NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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GERALD ARNOLD

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JOSEPH R. JOHN, SR.
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RALPH A. WALKER
LINDA M. McGEE
PATRICIA TIMMONS-GOODSON
CLARENCE E. HORTON, JR.[2]

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Former Chief Judge

R. A. HEDRICK

Former Judges

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JAMES H. CARSON, JR.
JAMES M. BALEY, JR.
DAVID M. BRITT
J. PHIL CARLTON
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ROBERT F. ORR
SYDNOR THOMPSON
CLIFTON E. JOHNSON
JACK COZORT

Administrative Counsel

FRANCIS E. DAIL

Clerk

JOHN H. CONNELL

1. Resigned 31 July 1997.
2. Appointed by Governor James B. Hunt, Jr. and sworn in 2 January 1998.

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Leslie Hollowell Davis

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Robert C. Montgomery

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8B	Paul M. Wright	Goldsboro

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1. Deceased 23 December 1997.
2. Appointed and sworn in 2 January 1998 to replace F. Gordon Battle who retired 31 December 1997.
3. Appointed and sworn in 1 January 1998 to replace James C. Davis who retired 31 December 1997.
4. Appointed and sworn in 25 November 1997.
5. Sworn in as Emergency Judge 1 January 1998.
6. Recalled to the Court of Appeals 1 September 1995.

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1. Appointed and sworn in 25 November 1997.
2. Retired 1 December 1997.
3. Appointed Chief Judge 5 January 1998 to replace Janeice B. Tindal who retired 31 December 1997.
4. Appointed Chief Judge 5 January 1988 to replace Adam C. Grant, Jr. who retired 1 January 1998 and became an Emergency Judge on 9 January 1998.
5. Resigned 31 December 1997 and appointed to the Court of Appeals.
6. Deceased 30 October 1997.
7. Deceased 14 December 1997.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

MICHAEL F. EASLEY

Deputy Attorney General for Administration
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ORDER

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF THE UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APELLATE PROCEDURE CITED AND CONSTRUED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE KNIGHT PUBLISHING CO., INC., PLAINTIFF v. THE CHASE MANHATTAN BANK, N.A. AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, DEFENDANTS

No. COA95-351

(Filed 7 January 1997)

1. Banks and Other Financial Institutions § 96 (NCI4th); Negotiable Instruments and Other Negotiable Paper § 24 (NCI4th)— checks—indorsement not substantially similar to payee—liability of drawee banks

Defendant drawee banks were liable under UCC § 4-401 for charging plaintiff's account for checks lacking indorsement by the named payee where the checks were payable to "Graphic Image" but were indorsed "Color Graphic Prep." The indorsements were not effective under former UCC § 3-405, even if an employee of plaintiff drawer supplied plaintiff with the name of the payee intending the latter to have no interest in the check, because the statute is applicable only when the indorsement is "in the name of a named payee"; this provision requires an indorsement substantially similar to the name of the payee; and "Color Graphic Prep." is not substantially similar to "Graphic Image." Furthermore, the courts are not required to engage in a loss causation analysis to determine whether plaintiff drawer's alleged negligence in failing to prevent a fraudulent scheme involving issuance of the checks should result in the application of § 3-405 to bar its claim against defendant banks. N.C.G.S. §§ 25-3-405, 25-4-401.

Am Jur 2d, Banks §§ 538 et seq.; Bills and Notes §§ 704 et seq.

2. Banks and Other Financial Institutions § 96 (NCI4th)— wrongful payment of check—drawee bank—New York law

In accordance with UCC § 4-102(2), the trial court properly applied New York law to the plaintiff's wrongful payment action against a bank located in New York. The defendant's liability was governed by the place where the bank was located.

Am Jur 2d, Banks §§ 538 et seq.

3. Banks and Other Financial Institutions § 96 (NCI4th)— wrongful payment of check—drawee bank liable—depository bank absolved

The trial court did not err in holding defendant Chase Bank liable as drawee while absolving the depository bank, defendant First Union Bank, where Chase made no claim in the instant action for indemnification against First Union.

Am Jur 2d, Banks §§ 538 et seq.

4. Banks and Other Financial Institutions § 96 (NCI4th) — unauthorized indorsement—failure to show agency relationship.

Defendant drawee bank's evidence was insufficient to show that Graphic Color Prep., a film preparation business operated on the same premises as Graphic Image, Inc., a printing company, had either actual or apparent authority to indorse checks made payable to Graphic Image.

Am Jur 2d, Banks §§ 538 et seq.

5. Banks and Other Financial Institutions § 96 (NCI4th)— unauthorized indorsement of check—wrongful payment—statute of limitations

Defendant bank could not rely on the 180-day statute of limitations period set forth in its "Account Conditions" to bar plaintiff's claim based on the bank's payment of checks lacking the indorsement of the named payee where UCC § 4-406(5) provides a three-year statute of limitations period within which to discover and report unauthorized indorsements.

Am Jur 2d, Banks §§ 538 et seq.

6. Appeal and Error § 418 (NCI4th)— UCC—negligence—material questions of fact—brief—no argument—no citation

The Court of Appeals declined to discuss defendant's assertion that, pursuant to UCC § 3-406, plaintiff publishing company's negligence created material questions of fact precluding entry of summary judgment in favor of plaintiff. Defendant's appellate brief contained no argument and no citation of authority.

Am Jur 2d, Appellate Review §§ 544, 545, 547, 550, 553-555, 557.

7. Judgments § 649 (NCI4th)— UCC—substantive law—interest on judgment—applicable law

New York law governed the award of interest on the sum due from defendant drawee bank for charging plaintiff's account with improperly indorsed checks where defendant is a New York bank and the substantive law of New York applied to plaintiff's claim. N.C.G.S. § 25-4-102(2).

Am Jur 2d, Interest and Usury §§ 59 et seq.

8. Judgments § 652 (NCI4th)— wrongful payment of checks—accrual of prejudgment interest

The trial court did not err in its calculation of prejudgment interest from the date plaintiff notified defendant Chase Bank of its improper payments. Pursuant to New York law interest arising out of a breach contract requires that interest be charged from the date of breach. Plaintiff's cause of action against Chase could not be maintained until plaintiff demanded repayment for wrongly cashed checks drawn on plaintiff's account.

Am Jur 2d, Interest and Usury §§ 63 et seq.

Appeal by plaintiff and by defendant The Chase Manhattan Bank, N.A., from Order and Judgment filed 26 October 1994 and Final Order and Judgment filed 9 January 1995 by Judge Chase B. Saunders in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 January 1996.

Smith Helms Mulliss & Moore, L.L.P., by Jonathan E. Buchan and Katherine T. Lange, and Blanchfield, Cordle & Moore, P.A., by Robert B. Cordle, for plaintiff.

Parker, Poe, Adams & Bernstein L.L.P., by William L. Rikard, Jr., and Craig T. Lynch, and First Union Corporation Legal Division, by Senior Vice President and Deputy General Counsel Francis C. Clark and Vice President and Assistant General Counsel Barbara H. Wright, for defendants.

JOHN, Judge.

Plaintiff The Knight Publishing Co., Inc. (Knight) appeals the trial court's grant of summary judgment to defendant First Union National Bank of North Carolina (FUNB) on Knight's claim that FUNB improperly charged Knight's checking account in violation of Uniform Commercial Code (UCC) § 4-401. Defendant The Chase Manhattan Bank, N.A. (Chase) appeals the court's grant of summary judgment to Knight on the issue of whether Chase likewise breached its duty to Knight under UCC § 4-401.[1] Other issues presented concern potential defenses of each bank to Knight's claim and the parties' contentions regarding calculation of interest on the judgment in favor of Knight.

The factual and procedural background is somewhat complicated, but may be summarized as follows: Knight, owner and operator of the Charlotte Observer (the Observer), first employed Oren Johnson (Johnson) in the Observer's camera/platemaking department in 1969. From 1980 until his termination in 1992, Johnson served as head of this department. His duties included ordering and receiving materials, and approving the corresponding invoices for payment.

Beginning in 1985, Johnson participated with John Rawlins (Rawlins) and Lloyd Douglas Moore (Moore), owners of a Charlotte printing company named Graphic Image, Inc. (GII), in a conspiracy to defraud Knight. Pursuant to the scheme, GII would deliver bogus invoices to Johnson charging Knight for supplies never received. Johnson would approve payment of the invoices and forward them to the accounts payable department at Knight, which would issue checks (the checks) made payable to the order of "Graphic Image" in

1 Throughout the opinion, when citing UCC sections in a generic fashion, such as UCC § 4-401, we intend to refer to the statutes as they apply under both New York law, *see* N.Y. U.C.C. Law (McKinney 1991), and North Carolina law, *see* N.C.G.S. Chapter 25 (1986). UCC sections applicable only under North Carolina law will be cited in reference to Chapter 25 of the North Carolina General Statutes.

the amount of the invoices. The checks were subsequently mailed to GII at the address indicated on the invoices. Johnson, Rawlins, and Moore divided the monies received in this manner.

Knight maintained a checking account at Chase, a New York bank. All the checks but two were drawn on this account; the remaining two were drawn on a Knight account with FUNB, a North Carolina bank.[2]

From 1985 until late 1987, the checks were deposited by Marilyn Mabe (Mabe), bookkeeper for GII, into the company's account at FUNB.[3] The checks were indorsed by Mabe in the following manner:

PAY TO THE ORDER OF
FIRST UNION NATIONAL
CHARLOTTE, NC
FOR DEPOSIT ONLY
GRAPHIC IMAGE, INC.
7048249267

However, on or about 1 July 1987, Conbraco, Inc. (Conbraco), a Charlotte-based company, purchased fifty percent of the stock of GII, leaving Rawlins and Moore each with a twenty-five percent ownership share. The board of directors of the company thereafter expanded to four persons: Rawlins, Moore, and two representatives from Conbraco. Concerned that their fraudulent enterprise might be discovered, Rawlins and Moore instructed Mabe that all checks received from Knight were to be deposited into the account of Graphic Color Prep. (GCP), a film preparation business formed as a partnership in 1985 by Rawlins and Moore and operated on the GII premises.

Beginning in late December 1987, Mabe began depositing the checks received from Knight and payable to "Graphic Image" into the FUNB account of GCP. She indorsed them as follows:

FOR DEPOSIT ONLY
GRAPHIC COLOR PREP.
ACCT. # 7048286557

From January 1988 to May 1992, Mabe deposited approximately fifty-five checks from Knight with a total face amount of $1,479,003.96 into the GCP account.

2 Thus, with respect to all the checks but two, Chase acted as the *drawee* bank; FUNB acted as the drawee for the remaining two.

3 FUNB acted as the *depository* bank with regard to all the checks.

After Knight detected the scheme in June 1992, Rawlins, Moore, and Johnson faced criminal charges and received active prison terms upon their guilty pleas. Knight demanded reimbursement from Chase and FUNB, on 19 June 1992 and 17 July 1992 respectively, for the checks paid notwithstanding the allegedly improper indorsements in the name of GCP. When the banks refused, Knight filed the instant lawsuit 30 July 1992.

Knight asserted three causes of action: (1) breach of contract as well as of statutory duty under the UCC against Chase as Knight's drawee bank by charging Knight's account for checks lacking indorsement by the named payee; (2) a parallel claim against FUNB for its role as a depository bank in accepting checks payable to "Graphic Image" but indorsed "Graphic Color Prep.," and depositing them into the latter's account; and (3) breach of contract and of UCC statutory duty against FUNB as Knight's drawee bank regarding the two checks allegedly lacking proper indorsement drawn on Knight's account at FUNB.

After extensive discovery, plaintiff and each defendant filed motions for summary judgment, which were heard during the 29 August 1994 session of the trial court. On 26 October 1994, the court granted summary judgment to Knight against Chase regarding those checks which Knight had notified Chase were improperly paid within three years of the date Chase sent information regarding the checks to Knight through bank statements or other items, *see* UCC § 4- 406(4); however, the court allowed Chase's motion for summary judgment regarding checks not within the three year cut-off period. Further, the court dismissed Knight's claims against FUNB by allowing the latter's summary judgment motion.

On 9 January 1995, the trial court entered a Final Order and Judgment, setting forth the amount of Chase's liability to Knight. The court ruled Knight was due $1,202,344.84 for the face amounts of the checks in question, in addition to interest on the judgment due at the rate of 8% as provided by N.C.G.S. § 24-1 (1991). Prejudgment interest was established as accruing from 19 June 1992, the date Knight provided notice of improper payment to Chase.

Knight appeals dismissal of its claim against FUNB, but limits its appeal to one check, conceding an action for payment of the second is time-barred under N.C.G.S. § 25-4-406. Moreover, Knight has elected not to appeal dismissal of its cause of action against FUNB as

depository bank. Knight also assigns error to the calculation of interest on the judgment at the rate provided by North Carolina law rather than New York law, and to the setting of 19 June 1992 as accrual date for prejudgment interest, asserting the date Knight's account was actually charged for the checks as the proper alternative. Chase appeals summary judgment in favor of Knight on the latter's cause of action against Chase as drawee bank.

Knight's claims against Chase and FUNB as drawee banks are based on UCC § 4-401 under which a bank may charge only "properly payable" items against a customer's account. Knight contends the checks herein were not "properly payable" because they failed to contain the indorsement of the named payee. We agree.

A check drawn to the order of a payee may not be negotiated without indorsement of that payee. *See* UCC § 3-202; *see also* James J. White & Robert S. Summers, *Uniform Commercial Code* § 13-9 at 562 (3d ed. 1988) ("[I]n the case of order instruments, only the payee or one who signs on his behalf can make the first effective indorsement and negotiate the instrument."). This rule results because an instrument payable to order is "negotiated by delivery with any necessary indorsement," UCC § 3-202(1), which "must be written by or on behalf of the holder," UCC § 3-202(2), defined as one "in possession of . . . an instrument . . . drawn, issued, or indorsed to him or to his order . . . ." UCC § 1-201(20).

The checks in this case were payable to the order of "Graphic Image," yet were indorsed "Graphic Color Prep." Nothing else appearing, therefore, the checks were not negotiated, and Chase and FUNB as drawee banks breached their duty under UCC § 4-401 to charge Knight's account only for items "properly payable." *See Tonelli v. Chase Manhattan Bank, N.A.*, 363 N.E.2d 564 (N.Y. 1977) (bank which honors check lacking indorsement of payee will be held liable pursuant to UCC § 4-401).

I.

[1] As defense to Knight's claim, the banks first assert that indorsements in the name of "Graphic Color Prep." were effective under UCC § 3-405, which states:

> (1) An indorsement by any person in the name of a named payee is effective if
>
> . . . .

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

The banks argue that Johnson, an employee of the drawer (Knight), supplied Knight with the name of the payee, "Graphic Image," intending the latter to have no interest in the check.

We do not believe the banks may avail themselves of the defense afforded by UCC § 3-405. The section by its terms is applicable only when the indorsement is "in the name of [the] named payee."

Case law from various jurisdictions has differed regarding the meaning of the above statutory phrase. Some courts have required an exact match between the name of the payee and the indorsement. *See, e.g., Consolidated Public Water Supply v. Farmers Bank*, 686 S.W.2d 844 (Mo. Ct. App. 1985) (one check payable to "Layne Western Co." and another to "Paul Politte, Inc.," yet indorsed, respectively, "Layne Western" and "Paul Politte;" court held "forged endorsements must be exactly the same as the named payees" for UCC § 3-405 to apply); *Seattle-First National Bank v. Pacific National Bank of Washington*, 587 P.2d 617 (Wash. Ct. App. 1978) (payable to "Sumner Motors, Inc.," but indorsed "Sumner Motors;" court ruled requiring indorsement in exact name of payee is "only reasonable standard to apply").

Other courts have considered an indorsement to be "in the name of a named payee" in circumstances involving minor spelling discrepancies between the name of the payee and the indorsement. *See Western Casualty & Surety Company v. Citizens Bank of Las Cruces*, 676 F.2d 1344 (10th Cir. 1982) (payable to "Grater Mesilla Valley Sanitation District," and indorsed "Greater Mesilla Valley Sanitation District;" "minor discrepancy in spelling" does not preclude application of UCC § 3-405); *British Caledonian Airways Limited v. First State Bank of Bedford, Texas*, 819 F.2d 593 (5th Cir. 1987) (payable to "Mary Tull Charter Services," and indorsed "Mary Toll Charter Services;" "discrepancy in spelling the payee's name . . . is a minor one").

Additionally, several commentators have rejected the proposition that UCC § 3-405 requires an exact match. *See, e.g.*, George G. Triantis, *Allocation of Losses from Forged Indorsements on Checks and the Application of § 3-405 of the Uniform Commercial Code*, 39 Okla. L. Rev. 669, 682-83 (1986); James Stuart Bailey, Comment,

Allocation of Loss for Forged Checks Under Articles 3 and 4 of the U.C.C. and the Proposed Revisions Thereto, 22 Pac. L.J. 1263, 1290 (1991); and Vilia Hayes, Note, *U.C.C. Section 3-405: Of Impostors, Fictitious Payees, and Padded Payrolls*, 47 Fordham L. Review 1083, 1091-93 (1979). One legal writer pointedly criticized the holding in *Seattle-First National Bank*, 587 P.2d 617, with the following observation:

> By requiring an exact correlation between the two names . . . the court failed to recognize that the purpose of the indorsement requirement is to ensure that the check presents a normal appearance. A misspelling or omission of a word, such as "Inc.", that is not essential for identification and would not bar the negotiation of a check with an authorized indorsement should not bar the statute's application.

Hayes, *supra*, at 1093.

In *Witten Productions v. Republic Bank & Trust Co.*, 102 N.C. App. 88, 401 S.E.2d 388 (1991), this Court appears to have followed the foregoing rationale. In *Witten*, eighteen checks delivered to Entertainers of America, Inc., and made payable either to "Republic Nat'l Bank & Ent. of America Escrow Acct." or "Republic Bank and Trust & Ent. of America Escrow Acct." were indorsed "Entertainers." *Id.* at 89, 401 S.E.2d at 389. Two others payable to an unnamed third party were indorsed with a stamp "similar" to the name of the payee. *Id.* We held that "the twenty checks indorsed in some form of the named payee's name" bore effective indorsements under N.C.G.S. § 25-3-405. *Id.* at 91, 401 S.E.2d at 391.

The 1990 revision of Article 3 of the UCC, *see* Uniform Commercial Code, U.L.A. (1991), reinforces the view that UCC § 3-405 does not require an exact match between the payee's name and the indorsement. The amended version of UCC § 3-405, adopted by this state in 1995, *see* 1995 N.C. Sess. Laws ch. 232, § 1, again mandates that indorsement be in the name of the person "to whom the instrument is payable." However, an additional provision explains that

> an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to the name of that person.

G.S. § 25-3-405(c) (1995).

In construing a statute with reference to an amendment, it is presumed that legislative intent was either to change the substance of the original statute or to clarify the meaning of it. *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968). Moreover, while it may be logical to conclude that amendment to an unambiguous statute indicates a legislative intent to change the law, no such inference arises from amendment to an ambiguous provision. *Id.* at 260, 162 S.E.2d at 484. The provision of unamended G.S. § 25-3-405 specifying that an indorsement be in "the name of a named payee" may fairly be considered ambiguous, particularly in view of the diversity in cases among jurisdictions interpreting the section. We further note that while the Official Comment to the amended statute explains several specific *changes*, it makes no mention of the addition regarding the similarity required between the named payee and the indorsement. Based on these observations, we consider the phrase "in the name of a named payee" in the unamended statute to be clarified by the amendment, and therefore to require an indorsement not identical to the name of the payee, but rather "substantially similar" to it.

In the case *sub judice*, "Graphic Color Prep." cannot be characterized as "substantially similar" to "Graphic Image." The addition of the words "Color Prep." to "Graphic" signifies that "Graphic Color Prep." is an entity distinct from "Graphic Image." By contrast, the indorsement of "Entertainers" in *Witten* consisted of a subset of the words contained in the name of the payee, either "Republic Nat'l Bank & Ent[ertainers] of American Escrow Acct." or "Republic Bank and Trust & Ent[ertainers] of America Escrow Acct." The checks indorsed in the name of "Graphic Color Prep." rather than "Graphic Image" thus did not "present[] a normal appearance," *Western Casualty*, 676 F.2d at 1346 (citing Hayes, *supra*, at 1093), and application of UCC § 3-405 is precluded.

The banks nonetheless assert that a finding in favor of Knight ignores the loss-causation analysis inherent in UCC § 3-405. The Official Comment to UCC § 3-405 at the time of the instant transactions provided as follows in reference to section (c) on employer liability:

> The principle followed is that the loss should fall upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. The reasons are that the employer is normally in a better position to prevent such forgeries by reasonable care in the selection or supervision of his employees, or,

if he is not, is at least in a better position to cover the loss by fidelity insurance; and that the cost of such insurance is properly an expense of his business rather than of the business of the holder or drawee.

Under the foregoing risk shifting provisions, therefore, it is irrelevant whether an employer is free of fault, *see* 6 Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 3-405:13 at 372 (3d ed. 1993), or whether a bank has been negligent in paying a check with an unauthorized indorsement, *see Witten*, 102 N.C. App. at 91-92, 401 S.E.2d at 390-91 and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chemical Bank*, 442 N.E.2d 1253, 1257 (N.Y. 1982); if the provisions of the statute fit the facts of the case, the statute will operate to absolve the bank of liability to the employer.

The banks maintain, however, that even should the facts not meet the requirements for application of UCC § 3-405, this Court should engage in its own loss causation analysis to determine whether Knight's alleged negligence in failing to prevent the fraudulent scheme should result in the application of the section to bar its claim. We do not agree.

Compliance with the banks' proposal would circumvent the entire purpose of loss allocation statutes such as UCC § 3-405, *i.e.*, the avoidance of analyzing fault on a case by case basis. The drafters of the UCC concluded that UCC § 3-405 should not operate to legitimate fraudulent indorsements which do not "match" (under the "substantially similar" test discussed above) the name of the payee. *See National Credit Union Administration v. Michigan National Bank of Detroit*, 771 F.2d 154, 160 (6th Cir. 1985) ("The requirement of an indorsement 'in the name of a named payee' is meant to *prevent a shift of liability* from the drawee to the drawer when the drawee negligently pays an instrument that does not bear a purportedly regular chain of indorsements." (emphasis added)). Courts should not change express provisions of the UCC by judicial construction, *see* Anderson, *supra*, § 3-405:6 at 366, and we decline to do so.

Moreover, *Perini Corporation v. First National Bank of Habersham County*, 553 F.2d 398, *reh'g denied*, 557 F.2d 823 (5th Cir. 1977), and *National Credit Union Administration*, 771 F.2d 154 (6th Cir. 1985), two cases cited by the banks for the loss causation analysis utilized therein, are inapposite. Each is a *double* forgery case wherein the signatures of both the payee *and* the drawer were forged. The *Perini* court determined forgery of the *drawer's* signature to be

the primary cause of loss in such a case; thus, the drawee bank alone should bear liability rather than be permitted to shift the loss to a collecting or depository bank for breach of warranty of good title under UCC § 4-207(1)(a).

It must be pointed out, however, that *Perini* specifically limited its holding (which allowed missing or incomplete indorsements to be ignored) to cases also involving the forged signature of a drawer. 553 F.2d at 412 and 414; *see also National Credit Union Administration*, 771 F.2d at 159, FN 2. In the present case, Knight's signature as drawer was not forged. Moreover, even under the loss causation analysis set out in *Perini*, the negligent employer would not ultimately bear the loss—rather it would be borne by the drawee bank.[4]

The trial court's order of summary judgment in favor of FUNB indicated the court perceived our holding in *Witten* to require determination that FUNB was protected by operation of G.S. § 25-3-405. Having earlier distinguished between the indorsements at issue in *Witten* and those herein, we reverse the trial court's ruling as to FUNB based on the preceding analysis.

[2] Chase additionally argues the trial court erred in applying New York law rather than North Carolina law to the issue of application of UCC § 3-405 to Knight's claim against Chase. Presumably, this argument loses its "appeal" upon our ruling, using North Carolina law, that the section has no applicability in this case.

In any event, the trial court properly elected to apply New York law. The UCC states in pertinent part:

> The liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located.

UCC § 4-102(2). Chase is located in New York. Therefore, New York law governs whether UCC § 3-405 may be applied to protect Chase.

Our examination of New York law reveals it to be at least as restrictive as our own in its application of UCC § 3-405. For example, in *Kosic v. Marine Midland Bank*, 430 N.Y.S.2d 175 (N.Y. App. Div.

4 The employers in *Perini* and *National Credit Union Administration* were respectively held liable simply because the former had agreed to hold the drawee blameless for losses due to fraudulent use of its facsimile signature machine, 553 F.2d at 400, and the latter had failed to bring the issue of drawee liability before the trial court, 771 F.2d at 161.

1980), *aff'd*, 446 N.Y.S.2d 264 (N.Y. 1981), the court cited *Seattle-First* (which required a mirror-image indorsement) when describing the indorsement therein as not "in the name of [the] named payee." 430 N.Y.S.2d at 179.

Moreover, the New York authority cited by Chase is unavailing. In *Prudential-Bache Securities, Inc. v. Citibank, N.A.*, 4 U.C.C. Rep. Serv. 2d 533 (N.Y. Sup. Ct. 1987), *aff'd*, 529 N.Y.S.2d 983 (N.Y. App. Div. 1988), *modified and aff'd*, 539 N.Y.S.2d 699 (N.Y. 1989), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chemical Bank*, 442 N.E.2d 1253 (N.Y. 1982), the indorsements in question were actually in the names of the payees. In *Hartford Accident & Indemnity Co. v. American Express Company*, 518 N.Y.S.2d 93 (N.Y. Sup. Ct. 1987), *aff'd*, 533 N.Y.S.2d 356 (N.Y. App. Div. 1988), *aff'd*, 542 N.E.2d 1090 (N.Y. 1989), the issue of a match between indorsement and payee was not raised.

Only *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. NCNB Nat. Bank of N.C.*, 695 F. Supp. 162 (S.D.N.Y. 1988), *aff'd*, 872 F.2d 1021 (2d Cir. 1989), is on point and it provides no support for Chase. *Merrill Lynch* involved a check payable to "Empire Paper & Envelope Co." and indorsed "Empire Paper & Envelope Co., Div. of Burke, Wainwright & Evans, Inc." Plaintiff drawer argued the addition of "Div. of Burke, Wainwright & Evans, Inc." rendered the indorsement ineffective under UCC § 3-405. The court ruled

> there was an *indorsement of the complete name of the named payee* and that the addition to it of a description of the payee is insufficient to preclude the application of § 3-405.

Id. at 164 (emphasis added and emphasis in original omitted). In the present case, the indorsements at issue were not in "the complete name of the named payee," *id.*

[3] The last argument of Chase as concerns UCC § 3-405 is that the trial court erred by holding Chase liable as drawee while absolving FUNB, the depository bank. A drawee bank held liable for improperly charging its customer's account in violation of UCC § 4-401 may normally look to the depository bank for reimbursement under the theory that the latter breached its warranty of good title under UCC § 4-207(1)(a). *See* White & Summers, *supra*, § 15-9 (banks "upstream" warrant when passing a check to a payor bank that they have "good title" to the check, *i.e.*, that the check bears no forged indorsements); *cf. Smith Barney, Harris Upham & Co., Incorporated v. Citibank*

(Delaware), 556 N.Y.S.2d 61, 63 (N.Y. App. Div. 1990) (while drawee bank may look to depository bank as guarantor of missing indorsement, its liability to customer is primary). However, the record reflects no claim by Chase in the instant action for indemnification against FUNB. Further, Knight declined to appeal the trial court's dismissal of its cause of action against FUNB as depository bank, and that issue thus is not before us. Finally, we note with interest in the context of this argument the revelation by Chase (albeit improperly, since not contained in the record) in its appellate brief of an agreement by FUNB to indemnify Chase for judgments entered against it in favor of Knight. *See Fowler v. Williamson*, 39 N.C. App. 715, 717, 251 S.E.2d 889, 890 (1979) (statements of fact in a brief may be assumed as true as against party asserting them).

In conclusion, under North Carolina and New York law respectively, neither FUNB nor Chase may use UCC § 3-405 to deny liability to Knight for improperly charging its account. We observe such a result is more satisfactory than that reached below which held Chase, but not FUNB, liable on the same facts. As provided within the UCC itself, the purpose thereof is "to make uniform the law among the various jurisdictions." UCC § 1-102(2)(c).

II.

[4] The banks next maintain Mabe's indorsement of the checks was effective because GCP (as indorser) was an agent of GII (the payee). We reject this contention.

UCC § 3-403(1) provides that "[a] signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation." However, case law indicates that an agent's alleged authority to indorse checks is not at issue unless the payee's indorsement is affixed. *See Kosic*, 430 N.Y.S.2d at 178-79 (embezzling party "never affixed the indorsement of the payee or purported to do so and the extent of her unexercised authority to do so is irrelevant"); *Mid-Atlantic Tennis Courts v. Citizens Bank & Trust Co.*, 658 F. Supp. 140, 143 (D. Md. 1987) ("question of whether the payee's signature was authorized or not arises only when there is a signature in the first place").

Moreover, in order for an agency relationship to be created, a principal must actually consent to an agent's acting on its behalf. Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* § 14 at 34 (2d ed. 1990). It is undisputed that the board

of directors of GII, at no time during which the improper indorsements were affixed, authorized any person to indorse or deposit GII checks on behalf of GCP. Indeed, the uncontradicted affidavit of a Conbraco representative who sat on the GII board during the relevant time period establishes that he was totally unaware of the existence of GCP.

In the main, the banks claim they are relying upon the principle of *apparent* agency. An apparent agency is created where "a person by words or conduct represents or permits it to be represented that another person is his agent" when no actual agency exists. *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 278, 357 S.E.2d 394, 397, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987). The banks point to evidence that in August 1986 Moore applied for a checking account in GCP's name and assured Sherrye Banker (Banker), an employee of FUNB, that GCP was a subsidiary of GII and that "it would be okay for the bank to transact business, one on behalf of the other."

However, apparent authority may not be relied upon to assert that a principal authorized a certain transaction between its purported agent and a third party unless the third party *actually relied* upon the assertions of the principal regarding the purported agent's power at the time of the transaction. 3 Am. Jur. 2d *Agency* § 80 (1986); *see also Hayman*, 86 N.C. App. at 278-79, 357 S.E.2d at 397-398. Absolutely nothing in the record indicates that any bank employee processing the checks made inquiry into GCP's authority to indorse checks payable to "Graphic Image" and deposit them into GCP's account. Nor is there evidence that any bank employee, when processing the checks notwithstanding lack of GII's indorsement, was aware of or relied upon Moore's alleged assurances to Banker.

The sole record instance of a teller calling into question the GCP indorsement works against the banks' argument. On that occasion, a FUNB teller allegedly alerted a supervisory employee that a check payable to "Graphic Image" was stamped with an indorsement in the name of GCP. The supervisor testified he then affixed the words "Graphic Image, Inc." by hand on the back of the check because he thought it was "more acceptable . . . at least to have Graphic Image's name on the back made out like the payee was." Completely absent from the record is any evidence the supervisor made inquiry into GCP's authority to indorse checks payable to "Graphic Image" before he supplied the missing indorsement.

Finally, the banks' reliance on the cases of *McIsaac v. Bank of New York*, 425 N.Y.S.2d 678 (N.Y. App. Div. 1980) and *Campbell v. Bank of America National Trust and Savings Association*, 235 Cal. Rptr. 906 (Cal. Ct. App. 1987) to support their agency theory is unavailing.

In *McIsaac*, the payee corporation and the indorsing corporation were "virtually one entity" and this fact was "known to the plaintiff." 425 N.Y.S.2d at 679. The court concluded that the entity intended to receive the proceeds of the check was that which in actuality received them, and therefore the drawer was precluded from recovering on an improperly paid check. *Id.* GII and GCP herein, however, were clearly separate entities, and GII was not the actual recipient of the proceeds of the checks payable to "Graphic Image."

In *Campbell*, the payee corporation had actually authorized the indorsement of its checks by a second corporation. 235 Cal. Rptr. at 911. Both corporations were family held companies with the same chief executive officer and majority shareholder. *Id.* at 907-8. The court stated that

> once the plaintiff has proven that the Bank (as payor bank) paid funds to someone other than the named payee, the Bank carries the burden of proving that the indorsement by a third party and the payment of the funds to a third party was authorized by the named payee.

Id. at 911. In the case *sub judice*, the banks failed to show GII authorized indorsement of its checks by, or payment of the proceeds thereof to, any other entity, including GCP. Indeed, GCP was being used by the embezzlers to conceal receipt of funds from the other shareholders of GII.

III.

