrowly drawn triggering events which must occur before execution may take place, those triggering events must be ascertainable and preordained (meaning the property is on a sure and irreversible course to its destination), and no search may occur unless and until the property does in fact arrive at that destination. **State v. Smith,** 565.

SECURED TRANSACTIONS

§ 119 (NCI4th). Disposition of collateral; notice to debtor

Where a certificate of deposit was used as collateral to secure a loan, notice to the debtor was required before the secured party could demand payment of the certificate of deposit. **Roberts v. First-Citizens Bank and Trust Co.,** 713.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 13 (NCI4th). Civil and criminal liability generally

A police officer and a police chief were not entitled to governmental or official immunity on claims of false imprisonment and malicious prosecution arising from an arrest; police officers share in the immunity of their governing municipalities and are not entitled to the defense of governmental immunity to the extent that the municipality waived immunity by purchasing liability insurance. **Moore v. Evans,** 35.

§ 20 (NCI4th). Civil and criminal liability; death or injury caused by prisoner

The Industrial Commission erred by finding the Department of Correction negligent where one Miller was on probation and house arrest, he reported to his probation officer that the leg bands necessary for electronic house arrest were getting broken at

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS—Continued

work, the probation officer failed to contact Miller's employer, the leg bands when broken could be left near the transmitter in his residence, allowing Miller to evade house arrest, and Miller assaulted plaintiff and murdered plaintiff's decedent while evading electronic house arrest. Nothing here indicates a special relationship, which would give rise to one exception to the public duty doctrine, and there is no indication of any promise of protection given to plaintiffs by the probation officer or the Department of Correction, which would give rise to the other exception to the public duty doctrine. **Humphries v. N.C. Dept. of Correction,** 545.

§ 23 (NCI4th). Civil rights violations

Summary judgment should have been granted for a police chief and an officer on a 42 U.S.C. § 1983 claim arising from an arrest. **Moore v. Evans,** 35.

SOCIAL SERVICES AND PUBLIC WELFARE

§ 20 (NCI4th). Food stamp program generally

The NCDHR violated the separation of powers provision of the N.C. Constitution by applying a decision of the Court of Appeals—that USDA and NCDHR regulations permitting postponement of the food stamp disqualification period for fraud conflicted with the Food Stamp Act—only to the plaintiff in that case and not to others similarly situated. **Thomas v. N.C. Dept. of Human Resources,** 698.

The Court of Appeals was not required to defer to the USDA's interpretation of the Food Stamp Act but could declare a USDA regulation invalid as being in conflict with the Act. **Ibid.**

There was no validity in the NCDHR's argument that it could not acquiesce in the Court of Appeals' interpretation of the Food Stamp Act because to do so would endanger federal funding or require the agency to secure a funding waiver from the USDA. **Ibid.**

STATE

§ 35 (NCI4th). Standard of care

There was evidence in the record to support the Industrial Commission's findings and conclusions that defendant state park was neither negligent in its maintenance of a boardwalk nor in its failure to warn of the possibility of protruding nails therein. **Jernigan v. N.C. Div. of Parks and Recreation,** 748.

§ 36 (NCI4th). Proximate cause; contributory negligence

A finding of contributory negligence by plaintiff was not necessary to uphold the Industrial Commission's decision where it was properly determined that defendant state park had not acted in a negligent manner. **Jernigan v. N.C. Div. of Parks and Recreation,** 748.

§ 55 (NCI4th). Sufficiency of evidence; other types of actions

The Industrial Commission's finding as to when a state park was notified of plaintiff's accident was irrelevant and was disregarded as surplusage. **Jernigan v. N.C. Div. of Parks and Recreation,** 748.

The Industrial Commission was entitled to resolve a conflict in a witness's testimony as to the length of a nail which plaintiff tripped over while visiting a state park. **Ibid.**

STATE—Continued

The Industrial Commission's finding that park employees did not have notice that the nail plaintiff tripped upon was protruding from a boardwalk was supported by the evidence. **Ibid.**

The Industrial Commission properly found that there was evidence of a firmly established opening routine and a reasonable procedure for inspecting the boardwalk at a state park where plaintiff claimed that she tripped over a nail protruding from a boardwalk. **Ibid.**

TAXATION

§ 178 (NCI4th). Civil action to collect taxes; execution on judgment

The trial court correctly ruled that the IRS properly served plaintiff with notice of seizure of his property where plaintiff admitted at trial that a revenue officer personally served him with notice and both parties agree that a revenue officer posted a notice of sale on the side of plaintiff's repair shop and that plaintiff went to the shop and saw the notice. Moreover the sale was substantially in compliance with the statute even though it was moved inside because of inclement weather. **Smith v. Moody,** 203.

TRIAL

§ 38 (NCI4th). Summary judgment generally

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. **McClain v. Walker,** 765.

§ 222 (NCI4th). Effect of voluntary dismissal upon previous orders or rulings

Admissions obtained under G.S. 1A-1, Rule 36 may not be utilized beyond the confines of the pending action; while an original claim may be preserved when a Rule 41 dismissal is taken, the proceeding is not. **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.,** 232.

§ 538 (NCI4th). New trial generally

The trial judge did not err in denying defendant's Rule 59 motion for a new trial in a wrongful discharge case. **Roberts v. First-Citizens Bank and Trust Co.,** 713.