[5] Chase advances the further argument that Knight is precluded from bringing suit on the improper indorsements because the "Account Conditions" governing Chase's relationship with Knight imposed a 180-day limitation on the period within which a customer might bring a claim against the bank. This argument is unfounded.

The provision relied upon by Chase reads as follows:

> [C]laims against us must be made as soon as possible but no later than 180 days after the date of the statement on which the transaction is referred to.

UCC § 4-406 delineates a customer's duty to examine statements and cancelled checks received from a bank and to report discovery of the customer's "unauthorized signature or any alternation" of the checks to the bank. UCC § 4-406(1). Such irregularities are to be reported "promptly" and the customer will be considered to have acted with reasonable promptness if it responds to the bank within 60 days following receipt of the bank statements. *Id.* If it fails to provide prompt notification to the bank, the customer is precluded in certain situations under UCC § 4-406(2) from asserting that the bank improperly paid the checks. However, the preclusions set out in UCC § 4-406(2) do not apply if the bank has failed to exercise ordinary care in paying the checks. UCC § 4-406(3). Regardless of the lack of care of either the customer or the bank in discovering errors, the statute imposes a one-year limitations period for discovering and reporting the forgery of the customer's own signature or any alteration of the check. UCC § 4-406(4). In addition, a *three-year* period is permitted within which to discover and report unauthorized *indorsements*.[5] UCC § 4-406(4).

By provision in its "Account Conditions," Chase has attempted to shorten to 180 days the three-year limitations period contained in UCC § 4-406(4) for discovering and reporting unauthorized indorsements. As authority to do so, Chase relies on UCC § 4-103(1), which provides the following:

> The effect of the provisions of this article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure[.]

Relying on case law from New York, *see* UCC § 4-102(2), we hold Chase may not utilize the shortened limitations period contained in its "Acount Conditions" to deny Knight's claim, because Chase as a matter of law failed to exercise "ordinary care" in paying checks which lacked effective indorsements.

In *Murray Walter, Inc. v. Marine Midland Bank*, 480 N.Y.S.2d 631 (N.Y. App. Div. 1984), a check payable to "Johnson Electric and G.E.

5 The Official Comments to UCC § 4-406 explain that the longer period for reporting unauthorized indorsements "recognizes that there is little excuse for a customer not detecting an alteration of his own check or a forgery of his own signature. However, he does not know the signatures of indorsers and may be delayed in learning that indorsements are forged."

Supply" was indorsed solely by Johnson Electric, yet was processed by defendant drawee bank. Upon suit, defendant asserted that its customer had failed "to promptly bring the irregularity to its attention." *Id.* at 632. The court responded:

> Defendant's attempt to invoke the provisions of section 4-406 of the Uniform Commercial Code as a defense is unavailing since that section pertains to a customer's obligation to detect a forgery of his own signature, or other alteration, and does not extend to an instance of a missing indorsement. . . . Moreover even if section 4-406 were deemed applicable, it is obvious that defendant acted without ordinary care in honoring plaintiff's check with a missing indorsement.

(citations omitted).

In *Smith Barney*, 556 N.Y.S.2d 61, 63 (N.Y. App. Div. 1990), an employee embezzlement case with facts similar to those herein, the court held:

> While it is true that a depositor is under a duty to examine statements and cancelled checks to discover irregularities in the account and notify the bank, where a payee's indorsement is entirely missing rather than forged [check in this case payable to "Telaid Industries, Inc." and indorsed "A.C.D. Communications Systems, Inc."], a bank that pays such an instrument cannot avoid liability on the basis of the drawer's subsequent failure to discover the irregularity.

(citation omitted).

A close reading of the above cases suggests the defendant banks were asserting preclusion of the plaintiffs' claims under UCC § 4-406(2), and that the courts were responding that the preclusion was inapplicable because of the banks' lack of ordinary care under UCC § 4-406(3) in paying the items at issue. Although Chase herein is attempting abbreviation of the limitations period set out in UCC § 4-406(4) rather than UCC § 4-406(2), we believe the analyses above by the New York courts regarding the banks' lack of ordinary care under UCC § 4-406(3) is relevant *sub judice*, since the limitations period of UCC § 4-406(4) may not be shortened if the effect is to "disclaim a bank's responsibility for its own . . . failure to exercise ordinary care," UCC § 4-103(1).

Retail Shoe Health Commission v. Manufacturers Hanover Trust Company, 558 N.Y.S.2d 949 (N.Y. App. Div. 1990), a case cited

by Chase in which the court allowed a payor bank to rely on a contractual six-month limitations period for reporting forged indorsements, is inapposite. The indorsements therein were forged in the names of the payees and therefore were not "missing" as in the present case and those cited above.

We also note that although the precise contractual terms at issue in *Retail Shoe* were not specified in the opinion, it appears they specifically addressed the customer's duty to report errors in *indorsements*. *Id.* at 951. By contrast, the "Account Conditions" asserted by Chase herein set forth no such specifications. *Cf.* White & Summers, *supra*, at § 16-3 (under UCC § 4-406, customer not responsible for checking indorsements).

In conclusion, Chase may not rely on the limitations period set forth in its "Account Conditions" to bar Knight's claim based on Chase's payment of checks lacking the indorsement of the named payee.

IV.

[6] Lastly, the banks assert as a defense that Knight is barred from bringing a claim against them under UCC § 3-406, which provides:

> Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

The banks insist "Knight Publishing's negligence creates material questions of fact" precluding entry of summary judgment in favor of Knight. However, their appellate brief contains no argument and no citation of authority directed at the propriety of applying the complex provisions of UCC § 3-406 to bar Knight's claim. Accordingly, we decline to discuss this question. *See* N.C.R. App. P. 28(b)(5) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

V.

[7] Prior to conclusion, we consider Knight's appeal. Knight first claims the court erred by charging Chase at the interest rate estab-

lished by North Carolina law, *see* G.S. § 24-1, rather than New York law, *see* N.Y. Civ. Prac. L. & R. 5004 (McKinney 1992). We agree.

As previously noted, under the UCC the substantive law of New York applies to Knight's claim against Chase. *See* UCC § 4-102(2). Further, determination of interest on a judgment is a matter of substantive law. *See Tennessee Carolina Transportation, Inc. v. Strick Corporation*, 283 N.C. 423, 440, 196 S.E.2d 711, 722 (1973). Therefore, New York law governed the award of interest on the sum due from Chase to Knight, and the trial court erred in holding that North Carolina law was applicable.

[8] Knight also assigns error to the calculation of prejudgment interest from the date Knight notified Chase of its improper payments as opposed to the date Chase actually charged Knight's account for the checks in question. The trial court did not err in this regard.

New York law provides: "Interest shall be computed from the earliest ascertainable date the cause of action existed . . . ." N.Y. Civ. Prac. L. & R. 5001 (McKinney 1992). In *American Building Main Co. of Cal. v. Federation B&T Co.*, 213 F.Supp. 412 (S.D.N.Y. 1963), plaintiff sued defendant bank to recredit its account for payments over forged indorsements. The court observed it is "undoubtedly the general rule" that "there is no breach of a contract between a bank and a depositor until the bank has refused a demand." *Id.* at 419. Moreover, "where a bank has rendered statements showing payments on checks bearing forged indorsements, further demand is necessary 'to entitle a person to maintain an action.' " *Id.* at 420. Under New York law then in effect requiring interest on an award arising out of a breach of contract to be paid "from the date of the breach," the court held the plaintiff was entitled to prejudgment interest only from the date it had notified the bank of its error. *Id.* at 419-20.

We conclude interest did not begin to accrue under New York law until Knight demanded repayment, since its cause of action against Chase could not be maintained until Knight made such demand. *Accord Aetna Casualty & Surety Co. v. Trader's National Bank & Trust Co.*, 514 S.W.2d 860, 867 (Mo. Ct. App. 1974) ("Fairness calls for interest to begin only after [bank] was notified that it owed some money and after it had opportunity to comply with that legal obligation.").

Knight cites *Zambia National Bank v. Fidelity International Bank*, 855 F. Supp. 1377 (S.D.N.Y. 1994), containing dicta to the ef-

fect that interest under N.Y. Civ. Prac. L. & R. 5001 on a similar UCC § 4-401 claim would accrue from the date the bank improperly charged its customer's account. However, the accrual date of prejudgment interest was not at issue in *Zambia*, and we do not consider the passing dicta therein to override the more detailed holding of the court in *American Building*.

In sum, we uphold the trial court's decision that Chase was liable to Knight as a matter of law under UCC § 4-401 in consequence of charging Knight's account for checks not "properly payable." Further, we hold FUNB was similarly liable to Knight for the single check presented on appeal upon which FUNB acted as drawee. In addition, we conclude the banks' various asserted UCC defenses to Knight's claim either fail as a matter of law or were not properly presented upon appeal. Summary judgment entered in favor of Knight against Chase is therefore affirmed, but the grant of summary judgment to FUNB is reversed and this matter remanded for entry of summary judgment in favor of Knight against FUNB.

With regard to interest due on Knight's judgment against Chase, we hold New York law applies and that the trial court erred in assessing interest at the rate set by North Carolina law. That portion of the trial court's interest award is therefore reversed, and we remand for an award of interest on Knight's judgment against Chase at the rate provided under New York law. The trial court's determination that prejudgment interest began to accrue from the date Knight notified Chase its account was wrongfully charged is affirmed.

Affirmed in part; reversed and remanded in part.

Judges JOHNSON and SMITH concur.

Judge Johnson participated in this opinion prior to his retirement on 1 December 1996.

STATE OF NORTH CAROLINA v. MARIA DELORIS MONSERRATE

No. COA96-13

(Filed 7 January 1997)

1. **Searches and Seizures § 100 (NCI4th)— motion to suppress—search warrant—inconsistencies between affidavit and deposition testimony—exclusion of deposition—harmless error**

The trial court erred by excluding the deposition of an informant, now deceased, in a hearing on defendant's motion to suppress evidence seized from defendant's trailer pursuant to a search warrant where there were discrepancies between the informant's statements in the deposition and statements attributed to him in an SBI agent's affidavit in support of his application for the warrant since the deposition could be probative of bad faith on the part of the SBI agent and should have been considered by the trial court. However, the exclusion of the deposition was harmless error, even if the minor discrepancies from the deposition testimony contained in the SBI agent's affidavit were found to have been included in the affidavit as a result of exaggeration, reckless disregard, or even bad faith, where the affidavit's remaining content was sufficient to establish probable cause.

Am Jur 2d, Searches and Seizures § 215.

2. **Judges, Justices, and Magistrates § 26 (NCI4th)— suppression hearing—judge who issued warrant—recusal not required**

The trial judge did not err in failing to recuse himself from a suppression hearing where the judge issued the search warrant and presided over a hearing to suppress evidence seized pursuant to the search warrant. There is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge although it is the better practice to allow a different judge to rule upon the validity of such a warrant. Further, Canon 3(C)(1)(a) of the Code of Judicial Conduct does not require the trial judge to recuse himself.

Am Jur 2d, Judges §§ 86, 88.

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

Waiver or loss of right to disqualify judge by participation in proceedings—modern state civil cases. 24 ALR4th 870.

Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR4th 923.

3. Criminal Law § 1246 (NCI4th Rev.)— sentencing—mitigating factor—minor or passive role—failure to find not error

The sentencing court's failure to find as a mitigating factor for kidnapping and burglary that defendant played a minor role or was a passive participant in the commission of those offenses did not constitute error where the evidence presented at trial showed that defendant recruited her son to assist in the acts, she drove her car to pick up the victims, and she did not let the victims go when they were bound and gagged in the defendant's trailer.

Am Jur 2d, Criminal Law §§ 525 et seq.

4. Criminal Law § 1297 (NCI4th Rev.)— mitigating factor—good character—no error in failure to find

It was not error for the sentencing court to decline to find as a mitigating factor for murder, kidnapping and burglary that defendant was a person of good character where the sole evidence regarding defendant's character and reputation was by defendant and defendant's daughter. The credibility of this evidence is a matter for the determination of the trial court; the court has the discretion to reject testimony of biased witnesses. N.C.G.S. § 15A-1340.4(a)(2)m.

Am Jur 2d, Criminal Law §§ 525 et seq.

5. Criminal Law § 1156 (NCI4th Rev.)— sentencing—no merit —no consideration of dismissed charges

There was no merit to defendant's argument that the sentencing court considered dismissed charges as a nonstatutory aggravating factor in sentencing the defendant who had pled guilty to murder, burglary and kidnapping charges. Though the court remarked about the charges which had been dismissed, formal findings were made in aggravation and mitigation of punish-

ment and the record does not affirmatively disclose that the court enhanced defendant's sentence based on dismissed charges.

Am Jur 2d, Criminal Law §§ 525 et seq.

Appeal by defendant from judgments entered 29 March 1995 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 21 October 1996.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine M. Crawley for defendant-appellant.

MARTIN, John C., Judge.

By true bills of indictment dated 7 January 1992, defendant was charged with the first degree kidnappings and first degree murders of Phyllis Aragona and Scott Allen Gasperson. By true bill of indictment dated 19 July 1994, defendant was also charged with second degree burglary of Scott Gasperson's dwelling, felonious larceny, and felonious possession of stolen goods. All of the crimes were alleged to have been committed on 12 July 1990.

After the denial of her pre-trial motion to suppress evidence obtained as a result of a search of a mobile home in which she resided at the time of the crimes, defendant entered guilty pleas to two counts of second degree murder, two counts of first degree kidnapping and one count of second degree burglary. The terms of her plea agreement included the State's agreement to dismiss, with prejudice, three drug charges; numerous charges of felonious larceny and possession of stolen property relating to the automobiles of Phyllis Aragona and Scott Gasperson; charges of felonious breaking and entering, felonious larceny, and felonious possession of stolen properties relating to the pawn shop managed by Scott Gasperson; and a safecracking charge relating to the pawn shop.

The district attorney summarized the evidence for the State with the consent of defendant. The State's summary of the evidence tended to show that on 12 July 1990 a break-in was discovered at the Woodson Music and Pawn Shop, which was managed by Scott Gasperson, in Jacksonville. In their investigation, police officers discovered that Mr. Gasperson's residence, located at 432 Ben Williams Road in Jacksonville, had also been broken into and that Mr.

Gasperson and his fiancee, Phyllis Aragona, were missing, along with their two vehicles. On 12 July 1990 around 5:00 p.m., Mr. Gasperson's body was found in his car on a road outside of town. He had been shot in the back of the head. On 7 April 1991 a body was found in Pender County; this body was later identified as Phyllis Aragona. She too had been shot.

Approximately one week after the crimes were committed, officers obtained a search warrant and went to Lot 41 of Pelletier Mobile Home Park in Jacksonville where defendant resided, along with her son Eli Ocasio, her boyfriend Gary Fernandez, and Gary's son Orlando Fernandez. Evidence seized from the trailer included the screwdriver which had been used to pry open the door at Mr. Gasperson's residence; two towels which had AB-type blood on them, matching Mr. Gasperson's blood type; a charred business card from the pawn shop; bullets which were similar to a shell casing found near the remains of Phyllis Aragona in Pender County, and which also were similar to the bullet found in Ms. Aragona's skull; two types of duct tape which matched the duct tape found at Woodson Music and Pawn, at the victims' residence, on the body of Scott Gasperson, and at the scene in Pender County where the remains of Phyllis Aragona had been discovered; and toboggans which had been made into "homemade type hoods" similar to one which was found near the body of Scott Gasperson. Officers in Miami, Florida, located a 1980 Thunderbird which belonged to Gary Fernandez and in which they found another toboggan which had been converted into a hood. Police also found comic books belonging to Mr. Gasperson, one of which had Orlando Fernandez's fingerprints. Police officers also searched a storage bin rented to co-defendant Orlando Fernandez. This search disclosed duct tape, a tennis bag belonging to Scott Gasperson, and items stolen from Mr. Gasperson's residence. Following his arrest, Gary Fernandez led police to the location of a shotgun, which also had been stolen from Mr. Gasperson's residence.

Co-defendant Eli Ocasio made a statement to police in which he admitted that defendant, his mother, drove him, Gary Fernandez, and Orlando Fernandez to Scott Gasperson's home on the night of 11 July 1990. The three men entered the home, restrained Mr. Gasperson and Ms. Aragona with duct tape, and stole items from the home. The victims were then loaded into Ms. Aragona's Chevrolet Blazer and transported by Gary Fernandez to Lot 41, Pelletier Mobile Home Park. Defendant drove Eli Ocasio and Orlando Fernandez back to the trailer. Gary Fernandez instructed Eli to watch the victims in a bed-

room in the trailer; defendant was also present with Eli and the victims. Gary Fernandez left with Scott Gasperson, returned without him, and told Eli that Mr. Gasperson was dead. The following morning Gary attempted to return Ms. Aragona to her residence, but saw police outside and did not stop. Gary returned to the trailer without Ms. Aragona. All of the co-defendants left later that night for Miami, Florida. On the way, at a location near where Ms. Aragona's remains were later found, Gary stopped his car and ran into the woods. Eli heard a gunshot. Gary returned to the car carrying some blankets. When Eli noticed blood on the blankets, Gary directed him to throw them out of the car.

At the sentencing hearing, the State introduced arrest warrants and release orders showing that defendant had been charged with multiple drug offenses in March 1990. When the instant crimes occurred, defendant was out of jail under bond for the March charges.

Defendant's daughter, Janette Ocasio, testified that on 4 July 1990 defendant approached her about driving to a location and dropping off defendant, Gary, and Orlando Fernandez. She refused to do so. On the day of the murders, defendant, Gary, and Orlando Fernandez picked her up from work and went to a storage bin. Defendant told Janette that defendant, Gary, Orlando, and Eli were going to Miami because they had committed a robbery and were worried someone had seen them. Several days later Janette and defendant spoke by telephone; defendant wanted to know if anything was going on in Jacksonville and if anybody was looking for them.

Defendant testified on her own behalf. She gave detailed testimony concerning the crime. She acknowledged that she had driven Gary, Orlando, and Eli to Mr. Gasperson's residence on 11 July 1990. She was aware that Gary planned to break into Mr. Gasperson's pawn shop and believed the purpose of the trip to Mr. Gasperson's residence was to obtain information about the pawn shop. Gary Fernandez told defendant that the proceeds from the pawn shop robbery were necessary to pay lawyers' fees for the drug charges, and that they would go to prison on the drug charges if they could not pay their lawyers. Defendant saw Gary leading the bound victims out of the house, but when she asked him what he was doing, he told her not to ask questions. Gary drove the victims to the trailer; defendant followed with Eli in her own car.

Defendant went on to explain that she was in the trailer with Eli and the victims. Gary and Orlando were gone for some period of time

during the night and Eli watched the victims; defendant had no interaction with the victims. She did not let them go because she and Gary needed the money to pay their attorney and she believed Gary would not harm the victims. Early the next morning, defendant drove Gary to the pawn shop. Gary entered the store briefly, returned to the car, and waited to see if police would come. Defendant and Gary then returned to the trailer. Gary left again with Mr. Gasperson in Mr. Gasperson's car. Defendant believed that Mr. Gasperson was going to open the pawn shop safe and then Gary would let Mr. Gasperson and Ms. Aragona go. She was too nervous to stay at the trailer, so she drove back by the pawn shop as Gary and Orlando were leaving. Gary threw a bag of jewelry into defendant's car, placed Mr. Gasperson in the back seat of Mr. Gasperson's car, and beckoned defendant to follow him. Defendant followed him until he waved her on and turned down a dirt road. Defendant was lost and continued to drive slowly down the paved road. She saw Gary and Orlando running towards her, so she backed up and picked them up. Gary told her that they had left Mr. Gasperson tied up in the woods with his car and that someone would soon find him because the car was visible from the road. Defendant believed the victim was unhurt.

When they returned to the trailer, Gary told defendant that he was going to take Ms. Aragona home. He returned alone two hours later. When she asked about the victim, Gary assured her that the victim had been returned home. Later that evening, Gary announced that they were all going back to Miami. Early in the trip, Gary pulled off the road, ran into the woods, and returned with a blanket that defendant had seen wrapped around Ms. Aragona. She again inquired about Ms. Aragona's whereabouts and was told by Gary that he had left her in the woods. He assured her the victim would be found.

Defendant called her daughter from Miami and learned that Scott Gasperson was dead. Gary arranged for the family to flee to the Dominican Republic. While there, defendant supported the family, and Gary took all the money defendant earned. At some point, defendant attempted to escape from Gary, but he found her and brought her back. Defendant said she was relieved to be arrested and extradited to North Carolina.

At the conclusion of her direct testimony, defendant read a prepared statement which said in part that she never thought Gary was going to kill anyone. She went on to say she was afraid and scared when she found out, and she accepts her guilt. She asked the community to forgive her.

On cross-examination, defendant testified that Gary Fernandez had told her, and she believed, that he was working for the FBI. She denied being involved in any drug dealing and denied knowledge that Gary was selling drugs. The drug charges arose in March 1990, when defendant drove Gary "to go and see some friends."

The sentencing court found as an aggravating factor that defendant had committed the offenses while on pretrial release on another felony charge. The court found as a mitigating factor that defendant had no record of prior criminal convictions. In the two murder cases the trial court found as mitigating factors that defendant was a passive participant and played a minor role in the commission of the offenses. The court found that the aggravating factor outweighed the mitigating factors in each of the cases and imposed consecutive life sentences upon each conviction of second degree murder, consecutive forty year sentences upon each conviction of first degree kidnapping, and an additional consecutive forty year sentence upon the conviction of second degree burglary. Defendant appeals.

On appeal, defendant contends that she is entitled to a new sentencing hearing because the trial court erred (1) by failing to find as a mitigating factor that defendant played a minor role or was a passive participant in the commission of the kidnappings and burglary, (2) by failing to find as a mitigating factor in all cases that defendant was a person of good character, and (3) by improperly considering as an aggravating factor the nature of the charges which the prosecutor dismissed as part of defendant's plea agreement. In addition, defendant acknowledges that she failed to properly preserve for appeal issues relating to the denial of her pretrial motion to suppress evidence, and has petitioned for a writ of *certiorari* in which she seeks review of the following alleged errors: (1) the trial court erred by failing to admit the deposition of Miguel Guzman into evidence at the hearing on defendant's motion to suppress evidence seized from the mobile home where defendant had resided, when this evidence was critical to the resolution of defendant's *Franks v. Delaware* claim, and (2) the trial judge erred by failing to recuse himself from hearing the motion to suppress the evidence seized from the mobile home, since the judge had issued the search warrant. Defendant contends that, because of these errors, this Court should vacate defendant's guilty pleas and remand the case for a new trial. Both defendant and the State have briefed the issues raised by defendant's petition for writ of *certiorari*; in our discretion we grant the petition and address

the issues on their merits. We affirm the denial of defendant's motion to suppress and the sentences imposed by the trial court.

Issues reviewed upon *Certiorari*

[1] Defendant filed a pretrial motion to suppress evidence seized after a search, pursuant to a search warrant, of her trailer at Lot 41 Pelletier Mobile Home Park. She alleged that significant portions of the affidavit supporting the application for the search warrant were knowingly false or made in reckless disregard for the truth. *See Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667 (1978); N.C. Gen. Stat. § 15A-978. In particular, defendant alleged that the statements in the affidavit attributed to Miguel Guzman were knowingly false. Prior to the motion hearing, Mr. Guzman died, and defendant proffered as evidence his deposition which had been taken in preparation for trial. The State objected to the admission of the deposition on the grounds of relevance, and the trial court sustained the objection and excluded the deposition. Defendant argues that there were significant discrepancies between Mr. Guzman's statements in the deposition and the statements attributed to him in an affidavit by SBI Agent Cummings in support of his application for a search warrant. Defendant contends that the deposition is probative of bad faith on the part of Agent Cummings and should have been admitted.

In the application for search warrant, Agent Cummings stated:

> On Tuesday July 17, 1990 at approximately 3:45 pm Detective Mack Whitney of the Onslow Co. Sheriff's Dept. was contacted by Miguel Angel Guzman Hispanic Male, DOB: 09-03-44 and was advised of the following facts: That approximately 3 months ago Guzman was told personally by Orlando Fernandez w/m DOB: 3-10-72 and Gary Fernandez w/m DOB: 03-15-52 that they were surveilling the Woodson Music and Pawn Shop at 18 Hwy. 24 Piney Green, Jacksonville, NC for the purpose of robbing the shop because it opened at 9:00 am and there would not be many persons in the area. On or about the first of July 1990, Guzman was again contacted by Orlando and Gary Fernandez and advised that they were personally going to rob the Woodson Music and Pawn at 18 Hwy. 24, Piney Green, Jacksonville, NC and solicited Guzman's assistance in the commission of the robbery. Guzman refused and was again contacted by Orlando and Gary Fernandez on Thursday July 12, 1990 at approximately 9:00 am.
>
> Both Orlando and Gary Fernandez were acting in a suspicious and nervous manner and they requested Guzman to secure and

> keep 1 large amount of gold jewelry for them. Guzman refused to hold the gold jewelry and Orlando and Gary Fernandez told Guzman that they would be leaving for Miami, FLA soon and quickly departed the scene. The Fernandez's were operating a small red vehicle and Gary Fernandez was attired in a red knit type shirt and stone washed slacks, with grey-white canvas type athletic shoes. Orlando was also wearing an athletic type shoe and according to the Fernandez's they would carry camouflage type clothing to wear during the commission of the robbery. Orlando and Gary Fernandez told Guzman on Friday July 13, 1990 where to find the key to their mobile home and told Guzman that he could remove all the furniture from their residence and upon their return Guzman could pay them $100.00 for all the furniture.
>
> On Wednesday July 18, 1990 Guzman told your affiant that the Fernandez's were residing at the Pelletier Mobile Home Park located at 1673 Marine Blvd. Jacksonville, NC.

In the order denying defendant's motion to suppress, the trial court made the following findings of fact: that the information in the affidavit attributed to Miguel Guzman was related to Agent Cummings by other investigating officers who were interviewing Mr. Guzman, that Agent Cummings set out the information in the search warrant affidavit truthfully and accurately based upon information he had first hand or that had been provided to him, and that there was no evidence before the Court that any law enforcement officer had given information for the search warrant affidavit which was knowingly and intentionally false or provided with reckless disregard for the truth. The court found that to the extent there were any factual inaccuracies, they were minor in nature and resulted from innocent mistakes. The court concluded as a matter of law that defendant had not established by a preponderance of the evidence that any of the statements in the search warrant affidavit were knowingly and intentionally false or that they were made with a reckless disregard for the truth.

There is a presumption of validity with regard to an affidavit supporting a search warrant. *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667 (1978). Where, however, defendant makes a substantial preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, he is entitled to a hearing at

his request. *Id.* Defendant may contest the truthfulness of the affiant's testimony by cross-examination or by offering evidence. N.C. Gen. Stat. § 15A-978. In this case, defendant was granted a hearing, but Miguel Guzman's deposition, which was offered by the defense as evidence of bad faith, was not admitted because the court found it was not relevant to the issue of bad faith.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. There were inconsistencies between the testimony given by Mr. Guzman in his deposition and the statements attributed to him by Agent Cummings in the affidavit. In his deposition, Mr. Guzman made no mention of being contacted by Gary or Orlando on 1 July 1990. However, he did hear Gary and Orlando discuss the robbery on two or three occasions. He also heard them discuss abducting the owners from their house and taking them to Woodson's Music and Pawn Shop. In his deposition, Mr. Guzman said Gary and Orlando drove up to his house the morning of the robbery, but that they did not speak. Mr. Guzman stepped outside to see who it was, then went inside to get clothes on, and when he returned they had left. He did not see what they were wearing. Also in his deposition, Mr. Guzman stated that Gary told him about a month and a half before the robbery that he could remove any furniture he wanted and pay him $100 later.

Although there may be explanations for these inconsistencies, the fact that the inconsistencies exist means the deposition has a tendency to make the existence of certain facts less probable. Thus, the deposition could be probative of bad faith on the part of Agent Cummings and should have been admitted into evidence. The question of whether the deposition does, in fact, show bad faith is a separate issue, which can be addressed only after the deposition is considered. Accordingly, the trial court erred in failing to admit and consider Mr. Guzman's deposition.

The error in the exclusion of the deposition is, however, harmless. In his deposition, Mr. Guzman admitted that he overheard Gary and Orlando Fernandez discussing robbing the pawn shop three months ahead of time, and he made the connection that they were the ones who robbed the pawn shop. He also admitted that Gary and Orlando had tried to get him to participate. Mr. Guzman explained in his deposition that he turned Gary and Orlando in to the police

because he feared for his life. Thus, even if the deposition had been considered and the minor discrepancies noted between Agent Cummings' affidavit and Mr. Guzman's testimony in his deposition were found to have been included in the affidavit as a result exaggeration, reckless disregard, or even bad faith, the affidavit's remaining content is sufficient to establish probable cause. *See Franks, supra; State v. Louchheim*, 296 N.C. 314, 250 S.E.2d 630, *U.S. cert. denied*, 444 U.S. 836, 62 L.E.2d 47 (1979), *State v. Winfrey*, 40 N.C. App. 266, 252 S.E.2d 248, *disc. review denied*, 297 N.C. 304, 254 S.E.2d 922 (1979).

[2] Defendant also asserts that because the trial judge had issued the search warrant upon the application of Agent Cummings, he should have recused himself from presiding over the suppression hearing which sought to have it declared invalid. Defendant contends that, by issuing the search warrant, the judge vouched for the veracity of the affidavit, and thus was not in a position to impartially determine the veracity of the affidavit in a later suppression hearing. We disagree.

In issuing the search warrant, a judge does not vouch for the veracity of the affidavit given in support thereof; he simply determines that the information in the affidavit is sufficient to provide probable cause to believe that the informant was giving truthful information. *See Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527 (1983). We agree.

> Upon a motion that a judge recuse himself, the burden is upon the movant to "demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially."

State v. Honaker, 111 N.C. App. 216, 219, 431 S.E.2d 869, 871 (1993) (citation omitted).

This Court held in *State v. Brown*, 20 N.C. App. 413, 201 S.E.2d 527, *appeal dismissed*, 285 N.C. 87, 204 S.E.2d 21 (1974), that "[t]here is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge." Although the Court observed that "it is the better practice to allow a different judge to rule upon the validity of such a warrant," *Id.* at 414, 201 S.E.2d at 528, it does not require a different judge to rule upon the validity of a search war-

rant. Nor do we agree that Canon 3(C)(1)(a) of the Code of Judicial Conduct, which states: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," required the trial judge to recuse himself. *See Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987) (Canon 3(C)(1)(a) does not require recusal when the judge has obtained knowledge of the facts of the case from previous proceedings in that case); *Hawkins v. State*, 586 S.W.2d 465 (1979) ("a trial judge who initially issues a search warrant is not thereafter so interested in the cause as to be disqualified" from presiding over the suppression hearing); *People v. Tariq*, 565 N.Y.S.2d 614 (A.D. 3 Dept. 1991) (there is no reason to prohibit the judge who issued a warrant from entertaining a motion to suppress evidence seized pursuant to it, and there is always appellate review); *Castillo v. State*, 761 S.W.2d 495 (Tex.App.—Waco 1988), *affirmed*, 810 S.W.2d 180 (1990) (court rejected defendant's argument that it was improper for the judge who issued the search warrant to preside over the motion to suppress evidence derived from the warrant). We conclude the judge did not err in failing to recuse himself from the suppression hearing.

Issues reviewed upon direct appeal

[3] With respect to her sentences for kidnapping and burglary, defendant contends the trial court erred in failing to find as a mitigating factor that defendant played a minor role or was a passive participant in the commission of those offenses. She contends the evidence supporting the existence of the factor was uncontradicted and manifestly credible, requiring the court to find their existence. We disagree.

It is the duty of the trial judge to examine the evidence to determine whether it would support any statutory factor in mitigation of punishment, even in the absence of a request by defense counsel. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985). The defendant must prove the presence of a mitigating factor by a preponderance of the evidence. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). The trial judge must consider any statutory mitigating factor where the evidence in support of the factor is uncontradicted and substantial, but the judge can attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983).

> [W]hen a defendant argues . . . that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, . . . [h]e is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn" and that the credibility of the evidence "is manifest as a matter of law."

Id. at 219-220, 306 S.E.2d at 455 (citations omitted). It is not error for a sentencing judge to fail to find a mitigating factor if uncontradicted, substantial and manifestly credible evidence is not probative of the mitigating factor sought to be established. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983).

There was evidence that defendant was aware of the planned burglary a week or two before it occurred, and agreed because she and Gary Fernandez needed the money to pay their attorney so that they could avoid going to prison on drug charges. Additionally, defendant successfully solicited the participation of her son Eli and unsuccessfully solicited the participation of her daughter Janette. In conformity with the plan, defendant drove Gary, Orlando, and Eli to the victims' house after dark and dropped them off. When she returned to pick them up a few hours later and found no one waiting for her, she went up to the house and knocked. The three men were bringing Scott Gasperson and Phyllis Aragona out of the house, and the victims' eyes, hands, and mouth were taped.

The three men and defendant returned to the trailer with the victims still bound and gagged. Gary and Orlando returned to the victims' residence and left Eli and defendant behind with the victims, who sat in the bedroom of the trailer. Defendant did not let them go at this time. She testified that it was because she did not think anyone would get hurt, and she and Gary needed money to pay their attorney. This evidence refutes a finding that defendant was a passive participant or played a minor role in either the burglary or the kidnappings, and we affirm the decision of the trial court.

[4] Defendant also contends the trial court erred in declining to find as a mitigating factor that defendant was a person of good character. G.S. § 15A-1340.4(a)(2)m establishes as a mitigating factor that "[d]efendant has been a person of good character or has had a good reputation in the community in which (s)he lives."

Defendant testified that she had come from a disadvantaged background, had been abandoned by her parents and had been

abused by her custodian, had had no educational opportunities and had worked from an early age. She had married for the first time at the age of fourteen and had given birth to two children. Her first marriage terminated; she subsequently married a Marine, moved to Jacksonville, and had a third child. Although defendant's second husband left her, she worked multiple jobs, supported her chronically ill mother as well as her children, and earned a GED.

Defendant married for a third time in 1986, and moved to Florida. The marriage lasted only six months. She met Gary Fernandez and they eventually moved to Miami together. Gary would disappear for days and sometimes weeks at a time, and told defendant he was working for the FBI. After a three week absence, he reappeared and told defendant he had moved to Jacksonville, North Carolina. At his request, defendant agreed to move back to Jacksonville. She then became aware of Gary's criminal activities dealing in stolen property.

Defendant's daughter, Janette Ocasio, testified that defendant was generous toward her family and was a devoted parent. The family had never had a bad Christmas, and she could not remember a time when there were not family members living with them.

The sole evidence presented in this case regarding defendant's character and reputation was presented by defendant and her daughter. The credibility of this evidence is a matter for the determination of the trial court; the court has the discretion to reject testimony of biased witnesses. *See State v. Russell*, 92 N.C. App. 639, 376 S.E.2d 458 (1989) (where sole evidence as to good reputation came from defendant's mother, trial court did not err in declining to find as a mitigating factor that defendant had a good reputation in the community); *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983) (the relationship of the witnesses to defendant is a factor which the fact finder may consider in assessing witness credibility); *State v. Smallwood*, 112 N.C. App. 76, 434 S.E.2d 615 (1993) (no error in declining to find good reputation as a mitigating factor where evidence presented showed defendant was "a very respectable person all his life" and was "a very good boy"); *State v. Greenspan*, 92 N.C. App. 563, 374 S.E.2d 884 (1989) (although the testimony was uncontradicted evidence of defendant's good character, it was not so manifestly credible as to require the trial court to find it as a mitigating factor). In the present case, the credibility of the evidence is not manifest as a matter of law and reasonable inferences inconsistent with the existence of the mitigating factor contended for by defendant can be drawn. Therefore,

the trial court did not err in declining to find as a mitigating factor that defendant was a person of good character.

[5] Finally, defendant contends the sentencing court erred by improperly considering as an aggravating factor the nature of the charges which the prosecutor dismissed as part of defendant's plea agreement. Defendant concedes that the sentencing court did not formally find, as a non-statutory aggravating factor, that certain charges had been dismissed pursuant to a plea agreement, but argues that the court improperly considered the dismissed charges in determining defendant's sentence. We find no merit to this argument. Though the court remarked about the charges which had been dismissed, formal findings were made in aggravation and mitigation of punishment and the record does not affirmatively disclose that the court enhanced defendant's sentence based on dismissed charges. *See State v. Westall*, 116 N.C. App. 534, 449 S.E.2d 24, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994) (record does not affirmatively disclose that the trial court enhanced defendant's sentence due to the pending charges, thus no error); *State v. Mack*, 87 N.C. App. 24, 359 S.E.2d 485 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 663 (1988) (same).

The judgments of the trial court are, in all respects, affirmed.

Affirmed.

Judges EAGLES and SMITH concur.

WEBSTER ENTERPRISES, INC., AND WEBSTER CONSTRUCTION COMPANY, INC., PLAINTIFF-APPELLEES v. SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST, DEFENDANT-APPELLANT

No. COA96-286

(Filed 7 January 1997)

1. Pleadings § 19 (NCI4th)— admission in answer—inconsistent motion for summary judgment

Summary judgment in favor of the plaintiff corporations was properly granted where defendant insurance company admitted in its answer that the losses plaintiffs suffered due to a fire were

covered by an insurance binder issued by defendant. Defendant failed to formally amend its answer but made a motion for summary judgment declaring the binder invalid at the time of the fire. Pursuant to N.C.G.S. § 1A-1, Rule 15, a party may amend its pleadings only by leave of court or by written consent of the adverse party; however, the mere filing of an inconsistent motion for summary judgment does not satisfy Rule 15.

Am Jur 2d, Pleading §§ 174, 175, 306, 311, 312.

2. Insurance § 1235 (NCI4th)— directed verdict—denied—insurance binder—misrepresentation—jury

Defendant's motion for directed verdict was properly denied by the trial court where the defendant's motion was based on alleged false and material misstatements knowingly made by plaintiffs in a fire insurance application where plaintiff insureds proffered evidence which supports a conclusion that any such misrepresentations were innocent. The jury verdict indicated that the plaintiffs did not wilfully conceal or misrepresent a material fact. If plaintiffs had made material misrepresentations, a jury must have decided whether the plaintiffs intended to commit fraud or a false swearing.

Am Jur 2d, Insurance §§ 2009, 2014, 2017, 2025, 2029.

3. Insurance § 819 (NCI4th)— fire insurance—increase in hazard—agent's knowledge imputed to insurer

The trial court correctly granted plaintiff insureds' motion for a directed verdict where defendant insurance company failed to carry its burden of proof by establishing there was an alteration in circumstances which materially and substantially increased the risk of insuring plaintiffs' warehouse against fire. Defendant claimed that plaintiffs' storage of flammable materials constituted an increased hazard or risk of fire. Knowledge by defendant's agent that fuel was stored in the warehouse was imputed to defendant. N.C.G.S. § 58-44-10.

Am Jur 2d, Insurance §§ 1923, 1933.

4. Trial § 121 (NCI4th)— refusal to bifurcate—no abuse of discretion

The trial court did not abuse its discretion by refusing to bifurcate bad faith and contract claims which were made by the plaintiff insureds against the defendant insurance company

where both of plaintiffs' claims arose out of an interrelated nucleus of facts. N.C.G.S. § 1A-1, Rule 42(b).

Am Jur 2d, Trial §§ 116, 120, 121.

Appeal by defendant from judgment entered 13 March 1995 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 20 November 1996.

Harrison, North, Cooke & Landreth, by A. Wayland Cooke, and Adams & Osteen, by William L. Osteen, Jr., for plaintiff-appellees.

Randolph M. James, P.C., by Randolph M. James, and Jefferson C. McConnaughey, P.C., by Jefferson C. McConnaughey, for defendant-appellant.

MARTIN, Mark D., Judge.

Defendant Selective Insurance Company of the Southeast appeals from jury verdict awarding plaintiffs Webster Enterprises and Webster Construction Company $371,723.80 plus interest for damages arising out of a warehouse fire.

Plaintiffs' claims arise under two insurance policies, a standard fire insurance policy (policy no. 03 86 172) and an equipment binder (binder 515), issued by defendant through Business Insurers. The standard policy was issued to plaintiffs and covered the warehouse and the following property:

Section I—Property Covered

When insurance under this policy covers "Building(s)," such insurance shall cover in accordance with the following description of coverage.

Coverage A—Building(s): Building(s) or structure(s) shall include . . . fixtures, machinery and equipment constituting a permanent part of and pertaining to the service of the building(s); materials and supplies intended for use in construction, alteration or repair of the building(s) or structure(s); . . . personal property of the named Insured used for the maintenance or service of the described building(s) . . . .

The binder, effective 27 January 1988, was issued to Webster Construction and provided $292,000 in coverage for equipment

Webster Construction stored in the warehouse. On 24 February 1988 Webster Construction received notification from defendant the binder was being cancelled as of 12:01 a.m. standard time on 15 April 1988.

On 4 April 1988 a fire, incendiary in origin and accelerated by flammable liquids, damaged plaintiffs' warehouse on Old Reidsville-Danville Road in Ruffin, North Carolina. The fire destroyed all property stored in the warehouse.

On 3 June 1988 plaintiffs submitted three proof of loss statements to defendant. Plaintiffs claimed: (a) under the standard fire insurance policy, $41,890.50 for damages to the warehouse and $153,500 for damages to the contents of the warehouse; and (b) under the binder, $176,333.30 for damages to equipment owned by Webster Construction. Defendant refused to honor these claims because of, among other things, allegedly suspicious circumstances surrounding the origin of the fire.

On 10 October 1991 plaintiffs instituted the present action against defendant alleging breach of contract and breach of the duty of good faith and fair dealing. On 23 June 1993 defendant filed a motion for summary judgment which the trial court, by order entered 9 August 1993, subsequently denied. On 3 February 1994 plaintiffs, pursuant to N.C.R. Civ. P. 15, filed a motion to amend their complaint to allege: (1) defendant is estopped from denying coverage under the binder because the cancellation notice indicated coverage would continue until 15 April 1988; and (2) the notice of cancellation, in and of itself, constitutes a contract of insurance between the parties. On 5 July 1994 the trial court denied plaintiffs' motion to amend.

On 18 January 1995 plaintiffs filed a motion for summary judgment concerning the validity of the binder at the time of the fire. The trial court granted plaintiffs' motion and subsequently instructed the jury there was no issue as to the existence of coverage under the binder.

After hearing all the evidence, the jury returned the following verdict:

> 1. Did the plaintiffs . . . , through their agent Henry Webster, intentionally cause the burning of their warehouse on April 4, 1988?
>
> No.

2. Did the plaintiffs . . . , through their agents, willfully falsely swear to a material fact or circumstance in connection with their insurance?

No.

3. Did the plaintiffs . . . , through their agents, willfully conceal or misrepresent a material fact or circumstance in connection with their insurance claim?

No.

4. What amount, if any, are the plaintiffs . . . entitled to recover of the defendant . . . as compensatory damages arising out of the April 4, 1988 fire for:

Warehouse: $41,890.50

Contents: $153,500.00

Equipment: $176,333.30

5. Did [defendant] tortiously act in bad faith in handling or denying plaintiffs' claims and was such conduct aggravated?

Yes.

6. What amount of punitive damages, if any, do you award to the plaintiffs?

None.

On 14 March 1995 defendant made a motion for judgment notwithstanding the verdict (JNOV) which, by order signed 3 May 1995, the trial court denied.

On appeal, defendant contends the trial court erred by: (1) concluding, as a matter of law, the binder was valid on the date of the fire; (2) denying defendant's directed verdict motion in light of plaintiffs' misrepresentation of material facts; (3) denying defendant's directed verdict motion on the increase of hazard defense; and (4) submitting plaintiffs' bad faith claims to the jury.

At the outset we note defendant's brief constitutes a blatant violation of N.C.R. App. P. 26(g). *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996). Each page of a properly formatted brief should contain no more than 27 lines of double spaced text with, at most, 65 characters per line. *Id.* In calcu-

lating characters per line, all letters, spaces, and punctuation marks must be considered. *Id.* In direct contravention of this mandate, defendant's brief utilizes a font which compresses approximately 105 characters per line. Such a manifest disregard for the Rules of Appellate Procedure would normally result in dismissal of defendant's appeal. We nevertheless waive the above violation, N.C.R. App. P. 2, and consider the merits of the present appeal because of the temporal proximity between the date defendant filed its brief, 10 May 1996, and the date the *Lewis* opinion was filed, 2 April 1996.

I.

[1] We first consider whether the trial court erred by finding, as a matter of law, that the binder was in full force and effect on the date of the fire, 4 April 1988.

It is well settled that parties are bound by admissions and allegations within their pleadings unless withdrawn, amended or otherwise altered pursuant to N.C.R. Civ. P. 15. *See, e.g., Dorton v. Dorton*, 69 N.C. App. 764, 765-766, 318 S.E.2d 344, 355, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984). Such judicial admissions have "the same effect as a jury finding and [are] conclusive upon the parties and the trial judge." *Buie v. High Point Associates Ltd. Partnership*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215, *disc. review denied*, 341 N.C. 419, 461 S.E.2d 755 (1995). It naturally follows the pleader cannot take a position contrary to its judicial admission. *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 161-162, 284 S.E.2d 697, 700 (1981).

In the present case, plaintiffs alleged, in paragraph seven of their complaint, that "At the time of the fire, [defendant] also insured equipment belonging to [Webster Construction] under an insurance binder issued by its agent Business Insurers, Inc." Defendant, by way of its answer, admitted the above allegation. Consequently, under *Dorton* and *Buie*, the validity of the binder at the time of the fire was conclusively established unless defendant withdrew, amended, or otherwise altered its judicial admission.

Toward that end, we note defendant failed to formally amend its answer. *See* N.C. Gen. Stat. § 1A-1, Rule 15 (1990). Defendant nonetheless argues that its motion for summary judgment concerning the alleged invalidity of the binder, *see* N.C. Gen. Stat. § 58-44-20(4) (1994), effectively withdrew its previous admission that the binder was in full force and effect at the time of the fire. To support this proposition, defendant relies on *Barrett, Robert & Woods v. Armi*, 59

N.C. App. 134, 296 S.E.2d 10, *disc. review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982), *recons. denied*, — N.C. —, 312 S.E.2d 649 (1984). *See also Miller v. Talton*, 112 N.C. App. 484, 487-488, 435 S.E.2d 793, 796-797 (1993).

The *Barrett* Court concluded, based on the nature of summary judgment and the liberal rules governing amendments to pleadings, that "unpleaded affirmative defenses [should] be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment." *Barrett*, 59 N.C. App. at 137-138, 296 S.E.2d at 13 (citations omitted). *See Miller*, 112 N.C. App. at 487-488, 435 S.E.2d at 796-797 (emphasizing party may properly assert previously unpled affirmative defense through motion for summary judgment only if no prejudice to opposing party). Unlike *Barrett*, however, defendant here waived its right to contest the validity of the binder by admitting, in its answer, that the binder was in effect at the time of the fire. *See J. W. Cross Industries v. Warner Hardware Co.*, 94 N.C. App. 184, 186, 379 S.E.2d 649, 650 (a party may waive virtually any right it possesses), *disc. review denied*, 325 N.C. 271, 384 S.E.2d 515 (1989). Defendant nonetheless argues there is no legally significant distinction between (a) raising a previously unpled affirmative defense through a motion for summary judgment, and (b) withdrawing a judicial admission through a subsequent motion for summary judgment.

To the contrary, we do not believe *Barrett* authorizes the withdrawal of a party's solemn admission through the mere filing of an inconsistent motion for summary judgment. To hold otherwise would emasculate not only the conclusive nature of judicial admissions but also the plain language of N.C.R. Civ. P. 15, which clearly provides that, under the present facts and circumstances, "a party may amend his pleadings only by leave of court or by written consent of the adverse party," N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990) (emphasis added). Further, we recognize an expansive interpretation of the *Barrett* rule may also provide a sword to delay trials—by filing a motion for summary judgment on the eve of trial which is inconsistent with a prior admission, a party could unilaterally delay a trial while the other party is forced to take further discovery on what it appropriately assumed was a judicially established fact.

Therefore, as defendant failed to formally amend its response to paragraph seven of plaintiffs' complaint pursuant to Rule 15, the validity of the binder on 4 April 1988 was conclusively established. Accordingly, we affirm the trial court's ruling the binder was, as a

matter of law, in full force and effect on 4 April 1988, the date of the fire.

II.

[2] We next consider defendant's allegation the trial court erred by failing to grant defendant's motion for directed verdict based on alleged false and material misstatements knowingly made by plaintiffs.

As mandated by N.C. Gen. Stat. § 58-44-15, the insurance policy issued by defendant contained the following provision:

> This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Id. (1994) (lines 1-6 of standard 165-line policy). "[T]he condition against false swearing is broken when a false oath is knowingly and willfully made by the insured as to any matter material to the insurance or the subject thereof . . . ." *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 368-369, 301 S.E.2d 439, 442 (*quoting Globe & Rutgers Fire Ins. Co. v. Stallard*, 68 F.2d 237, 240 (4th Cir. 1934)), *disc. review denied*, 308 N.C. 678, 304 S.E.2d 759 (1983). Simply put, to void a fire insurance policy for either misrepresentations or false swearing, the insurer must prove that the insured knowingly and willfully made statements which were false and material. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 370, 329 S.E.2d 333, 338 (1985). In any event, unless "the insured's misrepresentations cannot in any way be seen as innocent," the issue of fraud or false swearing is a question of fact which remains entirely within the province of the jury. *Shields*, 61 N.C. App. at 370, 301 S.E.2d at 443 (*quoting Lykos v. American Home Ins. Co.*, 609 F.2d 314, 315-316 (7th Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 1079, 62 L. Ed. 2d 762 (1980)).

Assuming plaintiffs' alleged misrepresentations were material, our review of the present record indicates plaintiffs proffered evidence which, when viewed, as we must, in the light most favorable to plaintiffs, *id.* at 374, 301 S.E.2d at 445, supports a conclusion any such misrepresentations were innocent. "Obviously, . . . the jury[,] in its composite wisdom, after hearing the testimony and observing the demeanor of the witnesses, disbelieved the defendant['s] evidence and resolved the issues against [it]. The record amply sustains the

[decision] . . . ." *State v. Hedrick*, 236 N.C. 727, 731, 73 S.E.2d 904, 906 (1953). Accordingly, defendant's motions for directed verdict and judgment notwithstanding the verdict were properly denied.

III.

[3] Defendant next alleges the trial court erred by directing a verdict in favor of plaintiffs on defendant's increase of hazard defense.

The standard fire insurance policy issued by defendant contained the following statutorily approved language:

> **Conditions suspending or restricting insurance.** Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured.

See N.C. Gen. Stat. § 58-44-15 (lines 28-32 of standard 165-line policy). As a general rule, when, as here, the insured establishes its insurance policy embraces a particular claim or injury, "the burden then shifts to the insurer to prove that a policy exclusion excepts the particular [claim] from coverage." *Hobson Construction Co. v. Great American Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985). Thus, "the insurer has the burden of [proving] . . . that there has been an increase of risk [or hazard]." 8 MARK S. RHODES, COUCH ON INSURANCE LAW 2D § 37A:305 (Rev. Ed. 1985).

The phrase 'increase of hazard' "denotes a change in the circumstances existing at the inception of the policy . . . ." 44 AM. JUR. 2D *Insurance* § 1200 (1982). More specifically, "increase of hazard" provisions encompass only new uses "which would increase the risk or hazard insured against, and not [] a continuation of a former or customary use, or [] a change in risk without increase of hazard. It contemplates an alteration . . . which would materially and substantially enhance the hazard . . . ." *Id.*

Defendant contends the introduction of flammable substances into the warehouse increased the hazard or risk of fire. This argument assumes flammable substances were not already located in the warehouse. The present record, however, clearly indicates flammable liquids (*i.e.* fuel for the equipment) were stored in the warehouse prior to the date defendant issued fire insurance to plaintiffs.

In response, defendant argues it had no knowledge plaintiffs stored flammable substances at the warehouse because the insurance

application indicated there were no flammables on the premises. Notably, plaintiffs did not personally file the application form. Rather, the form was completed by Business Insurers, a corporation which defendant admitted, in its answer, was its agent, at least with respect to the binder. Indeed, with regard to both the standard policy and the binder, we believe Business Insurers acted as a representative for defendant (insurer), and not plaintiffs (insured). N.C. Gen. Stat. § 58-33-20(a) (1994) ("Every agent or limited representative who solicits or negotiates an application for insurance of any kind, in any controversy between the insured . . . and the insurer, is regarded as representing the insurer and not the insured . . . ."). Thus, none of the representations in the application are properly imputed to plaintiffs.

Further, we note Business Insurers knew plaintiffs stored fuel at the warehouse. This knowledge is imputed to defendant. *Northern Nat'l Life Ins. v. Miller Machine Co.*, 63 N.C. App. 424, 429, 305 S.E.2d 568, 571-572 (1983) ("[K]nowledge of or notice to an agent of an insurer is imputed to the insurer itself, absent collusion between the agent and the insured."), *aff'd*, 311 N.C. 62, 316 S.E.2d 256 (1984). Although we acknowledge Business Insurers secured this information as a result of an inspection performed in connection with a policy issued by USF&G, not defendant, it nonetheless highlights that performance of a pre-issuance inspection, as mandated by N.C. Gen. Stat. § 58-44-10, would have revealed flammables were stored in the warehouse. The duty to inspect prior to issuance of fire insurance rests squarely on the insurer and his agent, not the insured. *See* N.C. Gen. Stat. § 58-44-10 (1994). We therefore believe plaintiffs should not bear the loss resulting from any failure of communication between defendant and its representative, Business Insurers. Rather, defendant is the proper party to shoulder the costs of faulty internal communications and procedures.

Accordingly, as defendant failed to carry its burden of proof by establishing there was an alteration in circumstances which materially and substantially increased the risk of insuring plaintiffs' warehouse against fire, we affirm the trial court's grant of a directed verdict to plaintiffs on defendant's increase of hazard defense.

IV.

[4] Defendant also contends the trial court erred by submitting plaintiffs' bad faith claims to the jury.

At the outset we note any error which attended the trial court's submission of the bad faith issue was harmless because the jury

refused to award punitive damages. *Shaw v. Stringer*, 101 N.C. App. 513, 516, 400 S.E.2d 101, 102 (1991) (erroneous submission of alienation of affection issue coupled with finding against appellant was nonetheless harmless error "since no damages were assessed against defendant"). *See also Henderson v. R. R.*, 171 N.C. 457, 459, 88 S.E. 626, 627 (1916) (improper submission of wanton negligence was harmless in that it did not tend to enhance damages in light of charge). We thus consider only whether the trial court erred by failing to bifurcate plaintiffs' contractual and extra-contractual claims.

N.C. Gen. Stat. § 1A-1, Rule 42(b) provides:

> The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues.

Id. (1990). The trial court is vested with broad discretionary authority in determining whether to bifurcate a trial. *Roberts v. Young*, 120 N.C. App. 720, 724-725, 464 S.E.2d 78, 82 (1995). This Court will not superimpose its judgment on the trial court absent a showing the trial court abused its discretion by entering an order manifestly unsupported by reason. *Id.* at 725, 464 S.E.2d at 82.

Defendant argues that severing the breach of contract and bad faith claims would have resulted in a more concise, orderly, and understandable presentation of the issues to the jury. While we recognize submission of a single issue per case would certainly decrease the burden on our juries, such a proposal is irreconcilable with the overriding interests of judicial economy. In any event, as both plaintiffs' claims arise from an interrelated nucleus of facts, the trial court did not abuse its discretion by refusing to bifurcate the contractual and extra-contractual issues. Accordingly, we affirm the trial court's denial of defendant's motion to sever the breach of contract and bad faith issues.

Finally, we note, after careful consideration of the present record, that defendant's remaining assignments of error are wholly without merit.

No error.

Chief Judge ARNOLD and Judge EAGLES concur.

KRISTEN S. DANIEL, PLAINTIFF v. THE CITY OF MORGANTON, THE BURKE COUNTY BOARD OF EDUCATION, AND DEBORAH GOBER, DEFENDANTS

No. COA96-267

(Filed 7 January 1997)

1. Trial § 38 (NCI4th)— summary judgment—genuine issue of material fact—eliminate formal trial—question of law

Summary judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C.G. S. § 1A-1, Rule 56(c). Its purpose is to eliminate formal trials where only questions of law are involved.

Am Jur 2d, Summary Judgment §§ 1, 26, 27, 32-36.

Propriety of considering answers to interrogatories in determining motion for summary judgment. 74 ALR2d 984.

2. Schools § 210 (NCI4th)— summary judgment—school board—high school student—softball practice—dangerous condition—no breach of duty

The trial court did not err by granting summary judgment in favor of defendant school board as to plaintiff's claim of negligence where the plaintiff, who was injured while participating in her high school softball practice, was playing on a field which was under construction; defendant coach directed plaintiff and her teammates to practice on the rough playing field; plaintiff, an invitee, was aware of the dangerous condition of the field prior to her injuries; and defendant board thus did not have a duty to warn plaintiff of the condition of the field and did not breach its duty to plaintiff.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 601-603, 605-607, 675, 676; Summary Judgment § 6.

Tort liability of public schools and institutions of higher learning for accident occurring during school athletic events. 35 ALR3d 725.

3. Schools § 172 (NCI4th)— summary judgment—school board—high school student—softball practice—injured—governmental immunity—insurance—exclusionary clause

The trial court correctly granted summary judgment in favor of the defendant board of education where the board established the complete defense of governmental immunity, and plaintiff, a high school student who was injured during the school's softball practice, failed to establish an actionable claim of negligence. A county board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to N.C.G.S. § 115C-42. While the board had procured insurance, the policy specifically excluded liability for injuries to any person injured while participating or practicing in a contest or exhibition sponsored by the board.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 42-44, 59, 60.

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

Modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning. 33 ALR3d 703.

4. Schools § 182 (NCI4th)— softball coach—unsafe playing field—student injured—negligence—contributory negligence

While defendant Gober, a mathematics teacher and assistant softball coach, was negligent by holding practice on a rough playing field and advising student players that it would improve their game if they practiced on the rough field, plaintiff's claim against defendant Gober for injuries received when she was struck by a ball that took an erratic hop was barred by plaintiff's contributory negligence where plaintiff's deposition statements showed that she knew that other players had been hit by balls taking erratic hops on the field; she knew if she practiced on the field she, too, could be hit; and she considered the field unsafe before her injury occurred.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 151, 606, 607.

5. Public Officers and Employees § 68 (NCI4th)— summary judgment—injured high school student—rough playing field—no governmental immunity—no recovery—contributory negligence

Defendant Gober, a high school mathematics teacher and assistant softball coach, did not have governmental immunity from liability for acts of negligence because she is an employee of the defendant board of education and not an officer. However, the plaintiff's contributory negligence barred recovery against defendant Gober for injuries received by plaintiff high school softball player while practicing on a field that was under construction.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 45, 606; Public Officers and Employees § 306.

6. Negligence § 69 (NCI4th)— summary judgment—high school softball player—city—leased property—licensee—absence of negligence—contributory negligence

The trial court did not err in granting defendant city's motion for summary judgment where defendant, a high school softball player, was injured while practicing on a field which was under construction. The city leased the field to the defendant school board; however the city was unaware that the board was using the rough playing field for softball practice. Plaintiff, a licensee to the city, entered the property at her own risk. The evidence showed that the plaintiff was aware of the dangers of the rough playing field; therefore, the city was not liable to the plaintiff.

Am Jur 2d, Premises Liability §§ 159, 160.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee or trespasser. 22 ALR4th 294.

Appeal by plaintiff from summary judgments entered 12 December 1995 by Judge Julia V. Jones in Burke County Superior Court. Heard in the Court of Appeals 19 November 1996.

Daniel & LeCroy, P.A., by M. Alan LeCroy, for plaintiff appellant.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant appellee City of Morganton.

Patton, Starnes, Thompson, Aycock, Teele & Ballew, P.A., by Larry A. Ballew, for defendant appellees Burke County Board of Education and Deborah Gober.

SMITH, Judge.

On 19 March 1990 plaintiff was participating in softball practice with the Freedom High School girl's varsity softball team. The softball field on which practice was being held was located on a portion of land owned by defendant, Burke County Board of Education (Board) and leased and maintained by defendant, City of Morganton (City). The softball field was in the course of being constructed by the City and the surface of the playing field was rough. Grass was in intermittent spots and there were a number of bare patches and numerous rocks in the outfield. The City recreation department was in charge of getting the softball fields ready for school teams use. The recreation department was not aware that Freedom High School was using the particular field. City personnel thought the high school was using another field, the Ralph Edwards Nursery Field for practices.

Defendant Gober was employed by defendant Board as a mathematics teacher and received compensation for being the assistant coach to the girl's softball team. On 19 March 1990, Coach Gober had the outfield players, including plaintiff, engaged in a drill to practice fielding "grounders." During the drill, Gober stood at the edge of the infield approximately 70 feet from the players and hit hard grounders into the roughly surfaced outfield to be fielded by the players. Defendant Gober hit a ground ball towards plaintiff's position. The ball hit either a clump of grass or a rock and took an erratic hop and hit plaintiff in the face. The force of the ball knocked out one of plaintiff's teeth and loosened another. Plaintiff's injuries will require her to undergo future dental treatment.

In her deposition plaintiff stated that other players had been struck by balls taking erratic hops on the field. Plaintiff also stated that in the past other players had complained to the coach about the dangerousness of the field. The record also indicates that some of the parents of the players may have complained to the principal and to the head coach about the field. When asked if she considered the field to be unsafe before she was hurt, plaintiff responded "yes." Additionally, plaintiff asserted that defendant Gober had remarked that practicing grounders on the rough field gave the players an advantage over other teams during games, because others would not be as familiar with balls taking erratic hops.

Through discovery, defendants Board and Gober produced a liability policy which provided coverage to defendants for certain accidents and injuries occurring on school grounds or at school sponsored events. The insurance policy contains an exclusion entitled "Athletic or Sports Participants." The exclusion states, "This insurance does not apply to . . . 'Bodily injury' to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor."

Also produced during discovery was a lease agreement between defendant/lessor Board and defendant/lessee City. The lease contains a mutual indemnification provision, whereby the Board and the City agree to indemnify each other. The lease also has a provision requiring the Board and City to each obtain liability insurance and for each to have the other designated as a named insured in their respective policies. The lease provided that the City could use the property for park purposes while the Board could use the same for school activities. Because none of the parties have argued or relied on the lease provisions regarding insurance as a basis for recovery, we need not address the effect of these provisions.

On 19 May 1995 defendant Board and defendant Gober moved for summary judgment. Defendant City moved for summary judgment on 26 October 1995. Both motions were heard on 13 November 1995 and were granted for all defendants. From these judgments plaintiff appeals.

Plaintiff first argues that the trial court erred in granting summary judgment in favor of all defendants as to plaintiff's claims of negligence. Plaintiff's second assignment of error is that all defendants waived governmental immunity. We will address the assignments of error together as to each defendant.

[1] Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). " '[I]ts purpose is to eliminate formal trials where only questions of law are involved.' " *Medlin v. Bass*, 327 N.C. 587, 590, 398 S.E.2d 460, 462 (1990) (quoting *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)). In ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party, who is entitled to the benefit of all favorable inferences that

may reasonably be drawn from the facts proffered. *Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28 (1995).

In order for plaintiff to recover from defendants for her injuries, plaintiff must show that defendants breached the standard of care owed to her and that the governmental entities waived their immunity. The standard of care of defendants depends upon the status of plaintiff, whether she was an invitee, a licensee or a trespasser. *See Hoots v. Pryor*, 106 N.C. App. 397, 406, 417 S.E.2d 269, 275, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992).

I. The Burke County Board of Education

[2] First, it has already been established that a plaintiff, while participating in team practice is an invitee as to a defendant school board. *Clary v. Alexander Bd. of Education*, 19 N.C. App. 637, 638, 199 S.E.2d 738, 739 (1973), *aff'd*, 285 N.C. 188, 203 S.E.2d 820 (1974), *opinion withdrawn and reversed on other grounds*, 286 N.C. 525, 212 S.E.2d 160 (1975). "An owner of premises owes to an invitee the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn the invitee of hidden perils or unsafe conditions that can be ascertained by reasonable inspection and supervision." *Byrd v. Arrowood*, 118 N.C. App. 418, 421, 455 S.E.2d 672, 674 (1995) (citing *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992)). However, "a premises owner does not have to warn an invitee of apparent hazards or circumstances of which the invitee has equal or superior knowledge. A reasonable person should be observant to avoid injury from a known and obvious danger." *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 546, 459 S.E.2d 23, 27 (1995) (citing *Roumillat*, 331 N.C. 57, 67, 414 S.E.2d 339, 344).

Plaintiff's deposition shows that she knew of the danger of the rough playing field. Thus, defendant Board did not have a duty to warn plaintiff of the condition of the field, of which she was already aware. Defendant Board did not breach its duty to plaintiff.

[3] As to immunity, a county board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority. *Beatty v. Charlotte-Mecklenburg Board of Education*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990).