UNFAIR COMPETITION OR TRADE PRACTICES

§ 12 (NCI4th). Leases and rentals

The trial court properly granted summary judgment for defendants on plaintiff's unfair and deceptive practices claim because defendants were simply exercising their right to contract freely by deciding not to enter into a written lease with plaintiff after the parties had negotiated, and even if defendants did breach an oral lease agreement, no substantial aggravating circumstances attendant to the breach were shown. **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.,** 383.

UNFAIR COMPETITION OR TRADE PRACTICES—Continued

§ 43 (NCI4th). Sufficiency of evidence to support jury verdict or trial court's findings generally

The trial court did not err in an action arising from the sale of a wrecked automobile by ruling that defendants' actions were unfair or deceptive practices as defined in G.S. Chapter 75. **Huff v. Autos Unlimited, Inc.**, 410.

§ 45 (NCI4th). Sufficiency of evidence to support jury verdict or trial court's findings; evidence of damages

The trial court correctly concluded that plaintiff had suffered an actual injury as a proximate result of defendant's misrepresentations in an action for unfair and deceptive practices arising from the sale of a wrecked automobile. **Huff v. Autos Unlimited, Inc.**, 410.

VENDOR AND PURCHASER

§ 41 (NCI4th). Vendor's breach

Summary judgment was improperly entered in an action for breach of a contract to sell realty where plaintiff buyers' evidence established an issue of fact as to whether the parties intended for the description in the deed book to control their agreement. **McClain v. Walker**, 765.

WILLS

§ 140 (NCI4th). General and specific legacies or bequests

The testatrix intended that a gift to a charitable foundation of the lesser of sixty percent of the residuary estate or thirty million dollars was to be a general bequest, rather than a residuary bequest, which was to be paid to the foundation before division of the residuary estate. **Central Carolina Bank v. Wright**, 477.

WORKERS' COMPENSATION

§ 62 (NCI4th). Exclusiveness of workers' compensation remedy; employer's misconduct tantamount to intentional tort

The trial court properly granted summary judgment for defendants on a Woodson claim for damages resulting from injuries plaintiff received after being ordered to work while still suffering from a prior work-related injury. Plaintiff's forecast of evidence fails to show that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury to plaintiff. **Bullins v. Abitibi-Price Corp.**, 530.

§ 153 (NCI4th). Recreational activity during business travel

The Industrial Commission correctly determined that decedent's death arose out of and in the course of his employment where decedent and his supervisor were assigned as part of a crew to a project out of state; decedent and his supervisor drove to a restaurant after work, ate dinner, and remained in the sports bar to watch a game; an accident occurred as they were returning to their motel; the supervisor was driving; and both were intoxicated. Employees whose work requires travel away from the employer's premises are within the course of their employment continuously during such travel except when there is a distinct departure for a personal errand; even if remaining at the restaurant to drink and watch a ball game constituted a personal

WORKERS' COMPENSATION—Continued

endeavor, sufficient evidence existed to support the finding that decedent had rejoined his course of employment at the time of the accident. **Cauble v. Soft-Play, Inc.**, 526.

§ 228 (NCI4th). Definition of "disability" or "disablement"

In order to find a worker disabled, the Industrial Commission must find (1) that plaintiff was incapable of earning the same wages he had earned before his injury in the same employment; (2) that plaintiff was incapable of earning the same wages he had earned before his injury in any other employment; and (3) that plaintiff's incapacity to earn was caused by his injury. **Brown v. S & N Communications, Inc.**, 320.

§ 230 (NCI4th). Requirement of showing impairment of earning capacity; existence of disability

In order to receive disability compensation, the injury must have impaired the worker's earning capacity. **Brown v. S & N Communications, Inc.**, 320.

§ 233 (NCI4th). Extent of disability as basis for computation of award; apportionment where disability caused by occupational and nonoccupational causes

An Industrial Commission award was remanded where there was evidence that any incapacity to work was caused by prior cigarette smoking rather than asbestosis, but the Commission failed to make its own determination as to the origins of plaintiff's impairment. The cause of plaintiff's disability need not be an either/or proposition. **Stroud v. Caswell Center**, 653.

§ 234 (NCI4th). Existence of disability; burden of proof

The Industrial Commission erred in a worker's compensation action when finding petitioner entitled to temporary total disability compensation for a back injury by failing to give the employer the benefit of the presumption that a newly created job was ordinarily available in the competitive job market. **Saums v. Raleigh Community Hospital**, 219.

The approval of a Form 21 agreement by the Industrial Commission relieves the employee of his initial burden of proving a disability, and the employee receives the benefit of a presumption that he is totally disabled. **Brown v. S & N Communications, Inc.**, 320.

§ 252 (NCI4th). Determination of temporary total disability in particular cases

The remedies for total disability under G.S. 97-29 or G.S. 97-31 and for partial disability under G.S. 97-30 are mutually exclusive. **Brown v. S & N Communications, Inc.**, 320.

§ 253 (NCI4th). Determination of total temporary disability in particular cases; respiratory disease

An Industrial Commission award was remanded where plaintiff was exposed to asbestos in the course of employment with defendant, retired at age sixty, filed a claim alleging that he suffered from asbestosis, was paid 10 weeks of compensation, was awarded $4,000 for permanent damage, and the deputy commissioner informed plaintiff's counsel that plaintiff had the burden of proving that plaintiff retired because of the disease. **Stroud v. Caswell Center**, 653.

WORKERS' COMPENSATION—Continued

§ 254 (NCI4th). When temporary total disability period ends

Where the parties executed an approved Form 21 agreement, the presumption of disability continued until defendant employer offered evidence to rebut the presumption. **Brown v. S & N Communications, Inc.,** 320.

An employer may rebut the presumption of continuing total disability arising from a Form 21 agreement by showing the employee's capacity to earn either the same or lesser wages than he received before the injury. **Ibid.**

The employer may rebut the presumption of continuing disability by showing that suitable jobs are available for the employee, the employee is capable of getting a job, and the job would enable the employee to earn some wages, or by showing that the employee has unjustifiably refused suitable employment. **Ibid.**

A finding of maximum medical improvement does not satisfy the employer's burden of rebutting the presumption of a continuing disability, and the Industrial Commission erred by placing on plaintiff employee the burden of proving continued disability following a finding that plaintiff had reached maximum medical improvement. **Ibid.**

If an employer offers sufficient evidence to rebut the presumption of continuing disability, the burden then switches back to the employee to show a continuing total disability or to prove a permanent partial disability under G.S. 97-30; the employee may prove a continuing total disability by showing that no jobs are available, that no suitable jobs are available, or that he had unsuccessfully sought employment with the employer. **Ibid.**

Where the parties' Form 21 agreement for the payment of temporary total disability was approved by the Industrial Commission, the Commission erred by placing on plaintiff employee the burden of proving continued disability even though plaintiff had been released to return to work with no restrictions. **King v. Yeargin Construction Co.,** 369.

§ 259 (NCI4th). Determination of partial disability in particular cases

When an employee's power to earn is diminished but not obliterated, the employee is entitled to benefits under G.S. 97-30 for permanent partial disability. **Brown v. S & N Communications, Inc.,** 320.

When an employee cannot be fully compensated under G.S. 97-29 or G.S. 97-31 for total disability, he may still be entitled to compensation for permanent partial disability, and the employee may select the remedy which offers the more generous benefits less the amount he or she has already received. **Ibid.**

Where a presumption of continuing total disability was established by an approved Form 21 agreement, the Industrial Commission's erroneous shifting of the burden of proving a temporary total disability to plaintiff employee after a finding of maximum medical improvement deprived plaintiff of an opportunity to offer evidence to establish a permanent partial disability and receive additional benefits under G.S. 97-30. **Ibid.**

§ 282 (NCI4th). Mental illness or incapacity arising from compensable injury

Mental as well as physical injuries by accident are compensable under the Workers' Compensation Act. **Jordan v. Central Piedmont Community College,** 112.

A vocational instructor at a correctional center suffered a compensable mental injury by accident arising out of and in the course of her employment where she suf-

WORKERS' COMPENSATION—Continued

fered from post-traumatic stress disorder as a result of witnessing a fight between two prison inmates in her classroom. **Ibid.**

§ 290 (NCI4th). Credit for payments employer has already made

It was improper for the Industrial Commission to conclude that credit should be given to defendant for disability payments made to plaintiff after defendant unilaterally and therefore improperly determined that plaintiff's return to work modified a Form 21 agreement. **Kisiah v. W. R. Kisiah Plumbing,** 72.

§ 292 (NCI4th). Credit for payments employer has already made; wages paid by employer after injury

The Industrial Commission erred in holding that the settlement proceeds from plaintiff's federal handicap discrimination claim against defendant employer constituted "wages" and she therefore was not entitled to temporary total disability benefits. **Allmon v. Alcatel, Inc.,** 341.

§ 301 (NCI4th). Penalty for late payment of installment

The Industrial Commission erred by determining that no basis existed upon which to assess a penalty against defendant where defendant voluntarily ceased making disability payments without the permission of the Commission, then resumed payments at a level it deemed proper. **Kisiah v. W. R. Kisiah Plumbing,** 72.

The Industrial Commission erred in assessing a penalty against defendant under G.S. 97-18(e) only for the period running from the date of the Commission's first order to reinstate benefits to the date of the Commission's approval of defendant's Form 24 request, rather than from the date defendant unilaterally terminated plaintiff's benefits until the date of plaintiff's reinstatement. **Allmon v. Alcatel, Inc.,** 341.

§ 420 (NCI4th). Industrial Commission's authority to modify award

The issue of plaintiff's disability compensation was remanded to the Industrial Commission for rehearing; a Form 21 agreement has long been regarded as constituting an award by the Commission and a presumption of disability exists to the benefit of the employee whenever a disability award is made by the Commission. Challenges must thereafter be made pursuant to processes mandated by the Act. **Kisiah v. W. R. Kisiah Plumbing,** 72.

§ 426 (NCI4th). Modification of award upon change of condition; what constitutes change of condition

A change in the physical condition of an employee's left hand could not support a conclusion that the employee had sustained a change of condition warranting modification of a prior compensation award where there was no finding that the change in condition was causally related to the employee's work-related injury. **Blair v. American Television & Communications Corp.,** 420.

The evidence did not support the Industrial Commission's determination that plaintiff had shown increased disability on the ground she had made a reasonable but unsuccessful effort to obtain employment. Even if she made a reasonable effort to find employment, the conclusion that her increased disability is a changed condition cannot stand because there was no finding that the increased disability was causally related to her work-related injury. **Ibid.**

ZONING

§ 114 (NCI4th). Review proceeding in nature of certiorari

The denial of plaintiffs' special use district application by the Wilmington City Council was reviewable in the superior court pursuant to a writ of certiorari. **Gossett v. City of Wilmington,** 741.