> Pursuant to N.C. Gen. Stat. § 115C-42 . . . any local board of education is authorized to waive its governmental immunity from lia-

> bility by securing liability insurance as provided for in the statute. The primary purpose of the statute is to encourage local school boards to waive immunity by obtaining insurance protection while, at the same time, giving such boards the discretion to determine whether and to what extent to waive immunity. The statute makes clear that unless the negligence or tort is covered by the insurance policy, sovereign immunity *has not been waived* by the Board or its agents.

Id. (emphasis added). In pertinent part N.C. Gen. Stat. § 115C-42 (1994) provides, "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."

The meaning of language used in an insurance contract is a question of law for the Court, *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993), as is the "construction and application of the policy provisions to the undisputed facts." *Walsh v. National Indem. Co.*, 80 N.C. App. 643, 647, 343 S.E.2d 430, 432 (1986). If the language in an exclusionary clause contained in a policy is ambiguous, the clause is "to be strictly construed in favor of coverage." *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 201-02, 415 S.E.2d 764, 765, *disc. review denied*, 331 N.C. 557, 417 S.E.2d 803 (1992). If such an exclusion is plainly expressed, it is to be construed and enforced as expressed. *Id.* at 202, 415 S.E.2d at 765-66.

At the time of plaintiff's injury, the Board had a liability policy, which provided coverage to the Board and its employees for negligent acts causing injuries on school grounds and at school sponsored events. This policy contains the following exclusion, "Exclusion—Athletic or Sports Participants. . . . With respect to any operations shown in the Schedule, this insurance does not apply to 'bodily injury' to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor." We hold that the policy in this case is clear and unambiguous and interpret the policy as written and according to its plain meaning. *Barbee v. Hartford Mutual Insurance Co.*, 330 N.C. 100, 408 S.E.2d 840 (1991). The plain language of the insurance policy excludes liability for injuries to athletic or sports participants. Plaintiff was engaged in an athletic event and was a sports participant at the time of her injury. While defendant Board has waived its immunity to the extent that it

is indemnified by insurance for its torts, it is not entitled to indemnification for plaintiff's softball injuries. Defendant Board has established the complete defense of governmental immunity, and plaintiff has failed to establish an actionable claim of negligence. The trial court correctly granted summary judgment in the Board's favor.

II. Deborah Gober

[4] As a full-time mathematics teacher and assistant softball coach, defendant Gober had "a duty to abide by that standard of care 'which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances.' " *Izard v. Hickory City Schools Bd. of Education*, 68 N.C. App. 625, 626-27, 315 S.E.2d 756, 757 (1984) (citation omitted). In the present case, we believe defendant Gober breached her duty owed to plaintiff by holding practice on the rough field and advising students that it would improve their game if they practiced on the rough field. A person of ordinary prudence would not have conducted softball practice on the instant playing field. Thus, Gober was negligent. However, "[t]he rule with respect to acting in obedience to the orders of a person in authority *requires that such orders be disregarded when a reasonable man under similar circumstances would know that his compliance with such orders would result in his injury.*" *Clary*, 19 N.C. App. at 640, 199 S.E.2d at 740 (citing *Swaney v. Peden Steel Co.*, 259 N.C. 531, 131 S.E.2d 601 (1963); *Johnson v. R.R.*, 130 N.C. 488, 41 S.E. 794 (1902); *Lambeth v. R.R.*, 66 N.C. 495 (1872). Thus, even though defendant Gober negligently conducted softball practice on the instant field, plaintiff's own negligence bars her recovery.

In *Clary v. Bd. of Education*, 286 N.C. 525, 212 S.E.2d 160 (1975), plaintiff was a student who was injured when he ran into a large glass window at the end of the basketball court, while running wind sprints. *Id.* at 532, 212 S.E.2d 160, 165. Evidence showed that he had practiced under similar circumstances during previous school years as well as early weeks of the particular season in which he was injured. *Id.* Evidence also showed that other students had collided with the glass windows before and the glass in the transom had cracked when struck by a basketball. *Id.* at 532-33, 212 S.E.2d at 165. The evidence was sufficient to permit finding that negligence on the part of plaintiff contributed to his injuries, but did not compel such a finding. *Id.* at 533, 212 S.E.2d at 165. This was so because "[t]here was no evidence [plaintiff] had knowledge or notice of the composition of the wire glass, or its relative strength, or any special hazard to a per-

son who might collide with it with sufficient force to break it." *Id.* The facts in the instant case are distinguishable. The record is replete with evidence from plaintiff that she knew of and appreciated the danger of the field. Plaintiff's own statements in her deposition showed the following. Plaintiff knew that other players had been hit by balls taking erratic hops on the field. She knew that if she practiced on the field she too could be hit. In fact, she considered the field unsafe before her injury occurred. The trial court properly granted summary judgment in favor of defendant Gober.

[5] Defendants Gober and Board argue that as a schoolteacher Gober has governmental immunity from liability for acts of negligence. However, defendant Gober is an employee and not an officer and is therefore not entitled to governmental immunity as her duties are purely ministerial and do not, in the instant case, involve the exercise of sovereign power. *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

> "[A]n employee of a governmental agency . . . is personally liable for his negligence in the performance of his duties proximately causing injury to the property [or person] of another even though his employer is clothed with immunity and not liable on the principle of *respondeat superior*."

An officer, on the other hand, is entitled to share in the immunity of the sovereign, and to assert the separate defense of official immunity where applicable.

Pharr v. Worley, 125 N.C. App. 136, 479 S.E.2d 32 (1997) (citations and parentheticals omitted). As a schoolteacher, defendant Gober is not immune from acts of negligence. She can be held personally liable for negligent acts in the performance of her duties. However, as we have already discussed, we hold that while defendant Gober was negligent, plaintiff's negligence bars recovery against defendant Gober.

III. The City of Morganton

[6] A licensee is one who enters the premises with the possessor's permission, express or implied, solely for his or her own purposes rather than for the possessor's benefit. *Hoots*, 106 N.C. App. at 406, 417 S.E.2d at 275. If the owner (in this case the lessee), is actively negligent in managing the property while the licensee *is exercising due care on the premises and subjects the licensee to increased danger*, the owner will be liable for injuries sustained as a result of such

active conduct or affirmative negligence. *DeHaven v. Hoskins*, 95 N.C. App. 397, 400, 382 S.E.2d 856, 858, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989).

The property owner (lessee) has no duty, however, to keep the premises safe for the licensee's use, protect her from injuries caused by the condition of the property, or protect her from damages caused by ordinary use of the premises. *Pafford v. J.A. Jones Construction Co.*, 217 N.C. 730, 736, 9 S.E.2d 408, 412 (1940). The general rule is that a landowner (lessee) is not liable for injuries due to the condition of the property or due to passive negligence or acts of omission. *DeHaven*, 95 N.C. App. at 400, 382 S.E.2d at 858. A licensee enters the premises by permission but goes there at her own risk to enjoy the license subject to its accompanying perils. *Pafford*, 217 N.C. at 737, 9 S.E.2d at 412.

In this case, plaintiff was a licensee as to defendant City. She was at Freedom Park, property leased and maintained by the City. Plaintiff was at the park not for a park purpose, but rather she was there to practice softball as a part of the Board's operation of the school system. The forecast of evidence shows that the City was not even aware that the Board was using the softball field. In fact, City personnel thought the Board was using another field. Plaintiff's complaint only sounds in negligence and does not allege that the City did any positive act causing the softball to take an erratic hop and injure her. The most that can be said is that plaintiff claims the City, by negligently maintaining the park, allowed the rough playing field to remain. Any danger posed by the rough playing field was open and obvious, so no duty to warn of a newly hidden hazard arose regarding the rough surface. Furthermore, in plaintiff's deposition plaintiff was asked if she knew what the ball hit to cause it to take an erratic hop. She replied, "it was probably a clump of grass or it could have been a rock. I don't remember." Softball is an outdoor game and erratic hops of the ball are a common hazard. Plaintiff has failed to make out a claim for actionable negligence. Even if plaintiff had a claim for actionable negligence against the City, that claim would also be barred by plaintiff's own negligence as hereinbefore stated.

As to immunity, the general rule is that the doctrine of governmental immunity shields a municipality from liability when the municipality performs a governmental function. *Hickman v. Fuqua*, 108 N.C. App. 80, 82-83, 422 S.E.2d 449, 451, *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993). "The creation and operation of public parks and recreation programs are legitimate and traditional func-

tions of the government." *Id.* at 84, 422 S.E.2d at 452. However, pursuant to N.C. Gen. Stat. § 160A-485(a) (1994) (emphasis added), a city or town can waive immunity through the purchase of insurance.

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

In this case, defendant City participated in a government risk pool, which waived governmental immunity to the extent of coverage. The record before us however does not indicate the extent of coverage. Thus, we are unable to ascertain the extent, if any, that this claim is barred by immunity. However, the forecast of evidence does not support a claim of negligence against the City for the reason that plaintiff's own negligence would bar recovery from the City. The trial court correctly granted summary judgment in favor of defendant City.

Affirmed.

Judges LEWIS and WALKER concur.

ROGER D. MESSER AND WILLIAM L. HUNT v. TOWN OF CHAPEL HILL

No. COA95-488

(Filed 7 January 1997)

1. Zoning § 158 (NCI4th)— rezoning—taking—unripe claim

The plaintiffs' "takings" claim under N.C. Const. art. I, § 19 was unripe and was properly dismissed by the trial court where the plaintiff landowner and plaintiff interested party challenged the defendant city's rezoning ordnance but did not allege that they had applied for a development permit or a variance. Land-use challenges are not ripe for review until there has been a final decision about what uses of the property will be permitted.

Am Jur 2d, Zoning and Planning §§ 38 et seq., 213 et seq.

2. Zoning § 86 (NCI4th)— city zoning ordinance—due process—unripe—final determination of reasonableness of ordinance.

Plaintiffs' claim that the defendant city's zoning ordinance violated their due process rights was not ripe for adjudication where there had not been a final determination regarding how the ordinance would affect plaintiffs' property. The test for whether a zoning ordinance is reasonable is (1) whether the ordinance as applied is reasonably necessary to promote the public good and (2) whether the interference with the owner's right to use the property is reasonable in degree. Before a court can determine whether an ordinance is reasonable, there must be a determination as to how the plaintiffs will be affected by the ordinance.

Am Jur 2d, Zoning and Planning § 42.

3. Zoning § 88 (NCI4th)— constitutional claim—police power—adjudication—application for permit or variance

Plaintiffs' constitutional claim that defendant city's rezoning ordinance was arbitrary and capricious and not a legitimate use of the police power was not ripe for adjudication where plaintiffs made no effort to develop the property, submitted no development plans, and did not attempt to get a variance.

Am Jur 2d, Zoning and Planning § 42.

4. Zoning § 85 (NCI4th)— futility exception—no factual allegation—building permit or variance

Plaintiffs could not avoid the ripeness doctrine under a "futility exception" where plaintiffs made no factual allegations claiming an application for a building permit or variance would be pointless.

Am Jur 2d, Zoning and Planning § 39.

Standing of owner of property adjacent to zoned property, but not within territory of zoning authority, to attack zoning. 69 ALR3d 805.

5. Zoning § 117 (NCI4th)— exhaustion of administrative remedies—nine-month statute of limitations—zoning ordinance

The property owner's argument that courts should not require plaintiffs to exhaust their administrative remedies prior to bring-

ing an action challenging the validity of a rezoning ordinance because of statute of limitations considerations was not properly before the Court of Appeals where N.C.G.S. § 160A-364 provides a nine-month statute of limitations for challenging the validity of a zoning ordinance and plaintiffs were able to file their suit within the statutory time frame.

Am Jur 2d, Zoning and Planning §§ 1044, 1045.

Judge GREENE dissenting.

Appeal by plaintiffs from order entered 28 February 1995 by Judge Donald W. Stephens in Orange County Superior Court. Heard in the Court of Appeals 1 February 1996.

Plaintiffs' complaint alleges the following facts. Plaintiff William L. Hunt has owned an undeveloped tract of land of approximately 150 acres in the Laurel Hill area of Chapel Hill since 1937. This area is part of Chapel Hill's extraterritorial zoning and planning jurisdiction. Before 22 November 1993, the greater part of the property was zoned R-1, which allowed almost three residential units to be built for every one acre. In November, 1993, an amendment to this zoning ordinance was proposed by the town's Planning Director, a public hearing was held, and the changes were adopted. The amendment included raising the density of certain areas of the town and lowering the density of other areas. The effect of the amendment on Hunt's land resulted in a reduction in the number of residential units permitted on approximately 145 acres of the property. Now, the property is zoned to allow a minimum of five acres for every one housing unit.

Before the passage of the proposed amendment, Hunt's property had a fair market value of approximately three million dollars. Plaintiffs assert that since the zoning changes, the cost of developing the property, with the five acre tract minimum, would be greater than the total sales value of the individual five acre lots. Based on this assessment, plaintiff William L. Hunt and plaintiff Roger D. Messer, an interested party with respect to Hunt's property, filed a complaint on 19 August 1994 challenging the validity of the amendment.

On 21 October 1994, defendant Town of Chapel Hill moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The trial court granted defendant's motion in an order dated 28 February 1995. From this order plaintiffs appeal.

Robert H. Smith and Michael S. Davis, for plaintiff-appellant.

Poyner & Spruill, L.L.P., by S. Ellis Hankins, for defendant-appellee.

McGEE, Judge.

Although plaintiffs ask this Court to rule on the constitutionality of the November 1993 amendment to the zoning ordinance, the only issue properly before us is whether the trial court erred in granting defendant's motion to dismiss under N.C.R. Civ. P. 12(b)(6). Plaintiffs argue their complaint against the Town of Chapel Hill states a claim for relief, is ripe for adjudication and, therefore, the motion to dismiss should have been denied. We disagree.

We first note that plaintiffs' complaint fails to list or separate their causes of action, making it difficult to determine upon what grounds they seek relief. *See O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 392, 94 L. Ed. 187, 193 (1949) ("We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation, or thinking."). In reading the complaint, it appears plaintiffs are seeking to have the zoning ordinance declared invalid because they allege: 1) it constitutes a taking of private property for public use without payment of just compensation in violation of N.C. Const. art. I, § 19; 2) it violates due process as an improper use of the police power; and 3) it is arbitrary, capricious, and unreasonable.

[1] We first address the "taking" issue. "[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989). Although not controlling, federal court decisions interpreting the construction and effect of the due process clause of the United States Constitution are persuasive authority in interpreting the "law of the land" clause in our own state Constitution. *McNeil v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990).

In this case, plaintiffs failed to allege that they filed a development plan or sought a variance in order to determine exactly how, or if, the zoning ordinance would affect their property. The United

States Supreme Court has consistently held that land-use challenges are not ripe for review until there has been a final decision about what uses of the property will be permitted. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1041, 120 L. Ed. 2d 798, 829 (1992) (Blackmun, J., dissenting).

> The ripeness requirement is not simply a gesture of good-will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction.
>
> This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

Id. (citations omitted). *See also Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 87 L. Ed 2d 126, 144 (1985) (a property owner cannot claim a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the proper administrative channels); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453, (claim that zoning ordinance constituted a "taking" of property does not present a concrete controversy ripe for adjudication unless property owner first submits a development plan or applies for a land use permit), *amended by* 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043, 98 L. Ed. 2d 861 (1988). Because plaintiffs did not allege they had applied for a development permit or a variance, we hold their "takings" claim under N.C. Const. art. I, § 19 is unripe and was properly dismissed by the trial court.

[2] Nor do we find plaintiffs' claim that the ordinance violates due process as an improper use of the police power is ripe for adjudication.

> [E]ven if viewed as a question of due process, [the property owners'] claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to dis-

> tinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of [the owners'] property and investment-backed profit expectations. *That effect cannot be measured until a final decision is made as to how the regulation will be applied to [the owners'] property.*

Williamson County, 473 U.S. at 199-200, 87 L. Ed. 2d at 147 (emphasis added). When considering a due process challenge on grounds of an invalid exercise of police power, the court must consider if the object of legislation is within the scope of the police power and if the means of regulation are reasonable. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E.2d 444, 448-49 (1979).

Cities may regulate and restrict the use of property, such as the size of yards and density of population, as part of their power to provide for the physical, social, aesthetic and economic welfare of the community. N.C. Gen. Stat. § 160A-381; *See River Birch Associates v. City of Raleigh*, 326 N.C. 100, 116, 388 S.E.2d 538, 547 (1990); *see also*, *Agins v. Tiburon*, 447 U.S. 255, 261, 65 L. Ed. 2d 106, 112 (1980) (holding ordinance requiring developments to include open space in order to discourage "premature and unnecessary conversion of open-space land to urban uses" and to prevent the ill effects of urbanization was proper exercise of police power). Therefore, the regulation of land use, such as designating the size of residential lots and controlling population density, is within the scope of the police power. Since regulating land use is within the scope of the police power, a court must then decide if the means of the regulation are reasonable. The test of whether the means are reasonable is two-pronged: 1) whether the ordinance as applied is reasonably necessary to promote the public good and 2) whether the interference with the owner's right to use the property is reasonable in degree. *A-S-P Associates*, 298 N.C. at 214, 258 S.E.2d at 449. Here, absent a final determination regarding how the ordinance will be applied to plaintiffs' property, a court cannot determine if the ordinance goes "too far," whether it is reasonably necessary to promote the public good, or if the interference with the plaintiffs' right to use the property is unreasonable. Therefore, the issue is not ripe.

[3] The complaint further claims the zoning ordinance is arbitrary and capricious, unreasonable, and an unequal exercise of power. This is simply another way of stating the ordinance is an not a legitimate use of the police power. *See Goodman Toyota v. City of Raleigh*, 63 N.C. App. 660, 662, 306 S.E.2d 192, 194 (1983), *disc. review denied*, 310 N.C. 477, 312 S.E.2d 884 (1984). Plaintiffs cannot show the ordinance is unconstitutional on these grounds, either on a facial challenge or as applied.

As discussed above, regulation of land use is within a city's police power. As recognized by both statute and case law, promoting the general welfare of the community through control of lot size and population density is a legitimate use of the police power. G.S. § 160A-381; *see Goodman Toyota*, 63 N.C. App. at 663, 306 S.E.2d at 194 (if recognized worthwhile objectives are realized, challenged statute is within scope of permissible purposes, properly achieved by reasonable use of police power). Where, as here, the regulation is reasonably related to the legitimate objectives of the police power, a challenge to the facial validity of the ordinance must fail. *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 442-43, 358 S.E.2d 372, 374-75 (1987). Although plaintiffs argue the ordinance deprives them of the highest and best use of the property, "[i]f this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592, 8 L. Ed. 2d 130, 133 (1962); *see also A-S-P Associates*, 298 N.C. 207, 218, 258 S.E.2d 444, 451 ("[T]he mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid.").

Plaintiffs' allegation that the expenses in developing the property under the ordinance would exceed the probable return on the investment involves an as applied challenge, not a facial challenge to the ordinance. Plaintiffs did not allege that all property owners would be unable to develop their property, or that other owners could not develop their properties covered by the ordinance on a cost-effective basis. An ordinance within the scope of the police power will not be held to be arbitrary and capricious and an unreasonable use of the police power unless the burdens imposed on a private property owner outweigh the purpose to which the regulation is related. *Goodman Toyota*, 63 N.C. App. at 663, 306 S.E.2d at 194. The burdens imposed on a private property owner cannot be determined

until the ordinance has been applied to the property. As discussed above, plaintiffs cannot show the ordinance is unconstitutional as applied to plaintiffs' property where the ordinance has not been applied to the property. The plaintiffs have made no effort to develop the property, have submitted no development plans, and have not attempted to get a variance. Therefore, their constitutional challenge is not ripe.

[4] Plaintiffs further argue that where seeking a building permit would be pointless, a case is ripe for adjudication regardless of whether a permit or application has been sought, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798 (1992). However, *Lucas* is distinguishable. In that case, the Council stipulated that no building permit would have been granted to petitioner whether or not he had applied for a permit. *Lucas*, 505 U.S. at 1012-14, 120 L. Ed. 2d at 811 n.3; *cf.*, *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987) (church's allegation that the city intended to require paving of church's parking lot under city zoning ordinance did not confer standing to challenge constitutionality of ordinance, but defendant's answer which requested the court to order the church to cease use of the property until compliance with ordinance deemed sufficient). In this case, plaintiffs have made no factual allegations claiming an application for a building permit or variance would be pointless. Therefore, plaintiffs may not avoid the ripeness doctrine under a "futility exception."

[5] Plaintiffs also argue courts should not require an exhaustion of administrative remedies prior to bringing an action challenging the validity of an ordinance because of statute of limitations considerations. Because N.C. Gen. Stat. § 160A-364.1 sets a nine-month statute of limitations for challenging the validity of a zoning ordinance, plaintiffs argue landowners could lose their right to challenge the ordinance since administrative decisions might not be made within nine months of the adoption of the ordinance. However, plaintiffs filed this action within the statutory time frame and the complaint contains no allegation that an administrative decision could not be reached within nine months. Therefore, this issue is not before us. Further, this Court, in holding a landowner could not challenge the validity of an ordinance due to the statute of limitations, has previously ruled that "[t]he nine-month statute of limitations does not . . . deny disaffected property owners adequate venues of redress. Instead, the property owner is merely required to go through the statutorily mandated procedures for an amendment or variance."

Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 372, 344 S.E.2d 357, 359, *appeal dismissed, disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986).

"In order to challenge the constitutionality of an ordinance, a litigant must produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the challenged ordinance." *Grace Baptist Church*, 320 N.C. at 444, 358 S.E.2d at 375. Here, plaintiffs failed to meet this burden. For the reasons stated, the order of the trial court is affirmed.

Affirmed.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I do not agree that the complaint must be dismissed on the grounds that the claims are premature or "not ripe" for consideration. The plaintiffs challenge the ordinance on the grounds that it is an arbitrary and capricious act by the government and is therefore unconstitutional. In other words, the plaintiffs contend that *any* application of the ordinance is unconstitutional because their property rights were violated the very moment the government enacted the ordinance, without regard to how it may be applied. This constitutes a "facial challenge" as opposed to an "as applied challenge," *see Eide v. Sarasota County*, 908 F.2d 716, 724 n.14 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120, 112 L. Ed. 2d 1179 (1991), and as such there is no requirement that the plaintiff, prior to filing the complaint, first seek a variance from the zoning requirement. *See id.*; *Pennell v. San Jose*, 485 U.S. 1, 11, 99 L. Ed. 2d 1, 14 (1988) (addressing facial challenge). Furthermore, because any action challenging the validity of the ordinance must be filed within nine months of its enactment, N.C.G.S. § 160A-364.1 (1994), requiring the plaintiffs to seek a final ruling on a variance request prior to filing this action would seriously jeopardize the right to file the action, as it is likely that a final decision would not be entered within nine months of the enactment of the ordinance. I would reverse the order of the trial court and remand.

GLENN D. FUQUA v. ROCKINGHAM COUNTY BOARD OF SOCIAL SERVICES

No. COA95-560

(Filed 7 January 1997)

1. **Public Works and Contracts § 21 (NCI4th)— State Personnel Commission—DSS director—dismissal—computer equipment—improper purchases**

The trial court properly affirmed the State Personnel Commission's findings that plaintiff, the director of the Rockingham County Department of Social Services, failed to comply with the bidding and public record requirements of N.C.G.S. § 143-131 when he purchased $9,600 worth of imaging equipment and software, without informal bids, and arranged to have the seller provided two separate invoices so the purchase appeared to be valued at less than $5,000. Substantial evidence in the record supported a determination that petitioner purchased equipment in an amount over $5,000 and thus was required to comply with the bidding provisions of the statute.

Am Jur 2d, Public Works and Contracts § 39.

Determination of amount involved in contract within statutory provision requiring public contracts involving sums exceeding specified amount to be let to lowest bidder. 53 ALR2d 498.

2. **Public Officers and Employees § 63 (NCI4th)— circumvented statute—purchase requirements—dismissal—DSS director—not arbitrary, or capricious, or erroneous**

Plaintiff was properly dismissed as director of the Rockingham County Department of Social Services for personal misconduct without notice where the plaintiff violated the purchasing requirements of N.C.G.S. § 14-131 and county purchasing procedures. The evidence at trial indicated that plaintiff circumvented the statute and county rules by misidentifying purchased computer equipment, requesting the vendor to provide two separate invoices, ignoring the required approval process for purchasing computer equipment, and paying for the equipment under the wrong accounting line item.

Am Jur 2d, Public Officers and Employees §§ 152-229.

Rights of state and municipal public employees in grievance proceedings. 46 ALR4th 912.

Appeal by petitioner from order filed 15 March 1995 by Judge Jack Thompson in Wake County Superior Court. Heard in the Court of Appeals 22 February 1996.

Elliot, Pishko, Gelbin & Morgan, P.A., by David C. Pishko, for petitioner-appellant.

Womble Carlyle Sandridge & Rice, A Professional Limited Liability Company, by James R. Morgan, Jr., for respondent-appellee.

JOHN, Judge.

Petitioner Glenn D. Fuqua appeals the trial court's order affirming his dismissal as director of the Rockingham County Department of Social Services (the Department) by the Rockingham County Board of Social Services (the Board). We affirm.

Petitioner was initially retained in the position of director on 2 January 1967. He served continuously until his dismissal in September 1992. During petitioner's tenure, he had received no written warnings concerning job performance and, as acknowledged by the Board in dismissing him, had led the Department to a "fine record of accomplishment."

Petitioner was dismissed based upon his role in obtaining imaging equipment and computer software for the Department. According to the Board, petitioner failed to obtain the requisite prior approval of the purchase from the county data processing director, failed to obtain an amendment to the Department's budget to allow procurement of imaging equipment and corresponding computer software, and violated state law by splitting invoices for the equipment and software in order to avoid having to comply with statutory provisions governing bids.

Subsequent to petitioner's dismissal, he sought review by the Office of Administrative Hearings. Following a hearing, the Administrative Law Judge (ALJ) assigned to the case recommended that the Board's decision be left undisturbed. The State Personnel Commission (the Commission) thereafter adopted each of the findings and conclusions set out by the ALJ save one irrelevant to our decision herein, and, in a Decision and Order filed 23 February 1994, recommended that petitioner's dismissal "be upheld as being for just cause."

The Board adopted the decision of the ALJ (and by relation, that of the Commission) in a vote taken 25 April 1994. Petitioner thereafter sought judicial review pursuant to N.C.G.S. § 150B-43 *et seq.* in Wake County Superior Court, which court subsequently affirmed his dismissal. Petitioner finally appealed to the Court of Appeals.

The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs our review of the Commission's decision. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). Under the statute, we may reverse or modify the Commission's ruling if petitioner's substantial rights may have been prejudiced because the Commission's findings, inferences, conclusions, or decision are:

> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1995). The nature of our review is dependent upon the grounds asserted by petitioner:

> If [petitioner] argues the agency's decision was based on an error of law, then "*de novo*" review is required. If, however, [petitioner] questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.

Amanini, 114 N.C. App. at 674, 443 S.E.2d at 118 (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)).

[1] Petitioner first contends the finding of the Commission that he violated state purchasing procedures was not supported by substantial evidence in the record. The finding at issue reads: "Petitioner did not properly solicit bids for the purchased equipment and software, nor did he maintain accurate records as required."

Under *Amanini*, we therefore examine the "whole record" to determine whether substantial evidence exists to support the Commission's finding. *Id.*

> "Substantial evidence" is that which a reasonable mind would consider sufficient to support a particular conclusion, and must be more than a scintilla or just a permissible inference.

Id. at 682, 443 S.E.2d at 122 (citations omitted).

The statute petitioner is alleged to have violated is N.C.G.S. § 143-131 (1996), which provides:

> All contracts . . . for the purchase of apparatus, supplies, materials, or equipment, involving the expenditure of public money in the amount of five thousand dollars ($5,000) or more, but less than [$20,000], made by any officer, department, board, or commission of any county . . . shall be made after informal bids have been secured. All such contracts shall be awarded to the lowest responsible bidder, taking into consideration quality, performance, and the time specified in the bids for performance of the contract. It shall be the duty of any officer, department, board, or commission entering into such contract to keep a record of all bids submitted, and such record shall be subject to public inspection at any time.

Petitioner argues the statute was inapplicable to the purchase at issue because he effected two separate transactions of less than $5,000 each: the first, totalling $4,900, involved imaging system hardware; the second, in the amount of $4,600, was for Smartfile brand imaging system software, operating manuals, and technical assistance.

However, Larry Wayne Scruggs, Sr. (Scruggs), the Smartfile representative with whom petitioner dealt, testified that everything sold to petitioner was part of one system. Scruggs indicated he would not have sold the software separately from the imaging hardware. Most significantly, Scruggs revealed that the Department was billed for the equipment on two separate invoices because petitioner specifically requested such billing. Therefore, substantial evidence in the record supports a determination that petitioner purchased equipment in an amount over $5,000 and thus was required to comply with the bidding provisions of the statute.

We next consider whether there was substantial evidence that petitioner failed to obtain informal bids and to keep a record of such bids "subject to public inspection" as required by G.S. § 143-131.

James Joyce (Joyce), one of petitioner's subordinates highly involved in the system procurement process, testified he knew of no public record maintained by the Department of any bids received. Moreover, the only bid referred to in the record arguably maintained by petitioner as a "record" was that from Aamot Information Services, Inc. (Aamot). Aamot mailed pricing information to petitioner, who retained it in his file cabinet. However, the bid submitted by Aamot contained a price of $34,716.00 for one work station; by comparison, the system ultimately purchased cost $9,500. No evidence suggests Aamot's quote was directed at a similar type of system as that eventually purchased by petitioner.

Indeed, Ben Neal (Neal), assistant county manager, testified that Aamot's price was for a much more elaborate system than the one purchased by petitioner and, for that reason, its quote was useless to the bidding process. In addition, Ronny Winn (Winn), the county's director of data processing, testified that while investigating the propriety of petitioner's purchase, he obtained a price of $5900 from a discount catalog for the system bought by petitioner, excluding software. This detail further suggests Aamot did not quote on the system eventually purchased by petitioner. Lastly, petitioner himself admitted that the system about which Aamot sent pricing information was "not in the configuration that we finally chose."

Based on the foregoing, we hold the Commission's finding that petitioner failed to comply with the bidding and public record requirements of G.S. § 143-131 is supported by substantial evidence in the record. The fundamental purpose of the bidding process is to solicit various prices from competing providers on *similar* goods or services so that obtaining the lowest possible price may be assured.

[2] In his second and final argument, petitioner attacks, as being affected by error of law, the Commission's conclusion that violation of statutory purchasing requirements constituted "just cause" for his dismissal. As to this contention, we employ *de novo* review. *See Amanini,* 114 N.C. App. at 678, 443 S.E.2d at 120. Specifically, petitioner insists his alleged infractions in failing to follow state bidding procedures and failing to obtain prior purchasing approval fell within the "job performance" category of disciplinary action, and thus required a warning before dismissal was permissible.

25 N.C.A.C. 1I .2301(b) (August 1992), promulgated pursuant to the State Personnel Act (the Act), *see* N.C.G.S. § 126-4(7a) (1995), provides that:

> The basis for any disciplinary action taken in accordance with this policy falls into one of the two following categories:
>
> (1) Discipline imposed on the basis of job performance;
>
> (2) Discipline imposed on the basis of personal conduct.

While dismissal on the basis of job performance requires at least three prior warnings, *see* 25 N.C.A.C. 1I .2302 (August 1992), dismissal based on personal conduct may occur without any prior warning, *see* 25 N.C.A.C. 1I .2304 (August 1992).

25 N.C.A.C. 1I .2301(b) explains:

> The Job Performance category is intended to be used in addressing performance-related inadequacies for which a reasonable person would expect to be notified of and allowed an opportunity to improve. Personal Conduct discipline is intended to be imposed for those actions for which no reasonable person could, or should, expect to receive prior warnings.

The foregoing distinction is clarified in 25 N.C.A.C. 1I .2304 (effective August 1992, amended December 1995), which details, *inter alia*, the following examples of unacceptable personal conduct:

> (2) job related conduct which constitutes a violation of state or federal law; or
>
> . . . .
>
> (4) the willful violation of known or written work rules[.]

Although not set out in the Administrative Code at the time petitioner was dismissed, we believe these examples may properly be considered in determining whether he was properly terminated on the basis of personal conduct. *See Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 435, 470 S.E.2d 552, 555 (1996) (when statute contains ambiguous language, legislative intent may be ascertained by amendments to statute).

As discussed above, the record supports the Commission's determination that petitioner violated state law in failing to obtain and keep a record of informal bids. *See* G.S. § 143-131. We conclude the

record would further legitimately support a finding petitioner violated N.C.G.S. § 143-133 (1996), which mandates that "[n]o bill or contract shall be divided for the purpose of evading the [bidding requirements for state contracts]."