WORD AND PHRASE INDEX

ACCIDENT REPORT

Inclusion of circumstances contributing to collision, **Cooke v. Grigg**, 770.

ACCOUNTING

Negligence, **Bartlett v. Jacobs,** 521.

ADMISSIONS

No survival beyond voluntary dismissal, **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.**, 232.

ADVERTISING SIGN

Removable by DOT where lease not recorded, **National Advertising Co. v. N.C. Dept. of Transportation,** 620.

AGGRAVATING FACTORS

Husband away and victim sleeping, **State v. Davis,** 93.

Inducement of others, **State v. Weary,** 754.

AIRLINE PASSENGER

Injuries in air space over another state, **Laurent v. USAir, Inc.**, 208.

AIRPORT STOP

Cocaine, **State v. Hendrickson,** 150.

ALCO-SENSOR TEST

Detaining defendant for, **State v. Rogers,** 364.

ALIAS SUMMONS

Failure to deliver summons to sheriff, **Robinson v. Parker,** 164.

ALIENATION OF AFFECTIONS

Facially plausible pleadings, **Brown v. Hurley,** 377.

AMENDMENT

At close of plaintiff's evidence denied, **Members Interior Construction v. Leader Construction Co.**, 121.

ANNEXATION REPORT

Sufficient, **Parkwood Assn., Inc. v. City of Durham**, 486.

ANTICIPATORY SEARCH WARRANT

Requirements, **State v. Smith,** 556.

APPEALABILITY

Denial of motion to vacate child custody order, **Tataragasi v. Tataragasi,** 255.

Immunity claimed, **Moore v. Evans,** 84.

Order requiring appearance for deposition, **Wilson v. Wilson,** 371.

Order setting aside judgment, **Banner v. Hatcher,** 439.

Partial summary judgment not appealable, **Tinch v. Video Industrial Services,** 391.

ARBITRATION

Motion to confirm appraiser's report, **Hooper v. Allstate Ins. Co.**, 185.

ARGUMENT OF COUNSEL

See Prosecutor's Argument this Index.

ARREST

Civil rights claim, **Moore v. Evans,** 84.

ASBESTOSIS

Retirement, **Stroud v. Caswell Center,** 653.

ASSESSMENT

Attorney's fees, **Brookwood Unit Ownership Assn. v. Delon,** 446.

ATTORNEY

Disbarment for conflict of interest, **N.C. State Bar v. Maggiolo,** 22.

Promise not to sue, Creech v. Melnik, 502.

ATTORNEY FEES

Condominium assessment, **Brookwood Unit Ownership Assn. v. Delon,** 446.

Contested CAMA permit, **Walker v. N.C. Coastal Resources Comm.,** 1.

Debt collection, **Trull v. Central Carolina Bank & Trust,** 486.

Ruling after voluntary dismissal, **VSD Communications, Inc. v. Lone Wolf Publishing Group,** 642.

Sanctioned against plaintiff, **VSD Communications, Inc. v. Lone Wolf Publishing Group,** 642.

State Personnel Commission, **Morgan v. N.C. Dept. of Transportation,** 180.

AUTHENTICATION

Written statement of victim, **State v. Woody,** 296.

AUTOMOBILE

Sale of wrecked, **Huff v. Autos Unlimited, Inc.,** 410.

AUTOMOBILE INSURANCE

Employee exclusion clause in carrier's liability policies, **Hand v. Connecticut Indemnity Co.,** 774.

Reinsurance Facility forms, **St. Paul Fire and Marine Ins. Co. v. N.C. Motor Veh. Reinsurance Fac.,** 450.

AUTOMOBILE RATES

Allocating expenses between voluntary and Reinsurance Facility markets by premium volume, **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

Effect of dividends and deviations, **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

AUTOMOBILE RATES—Continued

Filing date adjustment, **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

Investment income from capital and surplus, **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

Mathematically specific findings, **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

Normative premium-to-surplus ratio, **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

Underwriting profit by use of statutory accounting principles, **State ex rel. Comr. of Ins. v. N.C. Rate Bureau,** 674.

BANK

Employee wrongfully discharged for refusal to violate statutes, **Roberts v. First-Citizens Bank and Trust Co.,** 713.

Expiration of temporary restraining order for checking account, **Taylor v. Centura Bank,** 661.

BLACKOUTS

Suffered by vehicle driver, **Cooke v. Grigg,** 770.

BOARD OF EDUCATION

Governmental immunity, **Hallman v. Charlotte-Mecklenburg Bd. of Educ.,** 435.

Insurance exclusion for school bus operation, **Vester v. Nash/Rocky Mount Bd. of Educ.,** 400.

BOARD OF HEALTH

Smoking rules, **City of Roanoke Rapids v. Peedin,** 578.

BREACH OF CONTRACT

Description in contract for sale of realty, **McClain v. Walker,** 765.

BRIEF

Printing costs taxed against attorney, **Roberts v. First-Citizens Bank and Trust Co.,** 713.

BUILDER

Common law unfair practice, **Henderson v. U.S. Fidelity & Guaranty Co.,** 103.

BUSINESS TRIP

Workers' compensation claim for death while returning from dinner, **Cauble v. Soft-Play, Inc.,** 526.

CAMA PERMIT

Marina, **Walker v. N.C. Coastal Resources Comm.,** 1.

CERTIFICATE OF DEPOSIT

Collateral for loan, notice to debtor of default, **Roberts v. First-Citizens Bank and Trust Co.,** 713.

CERTIFICATE OF NEED

Commitment for funding not shown, **Retirement Villages, Inc. v. N.C. Dept. of Human Resources,** 495.

Projecting patient origin, **Retirement Villages, Inc. v. N.C. Dept. of Human Resources,** 495.

Statement of type of service, **Retirement Villages, Inc. v. N.C. Dept. of Human Resources,** 495.

CHECKING ACCOUNT

Expiration of temporary restraining order, **Taylor v. Centura Bank,** 661.

CHIEF AUDITOR OF DOT

Policymaking exempt position, **N.C. Dept. of Transportation v. Hodge,** 515.

CHILD ABUSE

Investigation interfered with on religious grounds, **In re Browning,** 190.

CHILD CUSTODY

Consideration of prior orders, **Raynor v. Odom,** 724.

Grandparents' right to bring initial action, **Sharp v. Sharp,** 357.

Homosexual relationship, **Pulliam v. Smith,** 144.

Plain error doctrine inapplicable, **Raynor v. Odom,** 724.

Unfitness of mother supported by findings, **Raynor v. Odom,** 724.

CHILD SEXUAL OFFENSE

Victim's feelings for defendant-father, **State v. Woody,** 296.

CHILD VISITATION

Grandparent action prohibited where single parent living with child, **Fisher v. Gaydon,** 442.

Limited to once a month, **Raynor v. Odom,** 724.

CIVIL RIGHTS ACTION

Professor not reappointed, **Ware v. Fort,** 613.

COCAINE

Thrown into bushes, **State v. Wilder,** 136.

COLLATERAL ESTOPPEL

Relitigation of voiding of foreclosure sales, **C.C. Mangum, Inc. v. Brown,** 658.

CONDOMINIUM

Attorney's fees in excess of fifteen percent, **Brookwood Unit Ownership Assn. v. Delon,** 446.

CONFESSION

Not the result of improper photo I.D., **State v. Green,** 269.

Repudiation by motion to suppress, **State v. Davis,** 93.

CONFLICT OF INTEREST

Disbarment of attorney, **N.C. State Bar v. Maggiolo,** 1.

CONTEMPT

Order requiring appearance for deposition, **Wilson v. Wilson,** 371.

CONTRIBUTORY NEGLIGENCE

Product liability action, **Nicholson v. American Safety Utility Corp.,** 59.

CORPORATE MALFEASANCE

Phlebotomist's actions in testing putative father, **State v. Weary,** 754.

COSTS

Amount set after adjournment, **Hockaday v. Lee,** 425.

COUNTRY CLUB

Use of facilities after sale of, **Bicket v. McLean Securities, Inc.,** 548.

COVENANT NOT TO COMPETE

Manufacture of competing product, **Chemimetals Processing v. McEneny,** 194.

CRIMINAL CONVERSATION

Facially plausible pleadings, **Brown v. Hurley,** 377.

DEBT COLLECTION

Attorney's fee, **Trull v. Central Carolina Bank & Trust,** 486.

DECLARATORY JUDGMENTS

Negligence actions, **Strickland v. Town of Aberdeen,** 430.

DEED OF TRUST

Subordination agreements, **Smith v. Martin,** 592.

Unauthorized cancellation by trustee, **Smith v. Martin,** 592.

DEEMED ADMISSIONS

No survival beyond voluntary dismissal, **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.,** 232.

DEPOSITION

Order requiring appearance invalid, **Wilson v. Wilson,** 371.

DISTRIBUTORSHIP AGREEMENT

Manufacture of competing product, **Chemimetals Processing v. McEneny,** 194.

DOT CERTIFICATION

Wrecked vehicle, **Wilson v. Sutton,** 170.

DOUBLE JEOPARDY

Driver's license revocation and DWI conviction, **State v. Rogers,** 364.

DRIVER'S LICENSE

Revocation and DWI conviction not double jeopardy, **State v. Rogers,** 364.

Suspension without license card or affidavit, **Eibergen v. Killens,** 534.

DRIVING WHILE IMPAIRED

Probable cause after Alco-sensor test, **State v. Rogers,** 364.

DRUG ANALYSIS

Restitution of cost, **State v. Johnson,** 462.

DRUG COURIER PROFILE

Probable cause, **State v. Hendrickson,** 150.

DRUG RAID

Pat down unreasonable intrusion, **State v. Rhyne,** 84.

EFFECTIVE ASSISTANCE OF COUNSEL

Failure to compel informant's identity, **State v. Johnson,** 462.

Failure to make speedy trial motion, **State v. Johnson,** 462.

ELECTRICAL LINEMAN

Product liability action for safety gloves, **Nicholson v. American Safety Utility Corp.,** 59.

EMOTIONAL DISTRESS

Statement that someone in building has AIDS, **Chapman v. Byrd,** 13.

Workers' compensation, **Jordan v. Central Piedmont Community College,** 113.

EMPLOYMENT AT WILL

Public policy exception for bank employee, **Roberts v. First-Citizens Bank and Trust Co.,** 713.