Scruggs, for example, testified petitioner directed him to bill the Department in two separate invoices. Although Scruggs could not "recall" whether petitioner specifically indicated that both invoices should be kept under $5,000, petitioner's directive that the $9,500 total price for the package be divided between two invoices, without further explanation, constitutes strong circumstantial evidence of an intent to evade the statutory bidding requirements.

In addition, there is evidence petitioner willfully violated known work rules. Pat New (New), an accounting technician for the Department, stated that acquisitions of "data processing or computerware" were required to be approved by Winn. Joyce, a Department computer programmer and witness called by petitioner, testified Winn's approval was sought "in every instance" involving purchases of computer equipment. Finally, petitioner himself conceded it "possibly" was common knowledge in the Department that all computer equipment purchases were required to be sanctioned by Winn.

In any event, it is undisputed that petitioner failed to obtain Winn's approval prior to purchase of the imaging package. Moreover, petitioner admitted in deposition that he had been told "Mr. Winn was not in favor of imaging, that it was too expensive and he just didn't think [the purchase] would go down." The record thus supports a determination that petitioner purposefully avoided seeking the prior approval of Winn because petitioner knew it would not be forthcoming.

Further, Neal testified that acquisition of the imaging system required a line item in the Department's budget, and that no such entry was contained therein. The record indicates petitioner circumvented this work procedure by paying for the equipment under a line item designated "microfilm services."

First, Scruggs testified petitioner asserted "he had a microfilm budget" and instructed Scruggs to write "microfilm service" on the imaging system invoices. Further, New stated petitioner directed her to pay for the equipment with money allotted to microfilming. Finally, in his own testimony, petitioner admitted that, although the county had in place a procedure for transferring a purchase from one budget

line item to another, he failed to follow this procedure and the imaging equipment was paid for under the "microfilm services" line item. Ample evidence thus sustains a determination that petitioner intentionally violated established work rules and procedures.

In sum, we hold substantial evidence in the record supports the conclusion that petitioner's purchase of an imaging system for the Department involved violations of state law and willful violations of known work rules. Accordingly, the Commission properly considered petitioner's actions in the context of the Act under the category of personal conduct rather than job performance.

As an alternate argument, petitioner points to the Rockingham County Personnel Ordinance, which specifies the following as examples of failure in personal conduct:

> (d) Misappropriation of county funds or property;
>
> (e) Falsification of county records for personal profit or to grant special privileges[.]

Petitioner insists that because his actions were not for personal gain and were intended only to benefit the Department, they cannot properly be considered a failure in personal conduct under the county ordinance.

However, nothing in the record indicates the Act and attendant regulations have been supplanted by the County Ordinance. *See* N.C.G.S. § 126-11(a) (1995) (if county personnel system *approved* by State Personnel Commission, county system governs rather than Act). Further, examination of the county ordinance reveals that the listed examples of failure in personal conduct are not exclusive. Also, the examples contained in the ordinance as representative of failure in job performance appear to be distinct from a *willful* disobedience of regulations (*see*, *e.g.*, "Careless, *negligent* or improper use of county property or equipment").

In actuality, petitioner's argument is that, even if his actions may properly be characterized as personal misconduct, a higher level of personal misconduct should be required in order to allow his dismissal without warning. *See Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118 (manner of review not dictated merely by label appellant places upon assignments of error; court may determine actual nature of contended error). Such a contention implicates the "arbitrary or capricious" standard of review under the APA. *See Eury v.*

N.C. Employment Security Comm., 115 N.C. App. 590, 611, 446 S.E.2d 383, 395-96, *appeal dismissed and disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994) (to avoid arbitrary and capricious decision to dismiss where personal misconduct based upon off-duty criminal act, agency before dismissal must determine whether nexus existed between the criminal conduct and potential adverse impact on ability to perform job).

However,

> [t]he "arbitrary or capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ."

Lewis v. N.C. Dept. of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citations omitted).

In view of petitioner's diligent service to the Department for some twenty-five years, a less strict penalty might have been imposed. However, while we might have been more leniently inclined if sitting as the Board, we cannot say the decision to dismiss petitioner based upon his willful failure to follow county and state purchasing procedures may fairly be characterized as "patently in bad faith" or "fail[ing] to indicate any course of reasoning." *Id.*

In conclusion, we must affirm the trial court's determination that the Board's dismissal of petitioner was "supported by substantial evidence in the record" and "not arbitrary or capricious, or erroneous as a matter of law."

Affirmed.

Judges EAGLES and WALKER concur.

STATE OF NORTH CAROLINA v. CATHY ANN MILLS BARNES AND DONALD RAY HOOKS

No. COA96-597

(Filed 7 January 1997)

1. Robbery § 72 (NCI4th)— brandished weapon after goods were stolen—continuous transaction—armed robbery

The evidence was sufficient to support a jury finding that defendant Hooks' use of a handgun was inseparable from the taking of merchandise from a store so as to support defendants' conviction of armed robbery where it tended to show that after leaving a store with merchandise the defendants had stolen, defendant Hooks brandished a gun at store personnel in the store's parking lot to thwart the efforts of store personnel as they attempted to retain lawful possession of the store merchandise. When viewed in its entirety, the evidence tended to show one continuous transaction with the element of use of a dangerous weapon so joined in time and circumstances with the taking as to be inseparable.

Am Jur 2d, Robbery § 28.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery. 93 ALR3d 643.

2. Robbery § 138 (NCI4th Rev.)— denial of requested instructions—lesser included offenses—substantial evidence

The trial court in an armed robbery case did not err by denying defendants' requests to instruct the jury on the lesser included offenses of misdemeanor larceny and assault where the State presented substantial evidence of every element of the offense charged and defendants presented no evidence. The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense.

Am Jur 2d, Robbery §§ 75, 76.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

Judge WYNN dissenting.

Appeal by defendants from judgments entered 31 January 1996 by Judge Julius A. Rousseau, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 2 December 1996.

Attorney General Michael F. Easley, by Assistant Attorney General Sueanna P. Sumpter, for the State.

John Bryson for defendant appellants.

SMITH, Judge.

On 13 November 1995, a Guilford County Grand Jury indicted defendants Cathy Ann Mills Barnes and Donald Ray Hooks on charges of robbery with a dangerous weapon. Superseding indictments were returned by the Grand Jury on 8 January 1996. After the trial court allowed a motion for joinder filed by the State, defendants' trial began on 29 January 1996. The State presented evidence tending to show the following:

On 25 August 1995, the assistant manager of a High Point Winn-Dixie saw defendant Barnes take ten bottles of Advil and two bottles of Tylenol from a store shelf while defendant Hooks stood nearby in the middle of the aisle. Defendants next walked down the aisle away from the store entrance, then started walking towards the entrance. When defendants saw the assistant manager and the manager approaching them, they turned around and almost sprinted towards the rear of the store. They turned down the next aisle and headed for the front entrance.

Defendant Hooks blocked the aisle while defendant Barnes sprinted to the front entrance. Another employee joined the pursuit of defendants during that time. Defendant Barnes ran to a car which was parked on the curb almost blocking the store's front entrance. She got into the car on the passenger side. When the employee attempted to retrieve the merchandise from defendant Barnes, she threatened to give him AIDS with a needle. She bit the employee when he tried to grab some of the merchandise. Defendant Barnes cut the assistant manager's arm three times with a knife when he reached into the car through the driver's side window to retrieve the merchandise. During this time she also yelled for defendant Hooks to shoot the assistant manager.

While the manager went to call police, the assistant manager blocked the driver's side door of the car. He pushed defendant Hooks away when he tried to enter the car, then noticed a bulge in defend-

ant Hooks' pocket. The assistant manager continued his efforts to keep defendant Hooks from entering the car until defendant Hooks pulled a small chrome-colored handgun out of his pocket and pointed it at the assistant manager's stomach. Defendant Hooks got into the car, tossed the handgun into the car's back floorboard, and pulled out his keys. Before he could start the car, the assistant manager leaned into the car and blocked the ignition. At that time defendant Barnes cut the assistant manager's hand and rolled the window up on his right hand. The assistant manager broke the window in order to free his hand, and the defendants drove away.

The assistant manager and employee selected defendant Barnes' picture from a photographic lineup. All three of the store personnel involved in the incident selected defendant Hooks' picture from a photographic lineup. At the conclusion of the State's evidence, defendants each made a motion to dismiss due to insufficiency of the evidence. The trial court denied their motions. Defendants offered no evidence and renewed their motions, which the trial court again denied.

Defendants next requested that the trial court instruct the jury on misdemeanor larceny and misdemeanor assault with a deadly weapon. The trial court denied both defendants' requested instruction on the lesser offenses. Defendants subsequently excepted to the trial court's instruction on continuous transaction. After the jury found the defendants guilty of robbery with a dangerous weapon, the trial court sentenced defendant Barnes to a minimum of 101 months' imprisonment and a maximum term of 131 months' imprisonment. The trial court sentenced defendant Hooks to a minimum term of 66 months' imprisonment and a maximum term of 89 months' imprisonment. Defendants appealed.

[1] In their first argument, defendants contend that the trial court erred by denying their respective motions to dismiss due to insufficiency of the evidence. They argue that the State's evidence failed to demonstrate that defendant Hooks' use of a dangerous weapon occurred before or concomitant to the taking of the property. Because defendant Hooks' use of a dangerous weapon occurred after he exited the store, they assert that it cannot be considered part of the taking so as to constitute robbery. We disagree.

In ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State and to give the State the benefit of every reasonable inference which may be drawn from

that evidence. *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983). The trial court must determine whether there is substantial evidence of each element of the charged offense. *State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (1986). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "[I]f the State has offered substantial evidence against defendant of every essential element of the crime charged[,]" defendants' motions to dismiss must be denied. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

For the offense of robbery with a dangerous weapon, the State must prove the following elements: "1) the unlawful taking or attempt to take personal property from the person or in the presence of another; 2) by use or threatened use of a firearm or other dangerous weapon; 3) whereby the life of a person is endangered or threatened." *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993); N.C. Gen. Stat. § 14-87(a) (1993). "[T]he temporal order of the threat or use of a dangerous weapon and the taking is immaterial." *State v. Cunningham*, 97 N.C. App. 631, 634, 389 S.E.2d 286, 288, *disc. review denied*, 326 N.C. 802, 393 S.E.2d 905 (1990). Rather, there must be a continuous transaction in which the threat or use of the dangerous weapon and the taking are "so joined in time and circumstances as to be inseparable." *State v. Lilly*, 32 N.C. App. 467, 469, 232 S.E.2d 495, 497, *disc. review denied*, 292 N.C. 643, 235 S.E.2d 64 (1977).

When the preceding principles are applied to the present case, we conclude that the State introduced substantial evidence of the offense's elements and of a continuous transaction. The defendants concede in their brief that when viewed in the light most favorable to the State, the evidence shows that they entered the victim's store, obtained merchandise and left without paying for it. In addition, defendants admit that defendant Hooks displayed a handgun during a confrontation with store personnel outside of the store.

Defendant's argument essentially rests on the proposition that the armed robbery was complete when defendants exited the store with the merchandise. Such an argument blurs the distinction between larceny and robbery. *See State v. Barnes*, 345 N.C. 146, 479 S.E.2d 236 (1996) In *Barnes*, our Supreme Court emphasized: " 'For purposes of larceny the element of taking is complete in the sense of being satisfied at the moment a thief first exercises dominion over the property. . . . For purposes of robbery the taking is not over until after the thief succeeds in removing the stolen property from the victim's posses-

sion.' " *Barnes*, (quoting *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986)) (internal citations omitted). In the instant case, the store employees were actively attempting to retain possession of the property when defendant suddenly pulled out a handgun. In other words, the taking was not complete when defendant Hooks brandished the handgun, because defendant Hooks had not successfully wrested possession of the merchandise from the store employees.

The facts show that defendant's use of the handgun was tied directly to his effort to effect the taking. Hornbook law dictates that property need not be "attached" to a person in order for a person to retain legal possession of it; instead property is stolen from a person "if it was under the *protection* of the person at the time" it was taken. *Barnes*, (quoting from Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 342-43 (3d ed. 1982)) (emphasis added). Thus, just because a thief has physically taken an item does not mean that its rightful owner no longer has possession of it.

Here, defendant's purpose in brandishing the weapon was to thwart the efforts of store personnel, as they attempted to retain lawful possession of the store merchandise. Defendant Hooks' display of a handgun was thus necessary to the completion of the taking, *viz.*, defendant applied force when it became apparent the success of the taking required it. Accordingly, defendant Hooks' attempt to take the property from the store by force was inseparable from the rest of the transaction.

Defendants also assert the applicability of *State v. Dalton*, 122 N.C. App. 666, 671, 471 S.E.2d 657, 660-61 (1996), in support of their contention that the use of force was not part of a continuous transaction. We disagree. In the situation before the *Dalton* Court, the defendant first entered the victim's home while the victim was sleeping, and stole her purse. *Id.* After the theft, the *Dalton* defendant exited the victim's home and gave the purse to a codefendant. Then, the *Dalton* defendant re-entered the victim's home where he attempted to rape the victim by using a knife. *Id.* The *Dalton* Court determined these facts did not constitute a "continuous transaction" for armed robbery purposes. *Id.*

Simply put, we do not find the instant facts analogous to those in *Dalton*. In *Dalton*, the defendant's use of force was temporally distinct from the taking of the purse. *Id.* In the instant case, all of the events were linear, one following the other. Equally distinguishing is

the fact that the taking of the purse in *Dalton* was unconnected to the subsequent attempt at rape by using a knife. *Id.* In the instant case, our facts are continuous, as defendant's use of the handgun was integral to the taking of the merchandise. For these reasons, *Dalton* is irrelevant.

Defendants' contention that the State's evidence was insufficient to show that these events were a continuous transaction is without merit. The evidence tended to show one continuous transaction with the element of use of a dangerous weapon so joined in time and circumstances with the taking as to be inseparable. This evidence was sufficient to support a jury finding that defendant Hooks' use of the handgun was inseparable from the taking of the merchandise. The trial court did not err in denying defendants' motions to dismiss.

[2] Defendants next contend that the trial court erred by denying their requests for jury instructions on the offenses of misdemeanor larceny and assault. They assert that there was evidence present to support convictions for these lesser included offenses should the jury either have a reasonable doubt as to any element of robbery with a dangerous weapon or fail to find a continuous transaction. We are not persuaded by defendants' argument.

"The determinative factor of whether the trial court is to instruct the jury on the lesser included offense is the presence of evidence which tends to support a conviction of the lesser included offense." *State v. Summerlin*, 98 N.C. App. 167, 175, 390 S.E.2d 358, 362, *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990). However, "[t]he mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Black*, 21 N.C. App. 640, 643-44, 205 S.E.2d 154, 156, *aff'd*, 286 N.C. 191, 209 S.E.2d 458 (1974). As discussed previously, the State presented substantial evidence of every element of the offense charged. Since defendants presented no evidence, those elements were not negated. *See State v. Surrett*, 109 N.C. App. 344, 427 S.E.2d 124 (1993). Therefore, the trial court did not err by denying defendants' requests to instruct the jury on the lesser included offenses. This assignment of error is overruled.

No error.

Judge MARTIN, Mark D., concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

The issue presented in this case is whether the use of a handgun *after* defendants took merchandise and ran from a store is sufficient to sustain a charge of armed robbery. I believe that it is not.

The record establishes without question that defendants took the merchandise from the store without ever using force or displaying any kind of dangerous weapon. "In order for an armed robbery to occur, the use of force must be such as *to induce* the victim to part with the property." *State v. Dalton*, 122 N.C. App. 666, 671, 471 S.E.2d 657, 660 (1996) (emphasis added).

The record shows that, after taking the merchandise, Barnes exited the store and got into a car parked at a curb near the store. Similarly, Hooks exited the store and attempted to get in the car. As to both defendants, the property had already been taken at the time they reached the car. In fact, neither defendant had used force until they were confronted at the parked car by store employees who chose to pursue them in an effort to retrieve the property.

The majority correctly notes that "[f]or the purposes of robbery the taking is not over until after the thief succeeds in removing the stolen property from the victim's possession." *State v. Barnes*, 345 N.C. 146, 478 S.E.2d 188, —— (1996) (quoting *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986). However, the majority views the employees' actions as an attempt to *retain possession* of the property, while the facts indicate that the defendants had possession of the merchandise and the employees were in pursuit to attempt to *retrieve* the property. Since the property was already in the possession of the fleeing defendants, the taking was completed before store employees gave chase and force was employed. I know of no law in this state that holds that pursuit can defeat a completed taking.

Therefore, since force was not used *to induce* the victim to part with the property and the taking of that property was completed at the time force was used, defendants' actions in the instant case are insufficient to constitute robbery with a dangerous weapon. *See State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986); *Dalton*, 122 N.C. App. 666, 471 S.E.2d 657. Accordingly, I dissent.

DONNA JONES (GRIFFIN) ADMINISTRATRIX OF THE ESTATE OF ROCKY LANE JONES, PLAINTIFF v. WILLIAM LEE ROCHELLE, DEFENDANT

No. COA94-1411

(Filed 7 January 1997)

1. Evidence and Witnesses § 2885 (NCI4th)— wrongful death—excluded testimony—cross-examination—prior case—no abuse of discretion

The trial court did not abuse its discretion in a wrongful death action, which resulted from a collision with a log tractor-trailer, where it excluded a portion of a defense expert witness's prior testimony from a completely different case. The trial court correctly ruled that admitting this evidence would cause undue prejudice, create an undue consumption of time, and confuse the jury. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Witnesses § 831.

2. Automobiles and Other Vehicles § 729 (NCI4th)— posted speed limit—violation as negligence per se—erroneous instruction

The trial court erred by instructing the jury that the posted speed limit was 30 miles per hour where the accident occurred and that a violation of this safety statute by decedent was negligence *per se* where a yellow diamond-shaped sign which warned of two curves was a warning sign only and a smaller yellow rectangular sign posted below it with "30 m.p.h." in black letters was an advisory speed plate indicating the maximum recommended speed around the curves; the collision occurred on a straight portion of the highway at least 600 feet past the last curve for which the sign warned drivers; and once the decedent had safely negotiated the curves, the speed limit recommendation was no longer applicable.

Am Jur 2d, Automobiles and Highway Traffic §§ 232-235.

Necessity and propriety of instruction as to prima facie speed limit. 87 ALR2d 539.

3. Evidence and Witnesses § 1759 (NCI4th)— no abuse of discretion—experiment—reconstruction of automobile collision—variations explained

The trial court did not abuse its discretion in admitting expert testimony on a visibility experiment conducted by the defense during a reconstruction of an automobile accident where some differences existed between the experiment and the actual circumstances surrounding the accident. At trial the defense expert explained how these variations affected the experiment's results, and plaintiff had ample opportunity to highlight any dissimilarities between the experiment and the accident through cross-examination.

Am Jur 2d, Witnesses §§ 735, 736, 1027.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case. 66 ALR2d 1048.

4. Automobiles and Other Vehicles § 559 (NCI4th)— common law—contributory negligence.

The common law doctrine of contributory negligence has been the law in this State and will remain the law until our Supreme Court overrules it or the General Assembly adopts comparative negligence.

Am Jur 2d, Automobiles and Highway Traffic §§ 414 et seq.

Appeal by plaintiff from judgment entered 23 May 1994 by Judge Paul M. Wright in Jones County Superior Court. Heard in the Court of Appeals 26 September 1995.

Donald J. Dunn, P.A., by Donald J. Dunn, for plaintiff-appellant.

Sherman and Smith, L.L.P., by Scott G. Sherman and L. Bryan Smith, for defendant-appellee.

McGEE, Judge.

Rocky Lane Jones was killed on 13 November 1991 when the automobile he was operating ran into the side of an empty log tractor-trailer being driven by defendant, William Lee Rochelle, as Rochelle was backing the trailer into his driveway. At approximately 8:00 p.m., Jones was driving on Rural Paved Road 1116, also known as White

Oak River Road in Jones County. Traveling in an easterly direction, Jones approached a portion of the road that consisted of two curves in opposite directions. At the same time, about six hundred feet east of this set of curves, Rochelle was in the process of maneuvering his tractor-trailer into the driveway of his house located directly off White Oak River Road, by backing it in, trailer first. Because of the length of the tractor-trailer, the trailer was positioned across both lanes of the two-lane road, with the tractor pointing in a westerly direction creating an "L" shape in the road.

Before approaching the set of curves, Jones passed a yellow, diamond-shaped warning sign with the curve configuration on it located on the right shoulder of the road. Below the diamond-shaped sign was a rectangular sign with "30 m.p.h." printed in black letters against a yellow background. The record shows Jones proceeded through the curves at a speed of approximately 35 to 45 miles per hour. As he was coming out of the second curve he began to accelerate. He drove 600 feet along a straightaway, colliding with defendant's 40-foot-long log trailer pulled across decedent's lane of travel. Several hours later, Jones died from the injuries he sustained as a result of the collision. Highway Patrol officers who investigated the accident reported no skid marks left by Jones prior to impact and found no lights or reflectors on the part of the log trailer that was across the decedent's lane of travel. An eyewitness to the accident testified he saw no brake lights appear on Jones' vehicle before the collision with the trailer.

Plaintiff, Donna Jones Griffin, was appointed Administratrix of the Estate of Rocky Lane Jones. She filed a wrongful death action pursuant to N.C. Gen. Stat. § 28A-18-1 and 28A-18-2. The jury reached its verdict finding that William Lee Rochelle negligently caused the death of Rocky Lane Jones, that Rocky Lane Jones negligently contributed to his own death, and that William Lee Rochelle did not have the last clear chance to avoid plaintiff's injury. The jury did not reach the issue of damages. Plaintiff appeals from the judgment entered 23 May 1994.

I.

[1] Plaintiff's first issue is whether the trial court erred by striking a portion of plaintiff's cross-examination of defense expert, Dr. Charles R. Manning, which dealt with a different negligence case in which Dr. Manning had testified about an accident similar to the one in this case. We conclude it did not.

Rule 611(b) of the North Carolina Rules of Evidence states that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." However, the extent of cross-examination is within the discretion of the trial court. *State v. Sams*, 317 N.C. 230, 240, 345 S.E.2d 179, 185 (1986). "Absent a showing of an abuse of discretion or that prejudicial error has resulted, the trial court's ruling will not be disturbed on review." *State v. Maynard*, 311 N.C. 1, 10, 316 S.E.2d 197, 202-03, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984), *dismissal of habeas corpus aff'd*, 943 F.2d 407, 20 Fed. R. Serv. 3d 1384 (1991), *cert. denied*, 502 U.S. 1110, 117 L. Ed. 2d 450 (1992); *See also Sams*, 317 N.C. at 240, 345 S.E.2d at 185.

"A party has the right to an opportunity to fairly and fully cross-examine a witness who has testified for the adverse party. This right, with respect to the *subject of his examination-in-chief*, is absolute and not merely a privilege." *Bank v. Motor Co.*, 216 N.C. 432, 434, 5 S.E.2d 318, 320 (1939) (emphasis added). However, "[t]he admissibility in evidence of testimony taken in another action depends not only upon the identity of the question being investigated, but upon the opportunity of the party against whom the evidence is offered, to cross-examine." *Bank*, 216 N.C. at 435, 5 S.E.2d at 320. Whether the testimony would create danger of undue consumption of time, unfair prejudice, or confusion for the jury are factors for the trial court's consideration. N.C. Gen. Stat. § 8C-1, Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In *McClain v. Otis Elevator Co.*, 106 N.C. App. 45, 50, 415 S.E.2d 78, 80 (1992), this Court held it was within the trial court's discretion to exclude evidence of separate unrelated events when it determined that such evidence would likely confuse and mislead the jury. In this case, the trial court excluded a portion of defense witness Dr. Manning's prior testimony from a completely different case. In cross-examining Dr. Manning, plaintiff wanted to introduce names, parties, facts, and even entire portions of the transcript from the previous case. The trial court ruled admitting this evidence would cause undue prejudice, create an undue consumption of time, and confuse the jury.

The trial court is vested with broad discretion in controlling the scope of cross-examination and a ruling by the trial court should not

be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *Id.* at 49, 415 S.E.2d at 80. We find no abuse of this discretion in this case.

II.

[2] Plaintiff's second contention is that the trial court erred by determining the yellow, diamond-shaped signs on the highway set the legal speed limit within the area in which they were placed, resulting in a jury instruction that if the jury found the decedent exceeded that speed limit, he was contributorily negligent.

The trial court judge instructed the jury that:

> [T]he accident occurred between two thirty mile per hour signs. The posted speed limit was thirty miles per hour. Therefore, I further instruct you that by erecting these two signs, the Department of Transportation has determined and declared that thirty miles per hour was the reasonable and safe speed limit. A violation of this safety statute is negligence in and of itself, because . . . every person is under a duty to follow standards of conduct enacted as laws for the safety of the public.

N.C. Gen. Stat. § 20-141(d), as well as our case law, support the rule that when the Department of Transportation determines a safe speed under the conditions in existence on a particular portion of highway, that speed is to be obeyed when appropriate signs are erected upon the parts of the highway affected, giving notice of the speed limit. Plaintiff argues the erected yellow sign in this case is a warning sign only and that the smaller speed limit sign posted beneath it is also a warning or advisory sign, not a regulatory sign. N.C. Gen. Stat. § 20-158(a)(3) authorizes the Department of Transportation to control vehicles at appropriate places by installing traffic signs.

The yellow diamond-shaped sign which warned of a curve in this case was a warning sign only and the smaller yellow rectangular sign posted below it with "30 m.p.h." in black letters was an advisory speed plate used to supplement warning signs and indicating the maximum recommended speed around the curve. *See* Manual on Uniform Traffic Control Devices for Streets and Highways, 1988 Edition, adopted by the N.C. Board of Transportation on 2 February, 1990. The sign was not a regulatory sign, wherein a failure to obey the sign is a violation of the traffic law.

In *Davis v. Jessup and Carroll v. Jessup*, 257 N.C. 215, 218, 125 S.E.2d 440, 442 (1962), our Supreme Court examined the question of whether a jury instruction concerning the speed limit on an area of road surrounding an intersection was proper. The Court carefully noted the following facts:

> Approximately 240 yards south of the intersection there was a diamond-shaped sign with a cross, representing an intersection, and just below this, there was a square yellow sign with "35 MILES PER HOUR" written thereon in black letters. To the north of the intersection on the west side of [the road], for southward traffic, there was a similar sign.

Davis, 257 N.C. at 217, 125 S.E.2d at 441. The *Davis* Court upheld the following jury instruction: "within the intersection, between the two 35 miles per hour signs, the posted speed limit would be 35 miles an hour." *Davis*, 257 N.C. at 218, 125 S.E.2d at 442. See also G. S. 20-141(d). In *Davis*, the collision of the two automobiles was actually *in* the northern portion of the intersection. *Id.* at 217, 125 S.E.2d at 441. In this case, the record shows the collision occurred at least 600 feet past the last curve where the sign was erected to warn drivers, on a straight portion of the highway. Decedent had already passed the area where the warning sign notified him to drive with extra care.

As plaintiff argues, the speed limit posted below the diamond-shaped sign pertained only to the portion of the road that was curved and once the decedent had safely negotiated the curves, the speed limit recommendation on the warning sign was no longer applicable and the decedent could appropriately increase his speed. The trial court's jury instruction that the posted speed limit was 30 miles per hour where the accident occurred, and that a violation of this safety statute by decedent was negligence *per se* was in error. Plaintiff is therefore entitled to a new trial. *See Raper v. Byrum*, 265 N.C. 269, 144 S.E. 2d 38 (1965).

III.

[3] Plaintiff next argues the trial court erred in allowing into evidence expert testimony on a visibility experiment conducted by the defense during a reconstruction of the accident. Plaintiff asserts the experiment was not conducted under substantially similar conditions to the actual collision. We disagree.

There are two conditions which must be met in order for an experiment to be admissible: "(1) it must be under conditions sub-

stantially similar to those prevailing at the time of the occurrence involved in the action, and (2) the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence." *Hall v. Railroad Co.*, 44 N.C. App. 295, 298, 260 S.E.2d 798, 800 (1979), *disc. review denied*, 299 N.C. 544, 265 S.E.2d 404 (1980). There is no requirement that the circumstances under which the experiment is conducted be precisely similar because, "the want of exact similarity [goes] to the weight of the evidence with the jury." *State v. Brown*, 280 N.C. 588, 597, 187 S.E.2d 85, 91, *cert. denied*, 409 U.S. 870, 34 L. Ed. 2d 121 (1972). The requirement for precise replication becomes even less important when any differences in the experiment are explainable by an expert witness. *Short v. General Motors Corp.*, 70 N.C. App. 454, 455, 320 S.E.2d 19, 20, *disc. review denied*, 312 N.C. 623, 323 S.E.2d 924 (1984).

Although it is within the discretion of the trial court to determine whether results from an experiment are admissible, this decision is subject to review in determining whether substantial similarity exists. *State v. Jones*, 287 N.C. 84, 98, 214 S.E.2d 24, 34 (1975). Some differences did exist between the experiment and the actual circumstances surrounding the accident; however, the defense expert, Dr. Manning, explained how these variations affected the results, if at all. For example, Dr. Manning testified that differences in the headlights on the decedent's vehicle and the vehicle used in the reconstruction were insignificant. He also testified that even though the tractor-trailer was stationary while the experiment was being conducted, unlike in the actual collision where it was moving, this provided a "layer of conservatism" because a moving vehicle would have been easier to see. Finally, plaintiff had ample opportunity to highlight any dissimilarities between the experiment and the accident through cross-examination of Dr. Manning. "Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear." *Hall*, 44 N.C. App. at 298, 260 S.E.2d at 799-800. The trial court did not abuse its discretion in admitting Dr. Manning's testimony and this assignment of error is overruled.

IV.

[4] In her next assignment of error, plaintiff contends the trial court should not have submitted the issue of contributory negligence to the

jury. Plaintiff asserts this Court should "judicially abrogate the doctrine as outdated and unjust."

The common law doctrine of contributory negligence has been the law in this State since *Morrison v. Cornelius*, 63 N.C. 346 (1869); *See also Corns v. Hall*, 112 N.C. App. 232, 237, 435 S.E.2d 88, 90 (1993). Although forty-six states have abandoned the doctrine of contributory negligence in favor of comparative negligence, contributory negligence continues to be the law of this State until our Supreme Court overrules it or the General Assembly adopts comparative negligence. *Bosley v. Alexander*, 114 N.C. App. 470, 471, 442 S.E.2d 82, 83 (1994). It is therefore beyond this Court's authority to abandon the doctrine of contributory negligence. *Corns*, 112 N.C. App. at 237, 435 S.E.2d at 91.

V.

Having granted plaintiff a new trial, we need not address plaintiff's remaining issues related to damages and judgment notwithstanding the verdict.

The trial court erred in its instruction to the jury as to the posted speed where the accident occurred and in its instruction that a violation of the speed regulation by plaintiff was negligence *per se*. Therefore, plaintiff is entitled to a new trial.

New Trial.

Judges MARTIN, John C. and JOHN concur.

ELEANOR R. JONES, PETITIONER-APPELLEE v. RALPH J. AREHART, RESPONDENT-APPELLANT

No. COA96-324

(Filed 7 January 1997)

1. Evidence and Witnesses § 811 (NCI4th)— boundaries — altered map—additional names—admissibility

The trial court did not err by admitting into evidence a copy of a map which had been altered by the addition of two names where the plaintiff petitioned the court to establish the boundary line between her property and the adjoining property owned by defendant. The parties purchased their properties from the

same seller. The evidence indicated that a map filed in 1967 was meant to include the alleged alterations. Further, the record showed that petitioner's deed incorporated the references to the names on the altered map in its description of the property at issue. N.C. Gen. Stat. § 8-18 (1986) allows a certified copy of a registered map to be introduced into evidence unless it is shown by affidavit that there is some material variance from the original map in the registry. There was no evidence that the certified copy introduced at trial was different from the recorded copy.

Am Jur 2d, Evidence §§ 988-990.

2. **Boundaries § 7 (NCI4th)— adjacent property—court appointed surveyor—starting point—ditch—deed not specific—unknown corner**

It was not error for the trial court to allow the court-appointed surveyor, in a boundary dispute case, to locate lines in defendant's deed by starting at a point other than the starting point called for in the deed where the first point called for in defendant's deed was unknown in that the parties disagreed as to which ditch was the one described in respondent's deed. Furthermore, there was more than one ditch on the property in question and the deed did not specify which ditch was the starting point. The boundaries of a parcel of land should be determined by following the directions and in the sequence given in the deed. However, if a particular corner is unknown and cannot be determined by adhering to the directions in the sequence specified, it is permissible to go to a subsequent known or established corner and by reversing the direction fix the location of the unknown corner.

Am Jur 2d, Boundaries §§ 64-76.