EMPLOYMENT CLAIMS

Duty of insurance company to defend, **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.,** 232.

ENTRY OF JUDGMENT

Writing required, **Worsham v. Richbourg's Sales and Rentals,** 782.

EQUITABLE DISTRIBUTION

Certificate of deposit, **Riggs v. Riggs,** 647.

EQUITABLE DISTRIBUTION—Continued

Maintenance of marital property, **Coggins v. Vonhandschuh,** 405.

Marital residence, **Riggs v. Riggs,** 647.

Transferred property, **Riggs v. Riggs,** 647.

Visa debt, **Riggs v. Riggs,** 647.

ESTOPPEL

Promise not to sue, **Creech v. Melnik,** 502.

EXHIBITS

Use for retrial not public records, **Times-News Publishing Co. v. State of N.C.,** 175.

EXPERTS

Appointment for indigent defendant, **State v. Green,** 269.

EXIGENT CIRCUMSTANCES

Controlled drug sale, **State v. Smith,** 556.

FALSE ARREST

Probable cause, **Moore v. Evans,** 84.

FAMILY HEALTH FACILITY

Property unfit for, **Helms v. Holland,** 629.

FELLATIO

Sexual act by defendant, **State v. Woody,** 296.

FERTILIZER

Diluted, **Barber v. Continental Grain Co.,** 310.

FOOD STAMPS

DHR postponement of disqualification period for recipients, **Thomas v. N.C. Dept. of Human Resources,** 698.

FORFEITURE

Cash on person in drug arrest, **State v. Johnson,** 462.

GLOVES

Electric lineman's products liability action, **Nicholson v. American Safety Utility Corp.,** 59.

GOOD FAITH EXCEPTION

None under N.C. Constitution, **State v. Smith,** 556.

GOVERNMENTAL IMMUNITY

Appealability of denial of summary judgment, **Hallman v. Charlotte-Mecklenburg Bd. of Educ.,** 435.

Purchase of liability insurance, **Askew Kawasaki, Inc. v. City of Elizabeth City,** 453.

GRANDPARENTS

Child custody rights, **Sharp v. Sharp,** 357.

Visitation action prohibited where single parent living with child, **Fisher v. Gaydon,** 442.

HAGUE CONVENTION

Attempted service of process in Turkey, **Tataragasi v. Tataragasi,** 255.

HANDICAP DISCRIMINATION PROCEEDS

Not wages for workers' compensation, **Allmon v. Alcatel, Inc.,** 341.

HEARSAY

Medical exception for child's statements, **State v. Woody,** 296.

HIGHWAY BEAUTIFICATION DIRECTOR

Policymaking exempt position, **Powell v. N.C. Dept. of Transportation,** 542.

HIGHWAY PATROL OFFICER

Accident report containing hearsay, **Cooke v. Grigg,** 770.

HOMOSEXUAL RELATIONSHIP

Child custody, **Pulliam v. Smith,** 144.

HOUSE ARREST

Evasion of, **Humphries v. N.C. Dept. of Correction,** 545.

IMPAIRMENT OF CONTRACT

Retroactive statutory salary cap, **Miracle v. N.C. Local Gov't. Employees' Retirement System,** 285.

IMPLIED CONTRACT

Promise not to sue, **Creech v. Melnik,** 502.

IMPLIED WARRANTY

Electrical lineman's gloves, **Nicholson v. American Safety Utility Corp.,** 59.

INCOME TAX PREPARATION

Accounting negligence, **Bartlett v. Jacobs,** 521.

INDEMNITY POLICY

Common law unfair practice, **Henderson v. U.S. Fidelity & Guaranty Co.,** 103.

INSTRUCTIONS

Disjunctive, **State v. Green,** 269.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Statement that someone in building has AIDS, **Chapman v. Byrd,** 13.

INTEREST

Prejudgment, **Members Interior Construction v. Leader Construction Co.,** 136.

INTERSTATE MOTOR CARRIER

Employee exclusion clauses in liability policies, **Hand v. Connecticut Indemnity Co.**, 774.

INVESTIGATORY STOP

Alco-sensor test, **State v. Rogers,** 364.

IRS TAX SALE

Notice and sale sufficient, **Smith v. Moody,** 203.

JUDGMENTS

Writing required for entry, **Worsham v. Richbourg's Sales and Rentals,** 782.

JURY SELECTION

Questions regarding interracial marriage, **State v. Woody,** 296.

JUVENILE

Trial as adult, **State v. Green,** 269.

LAW OFFICER

Impairment of retirement obligation, **Miracle v. N.C. Local Gov't. Employees' Retirement System,** 285.

LEASE

Internal form and draft lease not contract, **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.,** 383.

LIBEL

Statement that someone in building has AIDS, **Chapman v. Byrd,** 13.

LIFE SENTENCE

Mandatory for thirteen-year-old defendant, **State v. Green,** 269.

LIMITATIONS OF ACTIONS

Claim barred under borrowing statute, **Laurent v. USAir, Inc.,** 208.

Claim for commission and bonus under employment contract, **Miller v. Randolph,** 779.

Period not tolled for defendant amenable to service by publication, **Tierney v. Garrard,** 415.

MALICIOUS PROSECUTION

Probable cause to arrest, **Moore v. Evans,** 84.

MARITAL PROPERTY

Maintenance, **Coggins v. Vonhandschuh,** 405.