3. **Evidence and Witnesses § 2359 (NCI4th)— court-appointed surveyor—opinion testimony—adjoining property—boundary line**

The trial court did not err by precluding the appointed surveyor from giving his opinion as to the location of the beginning point in respondent's deed where plaintiff petitioned the court to establish the boundary line between her property and adjoining property owned by defendant. A court-appointed surveyor may not offer his opinion as to the location of a disputed boundary line since that is an issue for the jury.

Am Jur 2d, Expert and Opinion Evidence §§ 47-52.

4. Evidence and Witnesses § 1020 (NCI4th)— declaration against interest—adjacent properties—boundary—exclusion not prejudicial

Respondent was not prejudiced by the trial court's exclusion of a former landowner's declaration against interest as to the location of a boundary line where the witness was permitted to identify the ditch that the former owner considered to be the property line.

Am Jur 2d, Boundaries § 110; Evidence § 785.

5. Boundaries § 36 (NCI4th)— length of boundary—remand for correction

The trial court's judgment which mistakenly described a boundary as 459.4 feet was remanded to the trial court for modification where the parties agreed the distance was 659.4 feet.

Am Jur 2d, Boundaries § 57.

Appeal by respondent from judgment entered 8 December 1995 by Judge William C. Griffin in Craven County Superior Court. Heard in the Court of Appeals 3 December 1996.

Lee, Hancock, Lasitter and King, P.A., by John W. King, Jr., for respondent-appellant.

Henderson, Baxter and Alford, P.A., by David S. Henderson, for petitioner-appellee.

WYNN, Judge.

This matter arises from Eleanor R. Jones' petition to establish the boundary line between her property and adjoining property owned by respondent Ralph J. Arehart. Both parties acquired title to their properties from a common source, Major R. Jones and Bettie Creech Jones.

The record on appeal indicates that all of the deeds in respondent's chain of title call for a ditch as the property line between the parties' properties. However, the respondent contends that this dividing ditch is an existing ditch whereas the petitioner contends that it is another ditch that has since been filled.

Following a hearing before the Clerk of Superior Court for Craven County, an order was entered in favor of respondent, and

petitioner appealed to Superior Court for a trial *de novo*. A jury returned a verdict in favor of petitioner from which respondent appeals.

The issues on appeal are: (I) Was it error to admit a copy of a map the original of which had been altered by adding two names? (II) Was it impermissible for the court to allow a surveyor to locate lines on a deed without using the deed's starting point? (III) Should a surveyor be allowed to give his opinion as to the location of a deed's beginning point? (IV) Was it error to exclude the testimony of a witness that a former owner of the property once showed him the location of the boundary line?

I.

[1] Respondent first contends that the trial court erred by allowing into evidence over his objection a copy of a map ("Exhibit No. 8") entitled "Major R. Jones—Land", prepared by J.G. Hassell, a registered surveyor, in November 1951 and recorded in 1961 in the Office of Deeds of Craven County. Petitioner's Exhibit No. 3, a deed to petitioner executed and recorded in 1967, incorporates by reference the subject map as part of its legal description. Petitioner introduced the map through Floyd Suitt, the court-appointed surveyor, who testified that it was consistent with the legal description of the property in petitioner's deed (Exhibit No. 3) and with the independent survey that he conducted for the court.

Respondent contends that the trial court erred in allowing a copy of the map to be introduced because someone had altered the original map by writing on it the names "Spellman" and "Newby". He argues that because of these alterations, the trial court should have required petitioner to produce the original 1951 map. We disagree.

One of the objectives of filing maps is to avoid the necessity of encumbering deeds with lengthy descriptions of the land to be conveyed. 12 Am. Jur. 2d *Boundaries* § 76 (1964). Accordingly, when a deed refers to such a map for a more particular description of the premises, the map becomes a part of the instrument and will aid the description therein. *Cragin v. Powell*, 128 U.S. 691, 32 L.Ed. 566 (1988). In the subject case, the evidence indicates that the map filed in 1967 was meant to include the alleged alterations. The record shows that petitioner's deed incorporated the references to "Spellman" and "Newby" in its description of the property at issue.

Moreover, N.C. Gen. Stat. § 8-18 (1986) allows a certified copy of a registered map to be introduced into evidence unless it is shown by affidavit that there is some material variance from the original map in the registry. In the instant case, there is no evidence that the certified copy introduced at trial was different from the recorded copy. Accordingly, respondent's objection is without merit.

II.

[2] Respondent next contends the trial court erred in allowing the court-appointed surveyor to locate lines in respondent's deed by starting at a point other than the starting point called for in the deed, i.e., "the mouth of a ditch." We disagree.

The law is well-settled that the location of the boundaries of a parcel of land should be determined by following the directions and in the sequence given in the deed. *Batson v. Bell*, 249 N.C. 718, 719 107 S.E.2d 562, 563 (1959). However, "[i]f a particular corner is unknown and cannot be determined by adhering to the directions in the sequence specified, it is permissible to go to a subsequent known or established corner and by reversing the direction fix the location of the unknown corner." *Id.* Ordinarily a corner is unknown when a monument is missing or disputed, and its description fails to give a course and distance from an established corner. *Young v. Young*, 76 N.C. App. 93, 97, 331 S.E.2d 769, 771 (1985).

In the instant case, the first point called for in respondent's deed is unknown in that the parties disagree as to which ditch is the one described in respondent's deed. Additionally, the deed which states the starting point as "[b]eginning in the south right-of-way line of N.C. Highway No. 101 in the mouth of a ditch", does not specify which ditch is the starting point. It follows that from this description, the ditch called for in the description cannot be established with any certainty. As such, we conclude that the trial court did not err by allowing the location of this beginning corner by the reversal method.

III.

[3] Respondent next argues that the trial court should have allowed the surveyor to give his opinion as to the location of the beginning point in respondent's deed. We disagree. A court-appointed surveyor may not offer his opinion as to the location of a disputed boundary line since that is an issue for the jury. *Carson v. Reid*, 76 N.C. App. 321, 323, 332 S.E.2d 497, 499 (1985), *aff'd*, 316 N.C. 189, 340 S.E.2d 109 (1986). Thus, it would have been error for the trial court to allow the surveyor to testify as to his opinion about the beginning corner of

respondent's deed, since this point starts the disputed boundary line between petitioner and respondent.

IV.

[4] Respondent presented Melvin Wetzel who stated that he could testify that he purchased his property from Major Jones in 1960 and that Jones once took him across the street to the property now owned by respondent and showed him the ditch which marked respondent's property line. Respondent contends the trial court erred by not allowing this testimony because it was admissible as a declaration against interest as to the location of the boundary line in dispute.

A declaration against interest made by a former owner of land during the time of his ownership regarding the location of the boundaries of the land is competent against one who claims under him any interest in the land acquired since the declaration was made. *Newkirk v. Porter*, 240 N.C. 296, 302, 82 S.E.2d 74, 79 (1954).

In the instant case, assuming for the sake of argument that Jones' statements to Wetzel constituted an admissible statement against interest, we nonetheless find that the defendants in this case were not prejudiced by the trial court's failure to allow this testimony. Indeed, the record clearly shows that the trial court permitted Wetzel to identify the ditch that Major Jones considered to be the property line. The following elicited from Wetzel testimony is dispositive:

> Q. Now, do you know where [respondent's] western property line [is]?
>
> A. Yes.
>
> . . .
>
> Q. Mr. Wetzel, did you ever have an occasion to talk with Major Jones about this particular ditch?
>
> A. Yes, I had.
>
> Q. And could you tell the jurors what took place?
>
> . . .
>
> COURT: Don't tell us what he said, Mr. Wetzel. What did you do?
>
> A. I bought some property from Mr. Jones and we were talking about a ditch, and then I asked him how he could identify the ditch, and he told me how he could.
>
> . . .

A. Anyway, I went to look at the ditch . . . that's the way things were going . . . at that time run from ditch to ditch, from stake to a ditch or . . .

Q. Did you at any time with Major Jones go to the ditch that [respondent] contends is the property line?

A. I did.

. . .

Q. Were you ever told by Major Jones that the ditch was a line?

[Petitioner's objection is sustained]

. . .

Q. Mr. Wetzel, can you tell the Court and the jury what is running across the front of the property that is claimed by [respondent]?

A. Chain link fence right now.

Q. And where is the western terminus of that fence?

A. Chain link fence runs over to some woods like. There was a wood fence there at one time; then the wood fencing goes off and started down the property line.

Q. Is there a ditch anywhere in that vicinity?

A. Right beyond that where the fence ends is a ditch, about a foot deep or more.

Q. And have you ever seen that ditch before?

A. Yes, I have.

Q. Okay. And did you see it the day that you talked with Mr. Jones?

A. I did.

Q. Is that the same ditch that's in existence now that you saw back in 1960?

A. It is.

Q. Did Mr. Jones identify that ditch to you?

[Petitioner]: Objection.

COURT: You can answer it yes or no.

. . .

A. Yes.

This testimony indicates that Jones showed Wetzel the ditch that respondent contended was the correct property line. Clearly, this was the essence of respondent's desire to have Mr. Wetzel testify that Major Jones showed him the ditch that marks respondent's western boundary line. Accordingly, we conclude that any error in the failure to allow specific testimony to that effect was not prejudicially infirm to the defendant's case.

V.

[5] Finally, respondent objects to the trial court's description, in its Judgment, of the boundary line as being "459.4 feet measured along said southern right of way line of Highway No. 101 from its intersection with the U.S. Forestry Service boundary line." The parties agree that the correct distance is 659.4 feet. Accordingly, the judgment of the trial court is affirmed but remanded for modification to remove "459.4" and substitute the correct footage of "659.4" in accordance with the parties' agreement on appeal.

Affirmed and remanded.

Judges GREENE and MARTIN, John C. concur.

HAROLD E. WARREN, PLAINTIFF-APPELLANT v. DAVID D. JACKSON, M.D., AND SURRY SURGICAL ASSOCIATES, P.A., DEFENDANT-APPELLEES

No. COA96-289

(Filed 7 January 1997)

Evidence and Witnesses § 148 (NCI4th)— expert witness—common malpractice insurance carrier—evidence properly excluded

The trial court did not abuse its discretion by granting defendant doctor's motion *in limine* to suppress evidence that the doctor and two of his expert witnesses shared a common malpractice carrier where plaintiff alleged that he sustained injuries

as a result of the doctor's negligence. Virtually every jurisdiction has concluded that mere policyholder status represents too attenuated a connection with an insurance company for the probative value of such evidence to outweigh the potential prejudice to the jury's deliberations. The connection test adopted in other jurisdictions is consistent with the decision in *State v. Hart*, 239 N.C. 709, 80 S.E.2d 901 (1954) because it safeguards the substantial legal right of a party to cross-examine an opposing witness regarding bias or prejudice, yet also acknowledges the inherent authority, and duty, of a trial court to exclude evidence where the probative value is outweighed by the prejudice such evidence would introduce into the proceedings. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 483, 488, 495; Witnesses §§ 876, 886.

Appeal by plaintiff from judgment entered 16 November 1995 and signed 28 November 1995 by Judge Melzer A. Morgan, Jr., in Surry County Superior Court. Heard in the Court of Appeals 20 November 1996.

John P. Kapp and Martin & Martin, P.A., by J. Matthew Martin and Harry C. Martin, for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller, Smith & Coles, P.L.L.C., by Stephen W. Coles, for defendant-appellees.

MARTIN, Mark D., Judge.

Plaintiff Harold Warren (Warren) appeals from jury verdict finding Warren was not injured by the negligence of defendant David Jackson, M.D., (Jackson).

On 21 November 1991 Warren was admitted to Northern Hospital in Mt. Airy, North Carolina. At the time Warren was admitted, it is undisputed he was suffering from severe ischemia of the right great toe and had a history of rest pain in the right foot and right leg. Warren's left leg was non-ischemic. On 25 November 1991 Jackson performed an aorto-biexternal iliac bypass graft. After the 25 November surgery, Warren developed ischemia in the toes of his left foot. On 28 December 1991 Warren's left leg was amputated below the knee.

On 20 August 1993 Warren instituted the present action. On 6 November 1995 Jackson made a motion *in limine* to prohibit ques-

tioning his medical experts concerning the fact Jackson and his medical experts shared a common medical malpractice carrier, Medical Mutual Insurance (Medical Mutual). Although the trial court agreed with Warren that such commonality of insurance may show bias, the trial court, pursuant to N.C.R. Evid. 403, excluded the evidence because "the danger of unfair prejudice and confusion of the issues outweighs its relevancy . . . ." After hearing all the evidence, the jury, on 16 November 1995, found Warren was not injured by the negligence of Jackson.

On appeal Warren, in his sole assignment of error, contends the trial court erred by granting Jackson's motion *in limine.*

Evidence regarding the existence of liability insurance is not *per se* inadmissible when offered for a purpose other than to prove the insured "acted negligently or otherwise wrongfully." N.C. Gen. Stat. § 8C-1, Rule 411 (1992). Put simply, Rule 411 does not operate as an absolute bar to the admission of evidence concerning liability insurance when "offered for [a] purpose, such as proof of agency, ownership, or control, or bias and prejudice of a witness." *Id.* (emphasis added).

In the present case, Warren was prepared to establish, during cross-examination, that two of Jackson's expert witnesses were insured by Medical Mutual—Jackson's malpractice insurance carrier. Warren argues, emphasizing the inherent qualities of mutual insurance companies, that such commonality of insurance tends to prove the expert witnesses were biased because they have a personal financial interest in the outcome of the trial. *See* N.C. Gen. Stat. § 58-8-1, *et seq.* (1994); 3 LEE R. RUSS AND THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 39:15 (1995) (each member of mutual insurance company is both insured and insurer). Although we acknowledge, as did the trial court, that personal financial interest of a witness falls within the bias exception to Rule 411, *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 379-380, 301 S.E.2d 439, 448, *disc. review denied,* 308 N.C. 678, 304 S.E.2d 759 (1983), such evidence is subject to the balancing test set forth by N.C.R. Evid. 403.

Rule 403 provides, in pertinent part, that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (1992). Application of the Rule 403 balancing test remains entirely within the inherent authority of the trial court. *Carrier v. Starnes*, 120 N.C. App. 513, 519-520, 463

S.E.2d 393, 397 (1995), *disc. review denied*, 342 N.C. 653, 467 S.E.2d 709 (1996). Thus, the balance struck by the trial court will not be disturbed on appeal absent a clear showing the court abused its discretion by admitting, or excluding, the contested evidence. *Id.* A trial court abuses its discretion when its decision "lack[s] any basis in reason." *Judkins v. Judkins*, 113 N.C. App. 734, 740, 441 S.E.2d 139, 142, *disc. review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994).

Warren relies heavily on *Ede v. Atrium South Ob-Gyn, Inc.*, 642 N.E.2d 365 (Ohio 1994), to support his allegation the trial court abused its discretion by prohibiting cross-examination concerning commonality of insurance between Jackson and two of his expert witnesses. In *Ede*, as here, the trial court, pursuant to Rule 403, stated that evidence of a common insurance carrier could not be used to demonstrate bias of an expert witness. *Id.* at 368. The *Ede* Court found such a ruling unreasonable, and thus reversible, for two reasons.

First, the court emphasized "the trial court was not responsive to [plaintiff's] argument that as a fractional part-owner of [the common mutual insurance company], [the defense witness'] own premiums might fluctuate due to the result of the case. Such testimony would have been probative of bias." *Id.* Second, the Ohio Court opined that all too often courts experience a Pavlovian response to evidence of liability insurance—exclusion. *Id.* Such a rote response to insurance evidence is, according to the *Ede* Court, clearly naive in light of the increasing knowledge and sophistication of present-day juries. *Id.* The *Ede* Court thus adopted a *per se* rule "that in a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause." *Id.*

The *per se* rule enunciated by the *Ede* Court, however, appears to stand alone among jurisdictions which have considered factually similar issues. *See, e.g., Cerasuoli v. Brevetti*, 560 N.Y.S.2d 468, 469-470 (N.Y. App. Div. 1990); *Strain v. Heinssen*, 434 N.W.2d 640, 642-643 (Iowa 1989); *Barsema v. Susong*, 751 P.2d 969, 973-974 (Ariz. 1988); *Kelley v. Wiggins*, 724 S.W.2d 443, 447 (Ark. 1987); *Otwell v. Bryant*, 497 So.2d 111, 115 (Ala. 1986); *Mendoza v. Varon*, 563 S.W.2d 646, 649 (Tex. Civ. App. 1978). Specifically, the preponderance of jurisdictions have adopted what is best characterized as a "connections test" to determine whether prohibiting a plaintiff from establishing common-

ality of insurance between defendant and his expert witness in an effort to show bias is an abuse of discretion. *Barsema*, 751 P.2d at 973-974, *Otwell*, 497 So.2d at 114-115, *Mendoza*, 563 S.W.2d at 649. *See Strain*, 434 N.W.2d at 642-643 (no abuse of discretion in prohibiting plaintiff from asking experts if services retained by defendant's insurance company because no evidence of an agency or employment relationship between experts and insurance carrier beyond mere payment of fee for testimony). *See also Cerasuoli*, 560 N.Y.S.2d at 469-470 (decided under abuse of discretion standard); *Kelley*, 724 S.W.2d at 447 (same).

In *Barsema*, plaintiff instituted a medical malpractice action against defendant, who was insured by Mutual Insurance Company of Arizona (MICA). *Barsema*, 751 P.2d at 971. One of defendant's expert witnesses, Dr. William Crisp (Dr. Crisp), was also insured by MICA. *Id.* Beyond merely being an insured, however, Dr. Crisp was a vice-president of MICA and a member of the MICA Board of Directors. *Id.* Dr. Crisp testified that, although not salaried, MICA compensated him for services rendered. *Id.* The *Barsema* Court, on these facts, concluded "the trial judge properly could have excluded evidence that Dr. Crisp was insured by MICA, but erred in precluding the introduction of evidence that Dr. Crisp was MICA's vice president and a member of its board of directors." *Id.* at 974.

Under similar facts and circumstances, the Alabama Supreme Court also adopted the connections test, rather than the *per se* rule enunciated in *Ede*. *See Otwell*, 497 So.2d at 114-115. The defendant doctor in *Otwell* was insured by the Mutual Assurance Society of Alabama (MASA). *Id.* at 113. Dr. Talbot, a witness for defendant, was also insured by MASA. *Id.* The trial court granted defendant's motion *in limine* thereby suppressing any reference to the commonality of malpractice carriers. *Id.*

The *Otwell* Court noted "that under certain circumstances a witness may have a sufficient degree of 'connection' with [defendant's] liability insurance carrier to justify allowing proof of this relationship as a means of attacking the credibility of the witness." *Id.* at 114. The requisite connection was not established, however, by "[t]he coincidental fact that [Dr. Talbot] and the defendants are both insured by MASA . . . ." *Id.* Indeed, the Alabama Supreme Court made clear "that the witness must be an 'agent' of the insurer before interrogation about insurance coverage would be acceptable." *Id.* at 113. *See also Carrier*, 120 N.C. App. at 518-520, 463 S.E.2d at 396-397 (no error in

allowing cross-examination of witness about his employment with defendant's insurance carrier to show bias).

Notably, the *Otwell* Court relied on *Mendoza v. Varon*, 563 S.W.2d 646 (Tex. Civ. App. 1978). In *Mendoza*, as in *Barsema* and *Otwell*, plaintiff attempted to introduce evidence that defendant doctor and one of his expert witnesses were insured by the same malpractice insurance provider. *Id.* at 649. Recognizing the witness was merely a policyholder, the *Mendoza* Court found the witness' connection with the common insurance carrier was not sufficient to warrant proof of this relationship. *Id.* As the Court stated:

> the [expert] witness had no direct interest in the outcome of the litigation, as would an agent, owner or employee of the defendant's insurer. While it is true that a large judgment against any doctor will probably affect the insurance rates of other physicians, this interest is remote, and any proof of bias based upon that interest is outweighed by the prejudice caused by informing the jury of the defendant's insurance protection.

Id.

Likewise, in the present case, Warren was prepared to establish that two of Jackson's expert witnesses were biased because they were insured by Medical Mutual, Jackson's insurance carrier. We recognize policyholders in a mutual insurance company have, by its very nature, a greater financial stake in the company than do policyholders in other types of insurance companies. *See* N.C. Gen. Stat. § 58-8-1, *et seq.*; 3 RUSS, COUCH ON INSURANCE 3D § 39:15. Virtually every jurisdiction has nevertheless concluded mere policyholder status represents too attenuated a "connection" with an insurance company, mutual or otherwise, for the probative value of such evidence to outweigh the potential prejudice to the jury's deliberations. *See, e.g.*, *Barsema*, 751 P.2d at 973; *Otwell*, 497 So.2d at 114. Therefore, the trial court did not abuse its discretion by granting Jackson's motion *in limine* thereby suppressing evidence that Jackson and two of his expert witnesses shared a common malpractice carrier, Medical Mutual.

Warren also asserts the connections test violates our Supreme Court's mandate that:

> [c]ross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of

> the cross-examining party. A contrary rule would substitute the whim of the trial judge for the law of the land . . . [which should be uniformly applied].

State v. Hart, 239 N.C. 709, 711, 80 S.E.2d 901, 903 (1954) (citations omitted). Nonetheless, the connections test is, in fact, consistent with *Hart* because it safeguards the "substantial legal right" of a party to cross-examine an opposing witness regarding bias or prejudice, *id.*, yet also acknowledges the inherent authority, and duty, of a trial court to exclude evidence where the probative value is outweighed by the prejudice such evidence would introduce into the proceedings, *Willoughby v. Wilkins*, 65 N.C. App. 626, 638, 310 S.E.2d 90, 98 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 697 (1983), N.C. Gen. Stat. § 8C-1, Rule 403.

Accordingly, under the present facts and circumstances, the trial court did not abuse its discretion by granting Jackson's motion *in limine*.

No error.

Chief Judge ARNOLD and Judge EAGLES concur.

DAVID C. JENKINS, PLAINTIFF v. LAKE MONTONIA CLUB, INC., DEFENDANT

No. COA96-315

(Filed 7 January 1997)

Negligence § 147 (NCI4th)— summary judgment—plaintiff's claim barred—contributory negligence—personal injury—plaintiff's awareness of danger

The trial court correctly granted summary judgment in favor of the defendant where the plaintiff's own negligence barred him from recovery in a personal injury case against defendant, Lake Montonia Club, Inc. Plaintiff was injured after he slid down a sliding board on his knees and struck his head on the bottom of the lake after attempting to dive across the lake. The defendant's forecast of evidence showed the danger of striking the bottom of the swimming area when diving head first into shallow water was

obvious to plaintiff. Therefore, defendants established the defense of contributory negligence.

Am Jur 2d, Premises Liability §§ 673, 674, 786, 790.

Liability of swimming facility operator for injury or death allegedly resulting from defects of diving board, slide, or other swimming pool equipment. 85 ALR3d 849.

Appeal by plaintiff from order of summary judgment entered 11 December 1995 by Judge Charles C. Lamm, Jr., in Cleveland County Superior Court. Heard in the Court of Appeals 21 November 1996.

Roberts & Rhodes, P.A., by Joseph B. Roberts, III, for plaintiff appellant.

Crews & Klein, P.C., by James P. Crews and Paul I. Klein, for defendant appellee.

SMITH, Judge.

Plaintiff instituted this action to recover for injuries suffered as a result of a dive made from a sliding board at Lake Montonia Club, Inc., located in Kings Mountain, North Carolina. Plaintiff was 18 years old at the time of the accident. On 27 June 1994, at approximately 8 p.m. plaintiff David C. Jenkins broke his neck when he made a flat, shallow dive from a kneeling position from a sliding board at Lake Montonia. While plaintiff was rendered permanently, partially paralyzed, he does have limited mobility by using braces and a walker.

Plaintiff and his girlfriend went to Lake Montonia in the early evening of 27 June 1994. They entered the swimming area and plaintiff went to the sliding board. Plaintiff slid down the sliding board on his knees. When he got to the end of the sliding board he attempted to dive out across the water. Plaintiff's head came into contact with the concrete bottom of the swimming area, located immediately in front of the sliding board. Subsequently this action was filed.

On 18 July 1995 defendant Lake Montonia Club moved for summary judgment. The trial court granted the motion and found that there was no genuine issue as to any material fact and plaintiff was contributorily negligent as a matter of law. From this judgment plaintiff appeals. Plaintiff brings forth two assignments of error. We

determine that plaintiff's own negligence precludes recovery from defendant.

Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). The party moving for summary judgment has the burden of showing there is no triable issue of material fact. *Pembee Manufacturing Corp. v. Cape Fear Construction Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). The Court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences. *Isbey v. Cooper Companies, Inc.*, 103 N.C. App. 774, 775, 407 S.E.2d 254, 256 (1991), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1992). Issues of contributory negligence, like those of ordinary negligence are rarely appropriate for summary judgment. *Ballenger v. Crowell*, 38 N.C. App. 50, 55, 247 S.E.2d 287, 291 (1978). Only where plaintiff's own negligence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted. *Izard v. Hickory City Schools Bd. of Education*, 68 N.C. App. 625, 627-28, 315 S.E.2d 756, 758 (1984).

In order for plaintiff to recover from defendant for his injuries, he must show defendant breached the standard of care owed to him. The standard of care of defendant depends upon the status of plaintiff, whether he was an invitee, a licensee or a trespasser. *See Hoots v. Pryor*, 106 N.C. App. 397, 406, 417 S.E.2d 269, 275, *disc. review denied*, 322 N.C. 345, 421 S.E.2d 148 (1992).

> "The distinction between an invitee and a licensee is determined by the nature of the business bringing a person to the premises. A licensee is one who enters on the premises with the possessor's permission, express or implied, *solely for his own purposes* rather than the possessor's benefit. An invitee is a person who goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself."

Newton v. New Hanover County Bd. of Ed., 114 N.C. App. 719, 723, 443 S.E.2d 347, 350 (1994) (citation omitted), *aff'd*, 342 N.C. 554, 467 S.E.2d 58 (1996). "An owner of premises owes to an invitee the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn the invitee of hidden perils or unsafe condi-

tions that can be ascertained by reasonable inspection and supervision." *Byrd v. Arrowood*, 118 N.C. App. 418, 421, 455 S.E.2d 672, 674 (1995) (citing *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992)). However, a premises owner does not have to warn an invitee of apparent hazards or circumstances of which the invitee has equal or superior knowledge. *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 546, 459 S.E.2d 23, 27 (1995) (citing *Roumillat*, 331 N.C. 57, 67, 414 S.E.2d 339, 344.) An invitee is still required to exercise ordinary care for his own safety.

> "Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.
>
> * * * *
>
> Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.

Smith v. Fiber Controls Corp., 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (quoting *Clark v. Roberts*, 263 N.C. 336, 139 S.E.2d 593 (1965)).

"A licensee is one who enters on the premises with the possessor's permission, express or implied, solely for his own purposes rather than for the possessor's benefit." *Hoots*, 106 N.C. App. at 406, 417 S.E.2d at 275. If the owner is actively negligent in managing the property while the licensee *is exercising due care on the premises and subjects the licensee to increased danger*, the owner will be liable for injuries sustained as a result of such active conduct or affirmative negligence. *DeHaven v. Hoskins*, 95 N.C. App. 397, 400, 382 S.E.2d 856, 858, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989).

A property owner has no duty, however, to keep the premises safe for the licensee's use, protect him from injuries caused by the condition of the property, or protect him from damages caused by ordinary

use of the premises. *Pafford v. Construction Co.*, 217 N.C. 730, 736, 9 S.E.2d 408, 412 (1940). The general rule is that a landowner is not liable for injuries to a licensee due to the condition of the property or due to passive negligence or acts of omission. *DeHaven*, 95 N.C. App. at 400, 382 S.E.2d at 858. A licensee enters the premises by permission but goes there at her own risk to enjoy the license subject to its accompanying perils. *Pafford*, 217 N.C. at 737, 9 S.E.2d at 412.

The record in this case reveals that Lake Montonia Club, Inc., consists of a group of owners of lots surrounding Lake Montonia. Landowners are members of the Club and the Club owns the lake and its recreational facilities. Others may become associate members of the Club and use the recreational facilities on a seasonal basis. Plaintiff's parents had been associate members of the Club for many years. The record does not disclose enough information upon which we can determine whether plaintiff was an invitee or a licensee. However, it matters not because in either case plaintiff's own negligence bars his recovery.

Defendant presented the following evidence in support of the summary judgment motion, much of which was from plaintiff's deposition. Prior to the accident, plaintiff had gone down the sliding board on his knees on many occasions. When asked if he had ever gone down the slide at Lake Montonia on his knees before, he replied, "Done it for a long time." Other members of the Club had also gone down the sliding board on their knees on previous occasions. Plaintiff said that he knew that the water under the slide was shallow but could not estimate how shallow. Plaintiff acknowledged that he knew that it would hurt if he hit his head on the bottom of the swimming area. Plaintiff stated that a few years ago another person had gone down the sliding board and hit her head on the bottom of the lake. She had gone down the slide in a different manner than plaintiff. Her injury required stitches.

The sliding board had been in place at Lake Montonia Club for 40 years, and neither the president of the Club nor its manager were aware of any other injury involving the sliding board. The slide was made of metal and was located in a shallow portion of the designated swimming area at Lake Montonia. The slide was 16 feet in length and reached a height of 8 feet 2 inches. The end of the slide was 3 feet from the concrete bottom of the lake. On the day of the accident the water level was approximately 1-1/2 to 2 feet deep in front of the end of the sliding board. As part of yearly maintenance, defendant usually

covered the concrete bottom below the sliding board with a 2- to 3-inch layer of sand. A sign was posted at the entrance gate of the Club complex which stated "Swim at your own risk." Defendant has no knowledge of whether the sand in the swimming area had been inspected in the time just prior to the accident.

Plaintiff also presented evidence from Kim W. Tyson, an expert on aquatic safety. Tyson conducted an on-site investigation of Lake Montonia and made the following observations and conclusions. The end of the slide was 3 feet from the concrete surface of the lake bottom. Concrete is not recommended for use under any playground equipment because of its hard, unyielding characteristics. Further, the water level in front of the slide was approximately 2 feet deep with a gradual slope downward to a wooden dock. Though the foregoing factors were discovered by Tyson's on-site investigation, plaintiff's own testimony shows that he had knowledge of the danger posed by the slide from his own use of the slide on numerous occasions in the past, and he had to be aware of the condition described by Tyson. Tyson also concluded that the water was inadequate and an unsafe depth for slide usage in the swimming area. Shallow water does not provide protection from accidental impacts with a concrete bottom. There were no signs posted with slide usage rules. The slide at Lake Montonia was designed for playground use and not intended for use in aquatic areas. The United States Department of Health, Centers for Disease Control recommends that a recreational water slide flume terminate either at a depth of at least 6 inches below the splash pool's operating water surface, or no more than 2 inches above the water surface. Splash pool depth at the end of a flume should be 3 feet. Tyson also presented other recommendations made by the U.S. Consumer Product Safety Commission, the American Red Cross and the YMCA.

Defendant's forecast of evidence discloses that plaintiff was contributorily negligent as a matter of law. Plaintiff had gone down the slide on his knees many times in the past. At age 18, plaintiff was aware that the water beneath the slide was shallow, and that if he hit his head on the bottom of the swimming area it would hurt. From the forecast of evidence before us, it appears that defendant was negligent in creating and maintaining a hazardous condition but plaintiff was aware of the potential danger and knew the risk of the activity in which he engaged. *See Benjamin et al. v. Deffet Rentals, Inc.*, 66 Ohio St. 2d 86 (1981). The danger of striking the bottom of the swimming area when diving head first into shallow water was obvious to

plaintiff. Therefore, defendants have established the defense of contributory negligence and we affirm the ruling of the trial court.

Affirm.

Judges LEWIS and WALKER concur.

CHARLOTTE T. CURRY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND CHARLES E. CURRY, PLAINTIFFS AND CAROL SCARVEY, PLAINTIFF-INTERVENOR v. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE, DEFENDANT

No. COA96-180

(Filed 7 January 1997)

1. Appeal and Error § 340 (NCI4th)— dismissal—motion for reconsideration—error not set out—brief—no argument

The Court of Appeals dismissed appellants appeal from the trial court's order denying their motion for reconsideration of its earlier rulings with respect to class certification and intervention. In their brief, the appellants did not set out any argument concerning the propriety of the court's order; rather, they argued only the denial of plaintiffs' motion for class certification and intervenor's motion to intervene. Appellants' assignments of error were directed to the denial of plaintiffs' motion for class certification and intervenor's motion to intervene; they did not assign error to the denial of their motions for reconsideration. The scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal. N.C.R. App. P. 10(a).

Am Jur 2d, Appellate Review §§ 285 et seq., 484 et seq.