MEDICAL EXPENSES

Jury finding that treatment not necessary, **Jacobsen v. McMillan,** 128.

MINIMUM CONTACTS

Jurisdiction over foreign corporation, **Starco, Inc. v. AMG Bonding and Ins. Services,** 332.

MIRANDA WARNINGS

Statements during pat-down search after traffic stop, **State v. Benjamin,** 734.

MITIGATING FACTOR

Confession repudiated by motion to suppress, **State v. Davi,** 93.

MUNICIPALITY

Purchase of liability insurance, **Askew Kawasaki, Inc. v. City of Elizabeth City,** 453.

NEGLIGENCE

Child jumping from truck, **Jacobsen v. McMillan,** 128.

NOTICE OF APPEAL

Jurisdictional, **Smith v. Moody,** 203.

ORDER

Signed after adjournment, **Hockaday v. Lee,** 425.

PARTIES IN INTEREST

Insurance funds for settlement, **U.S. Fidelity and Guaranty Co. v. Scott,** 224.

PAT DOWN

Unreasonable intrusion, **State v. Rhyne,** 84.

PERSONAL JURISDICTION

Foreign corporation's minimum contacts, **Starco, Inc. v. AMG Bonding and Ins. Services,** 332.

PETROLEUM MARKETING PRACTICES ACT

Assignment of fuel supply agreement, **Richardson v. BP Oil Co.,** 509.

PHLEBOTOMIST

Corporate malfeasance and false pretense, **State v. Weary,** 754.

PLAIN ERROR

Inapplicable in child custody cases, **Raynor v. Odom,** 724.

PLEADINGS

Amendment after plaintiff's evidence, **Members Interior Construction v. Leader Construction Co.,** 121.

Mislabeling as surplusage, **Strickland v. Town of Aberdeen,** 430.

POLICE OFFICERS

Immunity, **Moore v. Evans,** 84.

POLICYMAKING EXEMPT POSITION

Chief auditor of DOT, **N.C. Dept. of Transportation v. Hodge,** 515.

Highway beautification director, **Powell v. N.C. Dept. of Transportation,** 542.

PRIOR RECORD LEVEL

Consolidated judgment used for habitual felon status, **State v. McCrae,** 664.

PRISON INMATES

Instructor's distress from fight between inmates, **Jordan v. Central Piedmont Community College,** 113.

PROBATION

Murder and assault by prisoner on probation, **Humphries v. N.C. Dept. of Correction,** 545.

PRODUCT LIABILITY

Contributory negligence, **Nicholson v. American Safety Utility Corp.,** 59.

Privity requirement, **Nicholson v. American Safety Utility Corp.,** 59.

PROFESSOR

Section 1983 action for failure to reappoint, **Ware v. Fort,** 613.

PROMISE NOT TO SUE

From attorney to doctor, **Creech v. Melnik,** 502.

PROSECUTOR'S ARGUMENT

Comment on not guilty plea, **State v. Wilder,** 136.

Defendant's failure to offer evidence, **State v. Wilder,** 136.

Protection of victim from bully, **State v. Woody,** 296.

PUBLIC DUTY DOCTRINE

Murder and assault by prisoner on probation, **Humphries v. N.C. Dept. of Correction,** 545.

PUBLIC RECORDS

Exhibits at criminal trial, **Times-News Publishing Co. v. State of N.C.,** 175.

REAL ESTATE BROKERS

Failure to disclose unrepairable septic system, **Helms v. Holland,** 629.

Using description including conveyed property, **McClain v. Walker,** 765.

REDIRECT EXAMINATION

Line of questioning from direct examination, **State v. Woody,** 296.

RELIGIOUS FREEDOM

Psychological evaluation of children, **In re Browning,** 190.

RESTAURANT FLOOR

Slip and fall, **Smith v. Cochran,** 222.

RESTITUTION

Cost of drug analysis, **State v. Johnson,** 462.

RETIREMENT BENEFITS

Impairment of contract with law officer, **Miracle v. N.C. Local Gov't. Employees' Retirement System,** 285.

RIGHT TO COUNSEL

Not invoked, **State v. Davis,** 93.

SAFETY GLOVES

Electrical lineman's product liability action, **Nicholson v. American Safety Utility Corp.,** 59.

SALE OF WRECKED VEHICLE

Damage disclosure certificate, **Wilson v. Sutton,** 170.

SANCTIONS

Attorney fees, **VSD Communications, Inc. v. Lone Wolf Publishing Group,** 642.

Pleadings well-grounded and not for improper purpose, **Brown v. Hurley,** 377.

SCHOOL BUS

Assault on, **Vester v. Nash/Rocky Mount Bd. of Educ.,** 400.

Insurance exclusion, **Vester v. Nash/Rocky Mount Bd. of Educ.,** 400.

SCHOOL FUNDS

Standing of taxpayers to recover, **Guilford County Bd. of Comrs. v. Trogdon,** 741.

SCHOOL SUPERINTENDENT

Contract extension prior to merger, **Guilford County Bd. of Comrs. v. Trogdon,** 741.

SEARCH AND SEIZURE

Anticipatory warrant, **State v. Smith,** 556.

Contraband apparent during pat-down search, **State v. Benjamin,** 734.

No good faith exception under N.C. Constitution, **State v. Smith,** 556.

SECTION 1983 ACTION

No property right in professorship, **Ware v. Fort,** 613.