2. Appeal and Error § 384 (NCI4th)— record on appeal—failure to serve—not tolled—thirty-five day period—notice of appeal—motion for reconsideration

Appellants' appeal was properly dismissed where they failed to serve the record on appeal upon all other parties within thirty-five days after filing notice of appeal pursuant to N.C. R. App. P. 11(a). Appellants incorrectly believed that the filing of a notice of reconsideration after a notice of appeal was filed tolled

the thirty-five day period for filing the record on appeal. The general rule is that an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the trial judge is *functus officio.*

Am Jur 2d, Appellate Review §§ 326 et seq.

Appeal by plaintiffs and intervenor from orders entered 31 October 1995 by Judge Robert P. Johnston and 8 March 1996 by Judge William H. Helms in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 November 1996.

Moore & Brown, by Beverly C. Moore, Jr., Sandra B. Brantley, and B. Ervin Brown, II; Law Offices of Richard Bennett, by Richard Bennett, and Law Offices of Lisa Bennett, by Lisa Bennett, for plaintiff-appellants and intervenor-appellant.

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

MARTIN, John C., Judge.

Plaintiffs Charlotte T. Curry and Charles E. Curry, and intervenor Carol Scarvey (hereinafter collectively referred to as appellants) have filed notices of appeal from two orders entered in this civil action. The appeals have been consolidated pursuant to N.C.R. App. P. 40. The procedural history of the cases is as follows: On 10 December 1993, plaintiff Charlotte Curry filed this action on behalf of herself and a purported class against defendant First Federal Savings and Loan Association of Charlotte for breach of contract, breach of fiduciary duty, and unfair trade practices. Charles Curry was added as a plaintiff, but not as a class representative. On 14 October 1994, the Currys (plaintiffs) filed a motion for class certification pursuant to N.C.R. Civ. P. 23. In March 1995, Carol Scarvey (intervenor) moved to intervene as a party plaintiff pursuant to N.C.R. Civ. P. 24(b).

By letter dated 4 August 1995, the trial court advised counsel for the parties of its intention to deny the motions for class certification and intervention. On or about 8 September 1995, plaintiffs and intervenor filed a motion requesting that the trial court reconsider its proposed class certification and intervention rulings. On 15 September 1995, the trial court entered orders in accordance with its previously announced intention and denied plaintiffs' motion for class certification and intervenor's motion to intervene. On 20 September 1995,

plaintiffs and intervenor filed "Plaintiffs' Renewed Motion For Reconsideration" with respect to the rulings contained in the 15 September 1995 orders. On 16 October 1995, prior to a ruling on their motions for reconsideration, plaintiffs filed a notice of appeal from the 15 September 1995 orders.

On 31 October 1995, the trial court entered an order denying "Plaintiffs' Motion to Reconsider Proposed Class Certification/ Intervention Ruling, filed September 8, 1995, and Plaintiffs' Renewed Motion for Reconsideration with respect to the orders denying intervention and class certification, filed September 20, 1995." On 8 November 1995 appellants filed a notice of appeal from the 31 October 1995 order.

On 30 November 1995, defendants moved to dismiss the appeal from the 15 September 1995 orders on the ground that appellants had failed to serve a proposed record on appeal within thirty-five days after filing their notice of appeal on 16 October 1995 as required by N.C.R. Civ. P. 11(b). The motion to dismiss the appeal from the 15 September 1995 orders was granted on 8 March 1996. Appellants then gave notice of appeal from the 8 March 1996 order.

The appeals before this Court are (I) in case number 96-180, appellants' appeal from the trial court's 31 October 1995 order denying their motions for reconsideration; and (II) in case number 96-598, their appeal from the trial court's 8 March 1996 order dismissing their 16 October 1995 appeal from the orders denying class certification and intervention. We will address them sequentially.

I.

[1] In case number 96-180, appellants gave notice of appeal from the trial court's 31 October 1995 order denying their motions for reconsideration of its earlier rulings with respect to class certification and intervention. In the record on appeal, however, the only two assignments of error are directed to the denial of plaintiffs' motion for class certification and intervenor's motion to intervene; appellants have not assigned error to the denial of their motions for reconsideration. "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). Even if appellants' appeal can be interpreted as an exception to the 31 October 1995 order itself, bringing forward any error of law apparent on its face, *see Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616

(1985), appellants do not set out any argument in their brief concerning the propriety of the 31 October 1995 order; rather, they argue only the denial of plaintiffs' motion for class certification and intervenor's motion to intervene. Thus, appellants have not presented for appellate review the propriety of the 31 October 1995 order denying their motions to reconsider and their appeal from that order must be dismissed.

II.

[2] In the remaining appeal, case number 96-598, the dispositive issue is whether appellants' 16 October 1995 appeal from the 15 September 1995 orders denying their motions for class certification and intervention was properly dismissed for appellants' failure to timely file a proposed record on appeal. We hold that it was and affirm the order of dismissal.

N.C.R. App. P. 11(b) provides that if the record on appeal is not settled by agreement under N.C.R. App. P. 11(a), appellant shall serve a proposed record on appeal upon all other parties within thirty-five days after filing notice of appeal. *Higgins v. Town of China Grove*, 102 N.C. App. 570, 402 S.E.2d 885 (1991). In this case, the proposed record on appeal was not settled by agreement of the parties as provided by Rule 11(a). Thus, appellants had until 20 November 1995, thirty-five days after their 16 October 1995 notice of appeal from the 15 September 1995 orders, to serve a proposed record on appeal on defendants; they failed to do so. Indeed, there is no indication in either of the records filed in conjunction with the appeals before us now that appellants have ever served a proposed record on appeal in connection with their 16 October 1995 notice of appeal.

Citing G.S. § 1A-1, Rule 59 and N.C.R. App. P. 3(c)(3), however, appellants argue that the trial court erred in dismissing their 16 October 1995 appeal from the 15 September orders because their motions for reconsideration of those orders tolled the time requirements of the Appellate Rules. Alternatively, they argue their "premature" 16 October 1995 notice of appeal should have been "held in abeyance" during the pendency of their motions for reconsideration or "treated as a nullity" which would be cured by their 8 November 1995 notice of appeal. We reject their arguments.

G.S. § 1A-1, Rule 59 provides a mechanism for alteration or amendment of a judgment upon grounds stated in the rule and requires that the motion be served not later than 10 days after entry

of the judgment. N.C. Gen. Stat. § 1A-1, Rule 59(a) & (e). N.C.R. App. P. 3(c)(3) provides that the time for filing and serving a notice of appeal is tolled by a timely motion under Rule 59 to alter or amend a judgment. However, neither of these rules is applicable to the present case.

Initially, we observe that the trial court's 15 September 1995 orders denying plaintiffs' motion for class certification and intervenor's motion to intervene were not judgments. "A judgment is a determination or declaration on the merits of the rights and obligations of the parties to an action," *Hunter v. City of Asheville*, 80 N.C. App. 325, 327, 341 S.E.2d 743, 744 (1986), and an order is "every direction of a court not included in a judgment." *Id.* Thus, the motions denominated by appellants as motions for reconsideration were not motions to alter or amend a judgment pursuant to Rule 59(e). Moreover, even if Appellate Rule 3(c)(3) were applicable to a motion for reconsideration such as that made by appellants here (though we specifically hold it is not), it was not appellants' failure to give a timely notice of appeal that resulted in dismissal of their appeal. Rather, dismissal resulted from appellant's failure to timely serve the proposed record on appeal pursuant to N.C.R. App. P. 11(b) after giving a proper notice of appeal. Neither the North Carolina Rules of Civil Procedure nor the North Carolina Rules of Appellate Procedure provide for holding a premature notice of appeal "in abeyance" or treating it as a "nullity" pending the resolution of motions such as those filed by appellants. Indeed, G.S. § 1-294 (1996) provides that "[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . ."

In *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E.2d 240 (1984), this Court stated that "[t]he general rule is that an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the trial judge is *functus officio*. The enactment of N.C. Gen. Stat. § 1A-1, Rules 59 and 60 (1983) did not change this rule." *Id.* at 637, 321 S.E.2d at 247 (emphasis added) (citations omitted). Therefore, defendants' 16 October 1995 notice of appeal divested the trial court of jurisdiction to rule on their pending motions, and the trial court was not empowered to take further action except as to matters relating to the appeal, G.S. § 1-294, *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E.2d 748 (1977); *see, e.g.*, N.C.R. App. P. 11, 25, 27 and 36; G.S. § 1-283, or as otherwise permitted by statutes not applicable here. *See, e.g.*, N.C. Gen. Stat. § 1A-1, Rules 52(b) (amendment

to findings by court); Rule 60(a) (correction of clerical errors); and Rule 62 (stays).

Consequently, by filing the 16 October 1995 notice of appeal, appellants removed jurisdiction from the trial court and its 31 October 1995 denial of the motions to reconsider and defendants' 8 November 1995 appeal of that denial were nullities. Thus, defendants were required to serve a proposed record on appeal upon all other parties within thirty-five days. N.C.R. App. P. 11(b). Since they failed to do so, their appeal was properly dismissed.

Case No. 96-180—Appeal dismissed.

Case No. 96-598—Affirmed.

Judges GREENE and WYNN concur.

JAMES J. COLLINS, JR., PLAINTIFF v. VICKI L. COLLINS, DEFENDANT

No. COA96-318

(Filed 7 January 1997)

1. Divorce and Separation § 144 (NCI4th)— equitable distribution—residence—contributions of separate property—distributional factor

It was not error for the trial court to consider as a distributional factor the contributions the plaintiff husband made of his separate property to the acquisition of the residence titled in the entireties which was, consistent with *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988), classified as marital.

Am Jur 2d, Divorce and Separation §§ 887, 890, 920.

Divorce: excessiveness or adequacy of trial court's property award—modern cases. 56 ALR4th 12.

2. Divorce and Separation § 145 (NCI4th)— equitable distribution—consideration of evidence—health—income—error

The trial court erred in an equitable distribution case by failing to consider evidence that plaintiff husband was in good health and that the defendant wife was not in good health and that the

plaintiff was employed and the defendant was not employed. The health and incomes of the parties are factors that must be considered, when evidence is presented, by the trial court in making a distribution of the marital property. N.C.G.S. § 50-20(c)(1); N.C.G.S. § 50-20(c)(3).

Am Jur 2d, Divorce and Separation §§ 917, 918.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by defendant from order and judgment entered 1 November 1994 and order and judgment entered 24 May 1995 in Guilford County District Court by Judge Charles L. White. Heard in the Court of Appeals 3 December 1996.

Barbara R. Morgenstern for plaintiff-appellee.

Smith, Follin & James, L.L.P., by Norman B. Smith, for defendant-appellant.

GREENE, Judge.

Vicki Collins (defendant) appeals equitable distribution judgments entered 1 November 1994 and 24 May 1995.[1]

In its judgments the trial court found as a fact that the marital residence (residence) of the defendant and James J. Collins, Jr. (plaintiff) was acquired during the marriage and titled in the entireties. The trial court then found that the titling of the residence in the entireties gave "rise to the marital gift presumption" and that the plaintiff had failed to rebut the presumption by clear and convincing evidence. After classifying the residence as marital property the trial court entered the following pertinent finding of fact:

1 We note that the defendant did not appeal the 1 November 1994 judgment (which disposed of some of the marital property) until after entry of the 24 May 1995 judgment. Although the appeal of the 1 November 1994 judgment occurred more than thirty days after its entry, N.C. R. App. P. 3(c) (1997) (appeal must be taken within 30 days after entry), it is nonetheless timely because the 1 November judgment was entered over the objection of the defendant, N.C. R. App. P. 10(b)(1) (party may preserve a question for appellate review by objecting to action of trial court); N.C.G.S. § 1-277(b) (1996) (party may immediately appeal or "may preserve his exception for determination upon any subsequent appeal"), and the notice of appeal which was given after the 24 May judgment designated an appeal from both the 1 November and the 24 May judgments. N.C. R. App. P. 3(d) (notice of appeal must designate the judgment or order from which appeal is taken).

18. The parties presented evidence on numerous contentions for an unequal division. After giving due regard to the contentions of the parties and all the factors set forth in G.S. § 50-20(c), an equal division of the marital property would be inequitable based on the following factors (G.S. § 50-20(c)(6), (11a) and (12)):

> (a) The plaintiff contributed approximately $34,000.00 to his deferred compensation plan during the marriage from income which was earned prior to the marriage but deferred. These funds were his separate property, and were spent during the marriage for the support of the family.
>
> (b) The plaintiff used his separate funds to make the downpayment on the . . . residence of $20,000.00, and he expended in excess of $77,000.00 of his separate funds to complete the residence . . . .
>
> (c) The plaintiff is assuming responsibility for repaying the equity line obtained by the defendant against the . . . residence which, at the date of trial, had a balance of $14,963.65. The plaintiff should be awarded credit for one-half the repayment of this marital debt because not all of these funds were used for marital purposes.
>
> (d) The Court does not find the failure of the plaintiff to return [defendant's] property to be willful and will not find him to be in contempt of court, but finds that the defendant is entitled to a credit of $4,500.00 for the damage done to certain of her personalty and for the loss of use of the property since the expiration of the 50B order.

The trial court then distributed a portion of the marital property, including the residence, to the plaintiff. The total net value of that distribution was $122,658.60. The remaining marital property was distributed to the defendant and had a value of $56,317.92.

Other relevant evidence in the record shows that plaintiff is in excellent health and defendant has been diagnosed and was being treated for clinical depression which prevented her from working. The plaintiff is employed but the record is silent on the amount of his income, although there is evidence that he had received a bonus in August 1992 for $25,000.00, and another that was deferred from 1991 for approximately $52,000.00.

The issues are whether (I) a spouse's contribution of his separate property to acquire property titled in the entireties, and classified as marital, qualifies as a distributional factor under N.C. Gen. Stat. § 50-20(c) (1995); and (II) the trial court erred in making an unequal division of marital property without making specific findings with respect to the relative status of the parties health and incomes.

I

[1] The defendant argues that our statutes and case law do not permit a trial court to use the contributions of separate property by a spouse as a distributional factor under section 50-20(c) if those contributions are used to acquire assets classified, pursuant to *McLean v. McLean*, 323 N.C. 543, 555, 374 S.E.2d 376, 383 (1988), as marital property. We disagree.

It is well accepted that separate property which is either given to the marital estate or "which *trans mutes* [sic] *by implied gift* into marital property" (as occurs under *McLean*), is a division factor which may justify an unequal division of the marital property. Brett R. Turner, *Equitable Distribution of Property* § 8:05 (2d ed. 1994); *see Wood v. Wood*, 403 S.E.2d 761, 770 (W. Va. 1991); *Rando-Quillin v. Quillin*, 599 N.Y.S.2d 705, 706-07 (1993). Indeed this Court has previously held that a spouse's contribution of his separate property to the marital estate is a distributional factor under N.C. Gen. Stat. § 50-20(c)(12). *Haywood v. Haywood*, 106 N.C. App. 91, 95, 415 S.E.2d 565, 569 (1992), *rev'd in part on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993); *Minter v. Minter*, 111 N.C. App. 321, 329-30, 432 S.E.2d 720, 726, *disc. rev. denied*, 335 N.C. 176, 438 S.E.2d 201 (1993).

The trial court, therefore, did not err in considering as a distributional factor the contributions the plaintiff made of his separate property to the acquisition of the residence which was, consistent with *McLean*, classified as marital.

II

[2] Defendant argues the trial court erred in failing to consider the relative health and earnings of the parties in making the distribution.

An "equal division of marital property is mandatory unless the trial court determines that an equal division would be inequitable."

Armstrong v. Armstrong, 322 N.C. 396, 404, 368 S.E.2d 595, 599 (1988). When evidence is presented in support of any of the section 50-20(c) factors tending to show that an equal division of the marital property would be inequitable, the trial court must consider that evidence in determining an equitable division. *Armstrong*, 322 N.C. at 405, 368 S.E.2d at 600. To insure that this evidence has been considered by the trial court, there must be findings reflecting their consideration. *Armstrong*, 322 N.C. at 406, 368 S.E.2d at 600 (trial court erred in failing to enter findings that parties incomes, liabilities, and health were considered, when evidence on these matters introduced). It is not necessary that the findings "recite in detail the evidence considered" but they must include the ultimate facts considered by the trial court. *Armstrong*, 322 N.C. at 405-06, 368 S.E.2d at 600.

In this case there is evidence in the record that the plaintiff is in good health and the defendant is not in good health. There is also evidence that the plaintiff is employed and the defendant is not employed. The health and incomes of the parties are factors that must be considered, when evidence is presented, by the trial court in making a distribution of the marital property. N.C.G.S. § 50-20(c)(1); N.C.G.S. § 50-20(c)(3); *Harris v. Harris*, 84 N.C. App. 353, 359, 352 S.E.2d 869, 873 (1987). The judgments in this case do not include any findings that this evidence was considered in making the distribution and this was error. *See Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992). The finding that "due regard [was given] to the contentions of the parties and all the factors set forth in G.S. § 50-20(c)" is not sufficient. *Armstrong*, 322 N.C. at 406, 368 S.E.2d at 600; *Chandler*, 108 N.C. App. at 73, 422 S.E.2d at 592. This case must, therefore, be remanded to the trial court for the entry of a new equitable distribution judgment after consideration of the parties' incomes and health. The new judgment must be entered on the record before this Court and findings included revealing a consideration of the evidence relevant to the parties' incomes and health.

The defendant argues in her brief that the trial court erred in refusing to recuse himself and the trial court erred in denying her Rule 60 motion to set aside one of the equitable distribution judgments. We do not address these arguments because there has been no appeal from these orders. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (notice of appeal must specifically identify the orders and judgments appealed from). The other arguments asserted in the defendant's brief are rejected either because

there are no assignments of error to support the argument, N.C. R. App. P. 10(a), or because they are without merit.

Affirmed in part and remanded.

Judges WYNN and MARTIN, John C., concur.

MUTUAL COMMUNITY SAVINGS BANK, S.S.B., A NORTH CAROLINA CORPORATION, PLAINTIFF v. VIRGINIA BOYD, EXECUTRIX OF THE ESTATE OF EDDIE HARGROVE; AND HENRIETTA HARGROVE, DEFENDANTS

No. COA96-303

(Filed 7 January 1997)

1. Banks and Other Financial Institutions § 55 (NCI4th)—right of survivorship—CD—decedent—spouse—absence of written statement—signature card

The trial court correctly determined that rights of survivorship were not created where the decedent purchased two certificates of deposit from the plaintiff, a savings and loan association, and sometime later executed, along with his wife, two signature cards, but the boxes on both the signature cards indicating an intention to create joint accounts with rights of survivorship were not marked. State statutes require that all the parties seeking to establish an account with a right of survivorship must sign a written statement expressly showing their election of the right of survivorship. N.C.G.S. § 41-2.1(a); N.C.G.S. § 53-146.1(a); N.C.G.S. § 54B-129(a); N.C.G.S. § 54-109.58(a); N.C.G.S. § 41-2.

Am Jur 2d, Banks §§ 369 et seq.

2. Banks and Other Financial Institutions § 56 (NCI4th)—extrinsic evidence—joint tenancy—ambiguity—signature card—CD—intent of decedent and spouse

Parol evidence was not admissible to establish that decedent and his wife intended to establish a joint tenancy with rights of survivorship in two certificates of deposit where there was some ambiguity in the signature cards as to what type of accounts were created and there was some evidence suggesting that the parties intended to create accounts with rights of survivorship, but the existence of an ambiguity in the agreement demonstrates that

there has been no express or definite declaration of intent to create rights of survivorship.

Am Jur 2d, Banks §§ 369 et seq., 467.

3. Banks and Other Financial Institutions § 56 (NCI4th)—summary judgment—decedent—spouse—CD—material issue—ownership—signature card

Summary judgment was improperly entered where the defendant, decedent's wife, raised a genuine issue of material fact with respect to the ownership of certificates of deposit which were titled in the name of the decedent by her affidavit testimony that funds used to purchase the certificates belonged to both decedent and her.

Am Jur 2d, Banks §§ 459-461.

Appeal by defendant Henrietta Hargrove from orders entered 5 October 1995, 27 October 1995 and 21 November 1995 in Guilford County Superior Court by Judge Catherine C. Eagles. Heard in the Court of Appeals 20 November 1996.

No brief filed for plaintiff Mutual Community Savings Bank.

Ronald Barbee for defendant-appellee Virginia Boyd.

Alexander Ralston Speckhard & Speckhard, L.L.P., by Donald K. Speckhard, for defendant-appellant Henrietta Hargrove.

GREENE, Judge.

Henrietta Hargrove (Hargrove), the former wife of the deceased Eddie Hargrove (decedent), appeals from the entry of partial summary judgment entered for Virginia Boyd, executrix of the estate of the decedent (Boyd), in an interpleader action filed by Mutual Community Savings Bank (Savings Bank) to determine ownership of two Certificates of Deposit (CD's) held by the Savings Bank in the name of the decedent. In July 1992 the decedent and Hargrove went to the Savings Bank and met with Jacqueline S. Jolly (Ms. Jolly), the secretary to the manager of the Savings Bank. Ms. Jolly testified that the decedent told her he "wanted to put his wife on his accounts." She further stated that the decedent did not specifically say "joint account with right of survivorship" but that she "knew what he meant." Ms. Jolly witnessed both the decedent and his wife sign a new signature card for each of the CD's. The signature cards contain two blocks, one which indicates the account is "individual" and the other indicates

that the account is "joint." Underneath the box labeled "joint" is a paragraph which states in part: "We understand that by establishing a joint account . . . that . . . upon the death of one joint owner the money remaining in the account will belong to the surviving joint owners and not pass by inheritance to the heirs of the deceased joint owner or be controlled by the deceased joint owner's will." Neither box was checked by either the decedent, his wife, or Ms. Jolly. There is nothing on either signature card to indicate what type of account is created if neither box is checked. Ms. Jolly testified that she did the typing on both the cards.

As of the decedent's death, in January 1993, the CD's had not been changed. Shortly after this date, Hargrove went to the Savings Bank and withdrew the balance from the two CD's and placed it in a new account. The Savings Bank then froze the new account pending the outcome of this litigation.

Hargrove and Boyd filed motions for summary judgment.[1] In support of her motion, Hargrove offered an affidavit stating that at the time the signature cards were signed it was her "intent and desire to open and establish . . . a joint account with right of survivorship." She also stated in the affidavit that the funds used to purchase the CD's "belonged to both" she and the decedent. Hargrove contends that she is the owner of the funds as a matter of law; Boyd contends that the decedent's estate is the owner. The trial court denied Hargrove's motion and granted partial summary judgment for Boyd, finding that the CD's are not owned by the decedent and Hargrove as joint tenants with rights of survivorship. The trial court further found that Boyd is "entitled to at least fifty percent of the proceeds which . . . Hargrove withdrew from the two said certificates of deposit." The court stated that it would "decide the issue of . . . who owns the balance of the funds" at a "later date."

The issues are (I) whether the signature cards executed by the decedent and Hargrove established joint accounts with rights of survivorship; and if not, (II) whether parol evidence is admissible to show that the parties intended to establish joint accounts with rights of survivorship; and if not, (III) whether Hargrove has any ownership interest in the balance of the CD's.

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1 Boyd also filed a crossclaim against Hargrove alleging that Hargrove had refused to turn over the funds to the estate. The trial court denied Hargrove's motion to dismiss the crossclaim and Hargrove appeals this ruling to this Court. We do not address this appeal as it is premature. *Burlington v. Richmond County*, 90 N.C. App. 577, 581 S.E.2d 121 (1988) (denial of motion to dismiss a crossclaim is interlocutory).

I

[1] Parties seeking to establish with a banking institution, a savings and loan association, or a credit union, a right of survivorship in a "deposit account" (with a bank), a "withdrawable account" (with a savings and loan association), or an "account" (with a credit union), must comply with either the requirements of N.C. Gen. Stat. § 41-2.1, N.C. Gen. Stat. § 53-146.1(a) (with a bank), N.C. Gen. Stat. § 54B-129(a) (with a savings and loan association), or N.C. Gen. Stat. § 54-109.58(a) (with a credit union). All of these accounts include checking, savings and certificates of deposit. *See* N.C.G.S. § 41-2.1(e)(2) (defining "deposit account" to include "time and demand deposits"); N.C.G.S. § 53-1(2) (defining demand deposits as those "the payment of which can be legally required within 30 days"); N.C.G.S. § 53-1(7) (defining time deposits as those "the payment of which cannot be legally required within 30 days"); N.C.G.S. § 54B-4(b)(53) (defining "withdrawable account" as any account "which may be withdrawn by the account holder"). These statutes require that all the parties seeking to establish an account with a right of survivorship must sign a written statement *expressly* showing their election of the right of survivorship. N.C.G.S. § 41-2.1(a) (1996); N.C.G.S. § 53-146.1(a) (1994); N.C.G.S. § 54B-129(a) (1992); N.C.G.S. § 54-109.58(a) (1992); N.C.G.S. § 41-2 (1996) (instrument creating joint tenancy with right of survivorship must "expressly" so provide).

In this case, the decedent purchased two CD's from the Savings Bank, a savings and loan association, and sometime later executed, along with his wife Hargrove, two signature cards. The boxes on both the signature cards indicating their intention to create joint accounts with rights of survivorship were not marked. Thus, although there are survivorship provisions on each of the cards, that language was not given effect and could be given effect only upon the marking of the "joint" account boxes. *See O'Brien v. Reece*, 45 N.C. App. 611, 617, 263 S.E.2d 817, 821 (1980) (rejection of right of survivorship where the parties did not check the "joint" account box). Because the signature cards do not expressly reveal the parties' intention to establish joint accounts with rights of survivorship, the trial court correctly determined that rights of survivorship were not created.

II

[2] The general rule is that if the terms of an agreement "are equivocal or susceptible of explanation by extrinsic evidence" that evidence is admissible to explain the terms of the agreement. *Goodyear v.*

Goodyear, 257 N.C. 374, 380, 126 S.E.2d 113, 118 (1962); 32A C.J.S. *Evidence* § 959(1) (1962). Extrinsic or parol evidence, however, of the parties' intent to establish a joint tenancy with rights of survivorship is not admissible. *See In Re Estate of Heffner*, 99 N.C. App. 327, 329-30, 392 S.E.2d 770, 772 (1990) (use of the "subjective determination of the parties' intent" would create "uncertainty and increased litigation"). Indeed, the existence of an ambiguity in the agreement (which would normally give rise to the use of parol evidence) demonstrates that there has been no express or definite declaration of intent to create rights of survivorship, a requirement of the statute. Thus, although there is some ambiguity in the signature cards as to what type of CD's were created and there is some evidence suggesting that the parties intended to create accounts with rights of survivorship, the type of CD's created must be decided on the sole basis of the signature cards and extrinsic evidence is not admissible.

III

[3] The ownership of funds in a bank account is presumed to belong to or be owned by the person(s) named on the account. *See* 9 C.J.S. *Banks & Banking* § 280 (1996); *see also Smith v. Smith*, 255 N.C. 152, 154, 120 S.E.2d 575, 578 (1961). When, however, a controversy arises with respect to the ownership of the funds, ownership must be determined after consideration of several factors: "facts surrounding the creation and history of the account, the source of the funds, the intent of the depositor . . . the nature of the bank's transactions with the parties," 9 C.J.S. *Banks & Banking* § 281 (1996); *see McAulliffe v. Wilson*, 41 N.C. App. 117, 120, 254 S.E.2d 547, 549 (1979), and whether the owner of the monies deposited in the bank intended to make a gift to the person named on the account.[2] *See Smith*, 255 N.C. at 155, 120 S.E.2d at 578.

In this case, the CD's were placed in the name of the decedent at the time of their purchase and the execution of the signature cards did not alter that title.[3] Thus there arises a presumption that the funds from the CD's belong to the decedent's estate. Hargrove, however, raised a genuine issue of material fact with respect to the owner-

2. A gift is established upon a showing that there was donative intent "coupled with loss of dominion over the property." *Meyers v. Meyers*, 68 N.C. App. 177, 181, 314 S.E.2d 809, 813 (1984) (gift not shown where depositor retained right to withdraw funds from account).

3. The addition of Hargrove's name to the signature card simply authorized her to make withdrawals on the account; such authorization terminated as a matter of law upon the death of the decedent. *See Smith*, 255 N.C. at 155, 120 S.E.2d at 579.

ship of those funds when she testified (in the affidavit) that the funds used to purchase the CD's belonged to she and the decedent. *See Gore v. Hill*, 52 N.C. App. 620, 621, 279 S.E.2d 102, 104 (summary judgment not proper where genuine issue of fact exists), *disc. rev. denied*, 303 N.C. 710, 283 S.E.2d 136 (1981). Thus summary judgment was improperly entered and this case must be remanded to the trial court for determination of the ownership of the funds after presentation of evidence on the factors discussed herein.

Affirmed in part, reversed in part and remanded.

Judges WYNN and MARTIN, John C., concur.

RICHARD LEON QUICK, PETITIONER v. NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA96-361

(Filed 7 January 1997)

Automobiles and Other Vehicles § 92 (NCI4th)— unlawful arrest—refusal to take breathalyzer test—revocation of license

Petitioner's willful refusal to submit to a chemical analysis could be used to revoke his driver's license pursuant to N.C.G.S. § 20-16.2 even if his arrest did not comply with N.C.G.S. § 15A-401(b)(2) where petitioner was charged with an implied-consent offense after driving on a highway or public vehicular area and the arresting officer had reasonable grounds to believe petitioner had committed an implied-consent offense. The 1983 amendment which substituted "charged" for "arrested" in N.C.G.S. § 20-16.2(a) did not require that the charge be lawful in order to require the driver to submit to a chemical analysis.

Am Jur 2d, Automobiles and Highway Traffic §§ 122-132.

Suspension of revocation of driver's license for refusal to take sobriety test. 88 ALR2d 1064.

Appeal by petitioner from judgment entered 3 January 1996 in Mecklenburg County Superior Court by Judge Robert P. Johnston. Heard in the Court of Appeals 4 December 1996.

Ledford & Murray, by Joseph L. Ledford, for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General T. Lane Mallonee, for the State.

GREENE, Judge.

Richard Leon Quick (petitioner) appeals a judgment from superior court upholding the revocation of his drivers license by the North Carolina Division of Motor Vehicles (respondent).

The undisputed facts are that on 18 January 1995 at 12:45 a.m. Officer Newcomb (Newcomb) responded to a call concerning a single car accident. Upon arriving at the scene, Newcomb saw that another law enforcement officer was on the scene and that a vehicle was on the side of the road and damaged to the point it was not driveable. Upon seeing that the driver of the vehicle, petitioner, was a fellow police officer and in no need of medical attention, Newcomb radioed for a senior officer and another officer to help with the accident scene.

Newcomb smelled alcohol coming from petitioner and noticed that petitioner was having difficulty standing and "appeared to be upset about something" and told Newcomb that he had been out driving around and "something about problems at home of some sort." Petitioner was cooperative and told Newcomb to "do your job."

Newcomb said that petitioner "performed rather poorly" on the field sobriety tests and blew a .14 on the alco-sensor. From petitioner's results on all the tests, Newcomb formed the belief that petitioner had committed an implied-consent offense and placed him under arrest. Petitioner was transported to the intake center where a chemical analyst advised petitioner of his rights pursuant to N.C. Gen. Stat. § 20-16.2 (1993). After explaining the procedure to take the breath test, petitioner was asked to blow into the machine two separate times and both times he refused. Petitioner was recorded as having willfully refused to submit to a chemical analysis and his license was revoked pursuant to section 20-16.2(a)(2).

Petitioner requested a *de novo* hearing in superior court to appeal the revocation of his license. At the hearing, petitioner moved to

suppress any evidence of his willful refusal to take the chemical analysis based on the argument that pursuant to N.C. Gen. Stat. § 15A-401(b)(2) (1988), his arrest was unlawful. Affirming the revocation of petitioner's license, the trial court concluded: (1) petitioner was charged with an implied-consent offense; (2) Newcomb had reasonable grounds to believe petitioner committed such offense; (3) petitioner was notified of his rights; and (4) petitioner willfully refused to submit to a chemical analysis.

The issue is whether petitioner's willful refusal to submit to a chemical analysis can be used to revoke his drivers license when his arrest was not in compliance with section 15A-401(b)(2).

The petitioner argues that because his arrest was not in compliance with section 15A-401(b)(2), his willful refusal to submit to a chemical analysis could not be the basis for the revocation of his license under section 20-16.2(d).[1] We disagree.

Even assuming the arrest of the petitioner was not in compliance with section 15A-401(b)(2), because petitioner was "charged with an implied-consent offense" after driving on a "highway or public vehicular area" and because Newcomb had "reasonable grounds to believe [the petitioner] ha[d] committed the implied-consent offense," N.C.G.S. § 20-16.2(a), the trial court correctly affirmed the revocation of the petitioner's license on the basis of his refusal to take the chemical analysis.