SERVICE OF PROCESS

Attempt in foreign country under Hague Convention, **Tataragasi v. Tataragasi,** 255.

SERVICE OF PROCESS—Continued

Minimum contacts with N.C., **Starco, Inc. v. AMG Bonding and Ins. Services**, 332.

SERVICE STATION

Sale not violation of Petroleum Marketing Practices Act, **Richardson v. BP Oil Co.**, 509.

SLIP AND FALL

Wet restaurant floor, **Smith v. Cochran**, 222.

SMOKING RULES

Board of Health, **City of Roanoke Rapids v. Peedin**, 578.

SPECIAL USE DISTRICT

Judicial review of application denial, **Gossett v. City of Wilmington**, 774.

STATE EMPLOYEE

Veteran's preference inapplicable to reemployment, **Dunn v. N.C. Dept. of Human Resources**, 158.

STATE PARK

Nail protruding from boardwalk, **Jernigan v. N.C. Div. of Parks and Recreation**, 748.

STATUTE OF FRAUDS

Admissions in answer and deposition not sufficient writing, **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.**, 383.

Internal form and draft lease not contract, **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.**, 383.

Quasi-estoppel not bar to defense, **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.**, 383.

Sufficient pleading, **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.**, 383.

STATUTE OF LIMITATIONS

Claim barred under borrowing statute, **Laurent v. USAir, Inc.**, 208.

Claim for commission and bonus under employment contract, **Miller v. Randolph**, 779.

Period not tolled for defendant amenable to service by publication, **Tierney v. Garrard**, 415.

STAY

Pending federal action, **Howerton v. Grace Hospital, Inc.**, 199.

SUBORDINATION AGREEMENTS

Maximum amount and interest rate, **Smith v. Martin**, 592.

SUMMONS

Failure to deliver to sheriff, **Robinson v. Parker**, 164.

SURVIVAL OF ACTION

Death of victim of medical negligence, **Schronce v. Coniglio**, 216.

TAXPAYERS

Standing to recover school board funds, **Guilford County Bd. of Comrs. v. Trogdon**, 741.

TRAFFICKING IN COCAINE

Constructive possession, **State v. Wilder**, 136.

TRUCK ACCIDENT

Employee exclusion clauses in carrier's liability policies, **Hand v. Connecticut Indemnity Co.**, 774.

TRUSTS

Charitable gift at death as general bequest, **Central Carolina Bank v. Wright**, 477.

UNDERINSURED MOTORISTS COVERAGE

Declaratory judgment action while personal injury action pending, **Metropolitan Property and Casualty Ins. Co. v. Caviness,** 760.

UNEMPLOYMENT BENEFITS

Conflicting findings, **Bagwell & Bagwell, Inc. v. Blanton,** 538.

UNFAIR AND DECEPTIVE PRACTICES

Lease negotiations, **Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C.,** 383.

Sale of wrecked automobile, **Huff v. Autos Unlimited, Inc.,** 410.

UNIFORM CHILD CUSTODY JURISDICTION ACT

Action pending in Turkey, **Tataragasi v. Tataragasi,** 255.

Emergency jurisdiction, **Tataragasi v. Tataragasi,** 255.

Service of process in Turkey, **Tataragasi v. Tataragasi,** 255.

VETERAN'S PREFERENCE

Inapplicability to reemployment, **Dunn v. N.C. Dept. of Human Resources,** 158.

VOLUNTARY DISMISSAL

Survival of deemed admissions, **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.,** 232.

WILLS

Gift to charitable foundation as general bequest, **Central Carolina Bank v. Wright,** 477.

WOODSON CLAIM

Order to work while suffering from prior injury, **Bullins v. Abitibi-Price Corp.,** 530.

WORKERS' COMPENSATION

Change in physical condition of hand, **Blair v. American Television & Communications Corp.,** 420.

Death while returning to motel from dinner and sports bar, **Cauble v. Soft-Play, Inc.,** 526.

Federal discrimination claim proceeds not wages, **Allmon v. Alcatel, Inc.,** 341.

Increased disability not shown, **Blair v. American Television & Communications Corp.,** 420.

Newly created job, **Saums v. Raleigh Community Hospital,** 219.

Penalty for refusal to pay benefits, **Allmon v. Alcatel, Inc.,** 341.

Presumption of disability after Form 21 agreement, **Brown v. S & N Communications, Inc.,** 320; **King v. Yeargin Construction Co.,** 396.

PTSD from witnessing inmates fighting, **Jordan v. Central Piedmont Community College,** 113.

Retirement, **Stroud v. Caswell Center,** 653.

Selection of total or partial disability, **Brown v. S & N Communications, Inc.,** 320.

Unilateral modification, **Kisiah v. W. R. Kisiah Plumbing,** 72.

Woodson claim, **Bullins v. Abitibi-Price Corp.,** 530.

WRECKED VEHICLE

Sale of, **Wilson v. Sutton,** 170.

WRIT OF CERTIORARI

Judicial review of special use district application denial, **Gossett v. City of Wilmington,** 774.

WRITTEN STATEMENT

Admissible to corroborate child's testimony, **State v. Woody,** 296.

WRONGFUL DISCHARGE

Bank employee for refusing to violate statutes, **Roberts v. First-Citizens Bank and Trust Co.**, 713.

ZONING

Judicial review of special use district application denial, **Gossett v. City of Wilmington**, 774.

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