In *In re Gardner*, 39 N.C. App. 567, 251 S.E.2d 723 (1979), and *In re Pinyatello*, 36 N.C. App. 542, 245 S.E.2d 185 (1976), this Court determined that even if an arrest for an implied-consent offense does not comply with section 15A-401(b)(2), "the petitioner . . . could not willfully refuse to take the [chemical analysis] without incurring" the revocation of his license. *Gardner*, 39 N.C. App. at 572, 251 S.E.2d at 726; *see Pinyatello*, 36 N.C. App. at 545, 245 S.E.2d at 187; N.C.G.S. § 20-16.2(d) (1993) (twelve months revocation of license for willfully refusing to submit to chemical analysis). When determining whether revocation of petitioner's license was proper, "we are not concerned

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1 The petitioner does not argue, and we do not address whether evidence of his refusal to submit to a chemical analysis must be suppressed (at the civil revocation hearing) on the grounds that the arrest was unconstitutional. Indeed the petitioner concedes that the arrest was constitutional in that Newcomb had "probable cause to believe that [petitioner] had committed the offense of Driving While Subject to an Impaired Substance." *See In re Gardner*, 39 N.C. App. 567, 572-73, 251 S.E.2d 723, 726-27 (1979) (distinguishing unlawful arrest from unconstitutional arrest).

with the admissibility or suppression of evidence," but only with "whether the petitioner's driving privilege was properly revoked . . . because of his willful refusal to take a [chemical analysis.]" *Gardner*, 39 N.C. App. at 574, 251 S.E.2d at 727. "The question of the legality of his arrest . . . [is] simply not relevant to any issue presented in" the hearing to determine whether his license was properly revoked. *Id.*

We are aware that section 20-16.2 has been amended by the legislature since our decisions in *Gardner* and *Pinyatello*. At the time of *Gardner* and *Pinyatello*, section 20-16.2(a) stated that:

> Any person who drives or operates a motor vehicle upon any highway or any public vehicular area shall be deemed to have given consent subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood *if arrested* for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle . . . while under the influence of intoxicating liquor. . . .

1973 N.C. Sess. Laws ch. 206, § 1, amended, 1983 N.C. Sess. Laws ch. 435, § 11 (emphasis added). The same section now states that:

> Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis *if charged* with an implied-consent offense. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when the officer has reasonable grounds to believe that the person charged has committed the implied-consent offense.

N.C.G.S. § 20-16.2(a) (1993) (emphasis added). The petitioner argues that these changes reflect an intention by the legislature to overrule *Gardner* and *Pinyatello* and thus require that the petitioner be *lawfully* "charged" before he can be required to take the chemical analysis. We disagree. Although the legislature did substitute "charged"[2] for "arrested," it did not add any language suggesting that the charge

2. A person is "charged" within the meaning of section 20-16.2(a) "if he is arrested for [an implied-consent offense] or if criminal process for the offense has been issued." N.C.G.S. § 20-16.2(a1) (1993).

must be lawful as a prerequisite to requiring the driver to submit to a chemical analysis.

Petitioner argues alternatively that we should overturn *Gardner* and *Pinyatello* on the basis that evidence obtained as a result of an illegal arrest (the refusal to submit to a chemical analysis) should be excluded from the civil revocation proceeding. This Court is bound by its prior decisions addressing the same questions, *Moore v. Stern*, 122 N.C. App. 270, 274, 468 S.E.2d 607, 609-10, *disc. rev. denied*, 343 N.C. 512, 472 S.E.2d 15 (1996), and therefore petitioner's request to overturn our prior decisions is rejected.[3]

Affirmed.

Judges WYNN and MARTIN, John C., concur.

PAUL A. HOMOLY, D.D.S., PETITIONER-APPELLANT v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT-APPELLEE

No. COA96-252

(Filed 7 January 1997)

1. Administrative Law and Procedure § 46 (NCI4th)— complaint against dentist—informal settlement procedures not required—contested case

The State Board of Dental Examiners' failure to attempt to resolve a patient's complaint against a dentist through informal settlement procedures did not prevent the dispute from becoming a contested case within the jurisdiction of the Board.

Am Jur 2d, Administrative Law §§ 279, 299.

2. Physicians, Surgeons, and Other Health Care Professionals § 60 (NCI4th)— dentist—negligent treatment—reprimand—sufficient evidence

A decision of the State Board of Dental Examiners to reprimand a dentist for negligence in the treatment of a patient was supported by substantial evidence.

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3. The United States Supreme Court has held that the exclusionary rule does not apply in the context of civil proceedings, *United States v. Janis*, 428 U.S. 433, 459-60, 49 L. Ed. 2d 1046, 1064 (1976), and our own Supreme Court has held that a license revocation proceeding is civil in nature. *State v. Oliver*, 343 N.C. 202, 207, 470 S.E.2d 16, 20 (1996).

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 111, 116-118.

Appeal by petitioner from judgment entered 18 December 1995 by Judge H.W. Zimmerman, Jr. in Union County Superior Court. Heard in the Court of Appeals 31 October 1996.

Frank R. Recker & Associates, by Frank R. Recker; and Kennedy, Covington, Lobdell & Hickman, by Kiran H. Mehta and Lara E. Simmons; for petitioner-appellant.

Bailey & Dixon, L.L.P., by Ralph McDonald and Denise Stanford Haskell, for respondent-appellee.

WALKER, Judge.

On 25 April 1988, Ms. Vickie Ebbers consulted with petitioner, a licensed dentist, regarding the placement of fixed dental implants, dentures, and a lower bridge in her mouth. Ebbers agreed to a treatment plan recommended by petitioner which included the placement of implants and two dental bridges. On 14 July 1988, petitioner placed dental implants in Ebber's mouth. Later, on 16 August 1989, petitioner placed a bridge in Ebber's upper arch, and on 20 December 1989, Dr. Rossitch, petitioner's employee, placed a bridge in Ebber's lower arch. Petitioner continued to treat Ebbers until 15 May 1991. On 1 February 1993, Ebbers filed a complaint with respondent regarding the treatment she received from petitioner.

After an evidentiary hearing, respondent found that petitioner had failed to comply with the applicable standard of care in his treatment of Ebbers and that such failure constituted negligence. Petitioner was formally reprimanded for his conduct but additional disciplinary action was deferred for a period of five years provided that he abide by certain probationary terms. Petitioner, pursuant to N.C. Gen. Stat. § 150B-45 (1995), petitioned the trial court seeking review of respondent's decision to reprimand him. The trial court affirmed respondent's decision.

[1] On appeal, petitioner first contends that N.C. Gen. Stat. § 150B-22 (1995) requires respondent to attempt to resolve its disputes through informal settlement procedures before proceeding to a formal hearing. Petitioner argues that because respondent did not attempt to resolve the dispute through informal settlement procedures, his case never properly became a "contested case" under N.C. Gen. Stat.

§ 150B-22, and respondent did not have jurisdiction to hear his case. This Court, in another case involving petitioner, recently rejected the same argument. In *Homoly v. N.C. State Bd. of Dental Examiners*, 121 N.C. App. 695, 468 S.E.2d 481, *review denied*, 343 N.C. 306, 471 S.E.2d 71 (1996), our Court held that N.C. Gen. Stat. § 150B-22 did not apply to respondent. We find *Homoly* controlling in the present case, and it is therefore unnecessary to further address this issue.

[2] Petitioner also contends that the trial court erred in upholding respondent's decision to reprimand him because respondent's decision was not supported by the evidence. The North Carolina Administrative Procedure Act (APA), codified in Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions. *Amanini v. N.C. Department of Human Resources*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). The court's scope of review is described in N.C. Gen. Stat. § 150B-51(b) (1995) as follows:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
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> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

The standard of review to be applied by the reviewing court depends on the issues presented on appeal. *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118 (citations omitted).

> If [petitioner] argues the agency's decision was based on an error of law, then "de novo" review is required. If, however, [petitioner] questions (1) whether the agency's decision was sup-

ported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.

Id. Under the "de novo" standard, the reviewing court must consider the question presented on appeal anew, as if undecided by an agency, whereas under the "whole record" test, the reviewing court must consider all competent evidence to determine whether the agency's decision is supported by substantial evidence. *Id.* "Substantial evidence" is that amount of evidence a reasonable person would consider adequate to support a particular conclusion. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *cert. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). The scope of review of this Court is to examine the "whole record" in order to determine whether substantial evidence exists to support respondent's findings and conclusions that petitioner failed to comply with the applicable standard of care. *See Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560 (1996).

Because petitioner contends that respondent's decision to reprimand him for negligence was not supported by the evidence, the "whole record" test was the proper standard of review for the trial court to apply. The trial court concluded in its judgment that respondent's findings of fact, conclusions of law, and decision were supported by the record (R. at 29); therefore, it properly applied the "whole record" test. We must next examine the "whole record" to ascertain whether substantial evidence exists to support respondent's decision.

At the evidentiary hearing, petitioner and respondent offered conflicting evidence on the issue of petitioner's negligence. Petitioner complains that the only evidence to support respondent's findings of fact was provided by Dr. Samuel Davis, and that because Dr. Davis had treated Ebbers and another patient involved in the same hearing against petitioner, his testimony was biased and lacked credibility. As this Court stated in *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 68-69, 306 S.E.2d 534, 536 (1983), "[i]n an administrative proceeding, it is the prerogative and duty of that administrative body . . . 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.' " Thus, respondent " 'may accept or reject in whole or part the testimony of any witness.' " *Id.* at 69, 306 S.E.2d at 536. In addition,

> [i]t is within the province of [respondent] as an administrative agency to apply its own expertise in its conduct and evaluation of a disciplinary hearing. In the process of accepting or rejecting expert testimony the law does not require [respondent] to identify its method of reasoning or its method of determining credibility.

Woodlief v. N.C. State Bd. of Dental Examiners, 104 N.C. App. 52, 58, 407 S.E.2d 596, 600 (1991) (citations omitted). As in *Little*, respondent, whose composition includes licensed dental professionals, was qualified to judge whether petitioner violated the standard of care of a licensed dentist practicing in North Carolina. *See Little*, 64 N.C. App. at 75, 306 S.E.2d at 539.

After reviewing the "whole record," we find substantial evidence exists to support respondent's decision to reprimand petitioner; therefore, the trial court did not err in upholding respondent's decision.

Affirmed.

Judges LEWIS and SMITH concur.

CATAWBA COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, *EX. REL.* SHANNON DEE KENWORTHY, PLAINTIFF v. NEIL KUMMAN KHATOD, DEFENDANT

No. COA95-1224

(Filed 7 January 1997)

Evidence and Witnesses § 1457 (NCI4th)— exclusion of blood test—custody of sample—independent evidence required

The trial court did not err in excluding blood grouping test results as evidence that plaintiff's husband was not the father of her child in an action in which plaintiff sought to prove that defendant was the father of the child where the test report did not meet the prerequisites for admission under N.C.G.S. § 8-50.1(b)(1) because the testing was not ordered by the court and the husband was not the "alleged father-defendant"; the rule of *Lombroia v. Peek*, 107 N.C. App. 745, thus applied and required independent evidence of the chain of custody; and no competent witness tes-

tified regarding the proper administration of the blood test or the proper chain of possession, transportation and safekeeping of the blood sample so as to establish the likelihood that the blood tested was in fact drawn from plaintiff's husband.

Am Jur 2d, Evidence § 949.

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

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

Appeal by plaintiff from judgment entered 3 May 1995 by Judge Timothy S. Kincaid in Catawba County District Court. Heard in the Court of Appeals 23 August 1996.

Catawba County Staff Attorney Katherine R. Sumrall for plaintiff-appellant.

Rudisill & Brackett, P.A., by H. Kent Crowe, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals judgment for defendant in civil paternity action based upon jury determination defendant was not the father of "Baby S.," born to Shannon Kenworthy (Shannon). Plaintiff argues the trial court erred by "refusing to admit into evidence blood grouping and DNA tests performed on [Shannon's] husband." We disagree.

Pertinent background information includes the following: In June 1992, Shannon, then six months pregnant, married Christian Kenworthy (Christian). Shannon gave birth to Baby S. on 18 September 1992. Shannon and Christian separated in October 1992 and eventually divorced. Shannon subsequently applied for Medicaid benefits through the Catawba County Department of Social Services (DSS). DSS in turn contacted Christian seeking child support for Baby S.

Following interviews with Shannon and Christian conducted by DSS caseworker Cheryl Deal (Deal), paternity testing of the pair and Baby S. excluded Christian as the child's biological father. Based upon information received in the interviews, Deal contacted defendant to arrange paternity testing, the results of which indicated a

99.99% probability defendant was the biological father of Baby S. On 23 June 1994, plaintiff Catawba County Child Support Enforcement Agency initiated the instant action to establish the paternity of Baby S. and to obtain an order of child support.

At trial, Shannon admitted she had engaged in sexual intercourse with four different men following her last menstrual period prior to discovering she was pregnant. These included both defendant and Christian on 31 December 1991, at or about the time Baby S. was conceived. Shannon further indicated she "did not use any birth control" on that date during intercourse with defendant.

Deal related that she arranged for paternity testing of both defendant and Christian. Dr. Lee Tuckwiller (Dr. Tuckwiller), Associate Director of Roche Biomedical Laboratories (Roche) at Burlington, North Carolina, was qualified as an expert in the field of blood genetic marker testing, and stated he was "an official custodian" of paternity testing records kept in the ordinary course of business by Roche. Dr. Tuckwiller described tests administered to blood samples obtained from Shannon, defendant, and Baby S., and reported the results. Dr. Tuckwiller then proffered his opinion that the probability of defendant's paternity of Baby S. was 99.99%.

Plaintiff also attempted to present evidence of the testing of Shannon, Baby S., and Christian. Verified documentary evidence indicated blood specimens of the three were drawn 7 June 1993 in Conover, North Carolina, and then shipped to Roche in Burlington. No additional evidence was presented to establish the chain of custody. Following a *voir dire* hearing as to the admissibility under N.C.G.S. § 8-50.1(b1) of a report reflecting the test results, the trial court excluded the evidence.

Defendant offered no evidence. The issue of his paternity was submitted to the jury, which responded "No." Plaintiff timely entered notice of appeal.

Plaintiff's single assignment of error is directed at the trial court's refusal to admit into evidence results of the paternity testing involving Christian. In pertinent part, the version of G.S. § 8-50.1 applicable to the proceedings below provided:

> (b1) In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a

> duly certified physician or other expert. . . . Verified documentary evidence of the chain of custody of the blood specimens obtained pursuant to this subsection shall be competent evidence to establish the chain of custody. The testing expert's completed and certified report of the results and conclusions of the paternity blood test or genetic marker test is admissible as evidence without additional testimony by the expert if the laboratory in which the expert performed the test is accredited for parentage testing by the American Association of Blood Banks. Accreditation may be established by verified statement or reference to published sources. Any person contesting the results of a blood or genetic marker test has the right to subpoena the testing expert pursuant to the Rules of Civil Procedure. . . .

N.C.G.S. § 8-50(b1) (1993 Supp., subsequently amended by 1993 N.C. Sess. Laws ch. 733, § 1 for cases filed after 1 August 1994).

Plaintiff asserts the foregoing version of the statute was adopted in response to this Court's decision in *Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992), and that our holding in that case consequently is distinguishable. In *Lombroia*, decided under N.C.G.S § 8-50.l(b) (1979), the trial court permitted expert testimony concerning a report of an out-of-state blood grouping test notwithstanding the absence of evidence

> as to the proper administration of the blood test [and] of the proper chain of possession, transportation and safekeeping of the blood sample sufficient to establish a likelihood that the blood tested was in fact blood drawn from [plaintiff's husband].

Id. at 749, 421 S.E.2d at 787. We concluded the trial court had erred, emphasizing that the sole witness regarding the test

> admitted that he had no personal knowledge concerning the administration of this particular test nor any personal ability to trace a chain of custody for the sample allegedly tested.

Id.

G.S. § 8-50.1(b1) was thereafter enacted and made applicable to actions, such as that *sub judice*, filed on or after 1 October 1993. Under conditions set forth in the amended statute, verified documentary evidence became sufficient to validate the chain of custody. However, the statutory modification does not sustain plaintiff's position herein.

In the instant case, as in *Lombroia*, no competent witness testified regarding either the proper administration of the blood test involving Christian or the proper chain of possession, transportation and safekeeping of the blood sample allegedly obtained from him so as "to establish a likelihood that the blood tested was in fact drawn from [Christian]." *Id.* Accordingly, if the test report at issue did not meet the prerequisites for admission under G.S. § 8-50.1(b1), the rule of *Lombroia* requiring independent evidence of the chain of custody governs and the trial court did not err.

A condition precedent under the statute for report admissibility based upon documentary proof of chain of custody is that "the blood specimens [were] obtained pursuant to this subsection," G.S. § 8-50.1(b1), *i.e.*, ordered by the court upon "motion of a party." According to Deal's testimony, Christian "asked for paternity tests and paid for them" when contacted by plaintiff concerning child support for Baby S. Subsequent to administration of the test, plaintiff determined not "to pursue [Christian] for child support" of Baby S. As plaintiff concedes in its appellate brief, Christian thus was *not* a party to the instant action, begun well after conclusion of his test, and nothing in the record suggests the blood grouping test requested by him was "ordered" by the trial court.

In addition, the language of the statute specifically speaks to test results obtained from "the mother, the child, and the alleged *father-defendant*" in "the trial of [a] civil action in which the question of parentage arises." G.S. § 8-50.1(b1) (emphasis added). The "alleged father-defendant" in the instant action involving the parentage of Baby S. was the named defendant, Neil Khatod, *not* Christian.

Notwithstanding, plaintiff insists Christian was in any event "an alleged father" and points to subsequent language in the statute referring to test results obtained from "the alleged parent." The statute having provided for testing only of "the mother, the child, and the alleged father-defendant," the later mention of "the alleged parent" unquestionably refers to "the *alleged father-defendant" in the paternity action* upon whom testing has been performed pursuant to the statute. This argument of plaintiff is fatuous and we summarily reject it.

To conclude, the test report at issue did not qualify for admissibility under the relaxed evidentiary requirements of G.S. § 8-50.1(b1), and the trial court did not err by refusing to allow it into evidence.

No error.

Judges GREENE and MARTIN, Mark D., concur.

ROBERT L. PHARR, PLAINTIFF v. STEVEN W. WORLEY, AND THE CHARLOTTE MECKLENBURG BOARD OF EDUCATION, DEFENDANTS

No. COA96-68

(Filed 7 January 1997)

1. Appeal and Error § 156 (NCI4th)— governmental/proprietary function—issue not raised at trial

The plaintiff's governmental/proprietary function argument was dismissed where plaintiff did not raise the issue in the trial court. N.C. R. App. P. 10(b)(1).

Am Jur 2d, Appellate Review § 614.

2. Counties § 81 (NCI4th)— board of education—not risk pool participant—no waiver of sovereign immunity

A county board of education was not and could not be a local government risk pool participant so as to waive its sovereign immunity for negligence in an automobile accident by a security officer it employed.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 524, 633, 634.

3. Appeal and Error § 357 (NCI4th)— directed verdict—sovereign immunity—employee or officer—failure of record to show

The trial court's directed verdict for the individual defendant in a negligence action was affirmed where the Court of Appeals was unable, without engaging in speculation, to determine whether this defendant was an employee or an officer of defendant board of education and thus entitled to official immunity or to share in the board's sovereign immunity. An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.

Am Jur 2d, Appellate Review § 617.

PHARR v. WORLEY

[125 N.C. App. 136 (1997)]

Appeal by plaintiff from directed verdict for defendants entered 16 December 1994 by Judge Chase B. Saunders in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 1996.

Marshall A. Swann for plaintiff appellant.

Smith Helms Mulliss & Moore, L.L.P., by James G. Middlebrooks and Scott Boatwright, for defendant appellees.

SMITH, Judge.

This case involves injuries arising out of an automobile accident between plaintiff and Steven W. Worley (Worley), a security officer for the Charlotte-Mecklenburg Board of Education (the Board). Plaintiff's suit against both Worley and his employer, the Board, proceeded under the supposition that the Board had waived its governmental immunity by purchasing liability insurance under the aegis of a "local government risk pool." At trial, defendants moved for a directed verdict at the close of plaintiff's evidence, arguing the Board had not participated in a "risk pool," and, therefore, had not waived its governmental immunity by the purchase of insurance.

A directed verdict is properly granted where it appears, as a matter of law, that the nonmoving party cannot recover upon any view of the facts which the evidence reasonably tends to establish. *Sheppard v. Zep Manufacturing Co.*, 114 N.C. App. 25, 30, 441 S.E.2d 161, 164 (1994). Under this standard, this Court must determine whether plaintiff's evidence, when considered in the light most favorable to plaintiff, was legally sufficient to withstand defendants' motion for a directed verdict as to plaintiff's claims. *See Sheppard*, 114 N.C. App. at 30, 441 S.E.2d at 164.

[1] On appeal, plaintiff first argues that defendant Worley was engaged in a proprietary, rather than governmental function in his capacity as a patrol officer with the Board's security department. "Traditionally, a county [agency has been held] immune from torts committed by an employee carrying out a governmental function, but [the agency may still be held] liable for torts committed while [its employee is] engaged in a proprietary function." *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

We have carefully reviewed the record. Having done so, we are unable to consider plaintiff's governmental/proprietary function argu-

ments because plaintiff did not raise such issues in the court below. N.C.R. App. 10(b)(1) (1997); *Northwestern Financial Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 430 S.E.2d 689, 691, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). We are bound by our case law and appellate rules, and accordingly, we dismiss plaintiff's governmental/proprietary function argument.

[2] Next, we address plaintiff's claim that the Board is a participant in a "local government risk pool," and has thereby waived governmental immunity. The question of whether the risk management agreement (agreement) between the City of Charlotte, Mecklenburg County, and the Charlotte-Mecklenburg Board of Education constitutes a risk pool was recently settled by our Supreme Court in *Lyles v. City of Charlotte*, 344 N.C. 676, 477 S.E.2d 150 (1996). The *Lyles* Court concluded that "there must be more risk-sharing than is contained in the [instant] agreement in order to create a local government risk pool." *Id.*, slip op. at 5. Furthermore, the *Lyles* Court held that "[t]he Charlotte-Mecklenburg Board of Education *could not* join a risk pool pursuant to [N.C. Gen. Stat. § 58-23-1 (1994)]." *Id.*, slip op. at 5 (emphasis added). Since the instant case involves the same risk management plan at issue in *Lyles*, we must conclude that the instant Board is not and could not be, a risk pool participant, and has not waived its immunity. Accordingly, the trial court's directed verdict for defendant Board was not error.

[3] The final question is whether plaintiff's suit against defendant Worley should have been allowed to proceed despite the Board's governmental and official immunity defenses. Our courts have frequently stated that

> [a]n employee of a governmental agency . . . is personally liable for his negligence in the performance of his duties proximately causing injury to the property [or person] of another even though his employer is clothed with immunity and not liable on the principle of *respondeat superior*.

Givens v. Sellars, 273 N.C. 44, 49, 159 S.E.2d 530, 534-35 (1968) (cited to and quoted in part by *Harwood v. Johnson*, 92 N.C. App. 306, 309-10, 374 S.E.2d 401, 405 (1988). An officer, on the other hand, is entitled to share in the immunity of the sovereign, *Harwood*, 92 N.C. App. at 310-11, 374 S.E.2d at 405, and to assert the separate defense of official immunity where applicable. *See Epps v. Duke University*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 ("Official immunity is a

derivative form of sovereign immunity." (emphasis added)), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Determining whether a governmental worker is an employee or an official is often a difficult distinction to draw. *See Hare*, 99 N.C. App. at 698, 394 S.E.2d at 236.

In the instant appeal, we are unable to determine whether defendant Worley's duties and responsibilities were such that he is entitled to either official immunity or to share in the Board's sovereign immunity. Plaintiff has included only twenty-eight pages of transcript from the proceedings below in the record, none of which speak to these particular issues. In the portion of the transcript provided, plaintiff's arguments are directed solely at whether the Board waived its immunity by purchasing liability insurance or by participating in a local government risk pool. It is appellant's duty and responsibility to see that the record is in proper form and complete. N.C.R. App. P. 9(a)(1)(e) and 9(a)(1)(j) (1997); and *see State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969), *death sentence vacated sub. nom., Atkinson v. North Carolina*, 403 U.S. 948, 29 L. Ed. 2d 859 (1971). From the record before us, we cannot, without engaging in speculation, determine defendant Worley's status as an employee or officer. "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968). Thus, we affirm the trial court's directed verdict for defendant Worley as well.

In summary, we affirm the directed verdict of the court below as to all defendants for the reasons stated herein.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

IN RE CARTER

[125 N.C. App. 140 (1997)]

IN THE MATTER OF: JATE ANTWAN CARTER

No. COA96-265

(Filed 7 January 1997)

Infants or Minors § 136 (NCI4th)— juvenile delinquent—commitment period greater than that of an adult

The trial court did not err in sentencing a juvenile, who was adjudicated delinquent, to a commitment greater than the commitment period for which an adult could be committed for the same acts. N.C.G.S. § 7A-652(c) allows a trial court to commit a juvenile for the maximum period of time that *any adult* could be committed for the same offense without considering prior record levels and aggravating and mitigating factors as required under structured sentencing for adults. This interpretation is supported by the purpose of disposition in juvenile actions and by a 1996 clarifying amendment to the statute.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 30.

Appeal by juvenile from order entered 27 November 1995 by Judge Resa L. Harris in Mecklenburg County District Court. Heard in the Court of Appeals 19 November 1996.

Attorney General Michael F. Easley, by Associate Attorney General T. Brooks Skinner, Jr., for the State.

The Children's Law Center, by Phillip H. Redmond, Jr., for juvenile-appellant.

WALKER, Judge.

On 27 November 1995, the juvenile was adjudicated delinquent pursuant to a petition charging him with the offense of misdemeanor larceny. The juvenile had been adjudicated delinquent twice before in 1995: once for another misdemeanor larceny and once for misdemeanor possession of marijuana. During the dispositional hearing, the juvenile was committed to the North Carolina Division of Youth Services for placement in one of the residential facilities for an indefinite term not to exceed 260 days. The record reflects that the trial court considered the maximum period of commitment for each larceny to be 120 days and 20 days for possession of marijuana in

accordance with N.C. Gen. Stat. § 15A-1340.23 (1994). The juvenile contends that the trial court erred when it committed him for this period of time since the commitment period exceeds the maximum period for which an adult could be committed for acts for which the juvenile has been adjudicated delinquent.

N.C. Gen. Stat. § 7A-652(c) (1987) provides "[i]n no event shall commitment of a delinquent juvenile be for a period of time in excess of that period for which an adult could be committed for the same act. . . ." The juvenile argues that this language requires the structured sentencing guidelines for adults to apply to juveniles. As such, the juvenile contends that the maximum punishment level for a similarly situated adult would be a commitment of 105 days. (This figure was attained by applying the classes and levels proscribed by the structured sentencing guidelines to each of the three charges for which the juvenile was adjudicated delinquent. However, structured sentencing did not become effective until 1 October 1994).

In contrast, the State interprets N.C. Gen. Stat. § 7A-652 (c) to allow a trial court to commit a juvenile for the maximum period of time that *any adult could* be committed for the same offense, without considering prior record levels and aggravating/mitigating factors as required under structured sentencing for adults. We elect to follow the State's interpretation of N.C. Gen. Stat. § 7A-652, finding it to be supported by the purpose of disposition in juvenile actions and a recent clarifying amendment passed by the General Assembly.

The juvenile asserts that the case of *United States v. R.L.C.*, 503 U.S. 291, 117 L. Ed. 2d 559 (1992), controls and prohibits the detention of juveniles for longer periods than similarly situated adults. Further, he contends that this case supports his interpretation of N.C. Gen. Stat. § 7A-652. In the *R.L.C.* case, the United States Supreme Court, in addressing the issue of applying sentencing guidelines to juvenile sentences, held that a federal law prohibiting the detention of juveniles longer than a similarly situated adult "refers to the maximum length of sentence to which a similarly situated adult would be subject if convicted of the adult counterpart of the offense and sentenced under the statute requiring application of the Guidelines. . . ." *Id.* at 306, 117 L. Ed. 2d at 573 (citation omitted). Although we are faced with determining a similar issue in the case at hand, in *R.L.C.* the Court was interpreting federal law in light of Congressional intent, and thus we do not deem the decision to be controlling when applying the law of our State. In addition, the fed-

eral law is worded differently than N.C. Gen. Stat. § 7A-652(c). 18 U.S.C. § 5037 (c)(1)(B) (1985).

In our State there are significant differences that exist in sentencing an adult versus the dispositional phase of juvenile proceedings. The primary purposes of criminal sentencing are to "impose a punishment commensurate with the injury the offense has caused . . .; to protect the public by restraining offenders; to assist the offender toward rehabilitation . . .; and to provide a general deterrent to criminal behavior." N.C. Gen. Stat. § 15A-1340.12 (1994). A juvenile disposition on the other hand, has as its primary purpose "to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." N.C. Gen. Stat. § 7A-646 (1995). Thus, the statutory framework of our juvenile code was designed to provide flexible treatment plans that would serve the best interests of the juvenile and the State. *In re Hardy*, 39 N.C. App. 610, 251 S.E.2d 643 (1979); *In re Khork*, 71 N.C. App. 151, 321 S.E.2d 487 (1984). While the adult code focuses on punishment and deterrence through rigid sentencing guidelines, the juvenile code emphasizes the need for flexibility in meeting the child's special needs.

The juvenile also argues that there are two ways to apply the sentencing guidelines in juvenile dispositions. He first argues that because N.C. Gen. Stat. § 7A-638 (1995) provides "[a]n adjudication that a juvenile is delinquent . . . shall [not] be considered conviction of any criminal offense . . .," any juvenile eligible for commitment could only be committed for the minimum period for which an adult could be sentenced regardless of how many prior offenses the juvenile had committed, as none of the prior offenses would be considered prior convictions.

The second alternative argued by the juvenile would treat juvenile adjudications of delinquency as criminal convictions. In this case, the interpretation would mean that the juvenile's maximum commitment period would be that of an adult with three criminal convictions. However, each of these interpretations would remove the flexibility of juvenile dispositions and frustrate the purpose of the juvenile code. We believe the juvenile code mandates judicial flexibility in juvenile dispositions and draws a clear distinction between adult criminal sentencing and juvenile disposition proceedings.

The State's interpretation of N.C. Gen. Stat. § 7A-652 (c) is further supported by a recent clarifying amendment passed by our General Assembly. The statute, effective 1 December 1996, now reads, "In no

event shall commitment of a delinquent juvenile be for a period of time in excess of the maximum term of imprisonment for which an adult in prior record level VI for felonies or in prior record level III for misdemeanors could be sentenced for the same offense." N.C. Gen. Stat. § 7A-652 (c) (1996). Prior record level VI for felonies and prior record level III for misdemeanors are both the highest prior record levels in each respective category. Thus, it is now apparent that the Legislature intended that a juvenile could be committed for the maximum period allowed for an adult with the highest prior record level, regardless of the number of the juvenile's prior delinquent adjudications.

We find there was ample evidence in the record to support the disposition of commitment since all alternatives to commitment prescribed by statute had been attempted unsuccessfully or were considered and found to be inappropriate. Therefore, the trial court properly ordered that the juvenile be committed for an indefinite term not to exceed 260 days.

Affirmed.

Judges LEWIS and SMITH concur.

IN RE: NETRICA ASBURY, A MINOR CHILD

No. COA96-260

(Filed 7 January 1997)

1. Adoption or Placement for Adoption § 57 (NCI4th)— DSS custody—change of foster homes for adoption—trial court not authorized to interfere

Where legal and physical custody of a child vested in the DSS upon termination of the parental rights of her parents, the DSS was authorized to proceed in its discretion with placing the child for adoption, and the trial court had no authority to interfere with the DSS's decision to remove the child from the current foster home and to place her in another foster home for possible adoption.

Am Jur 2d, Administrative Law §§ 478-480; Adoption §§ 77, 94, 95.

2. Adoption and Placement for Adoption § 57 (NCI4th)— DSS custody—change of foster parents—adoption petition not filed—no authority in trial court

The trial court should not have entertained the guardian ad litem's request for relief from DSS's alleged abuse of discretion in removing a child from one foster home to another for possible adoption where no adoption petition had been filed.

Am Jur 2d, Adoption §§ 111, 117, 129, 130.

Appeal by the attorney advocate for the minor child and by the Mecklenburg County Department of Social Services from order entered 27 September 1995 by Judge Yvonne Mims Evans in Mecklenburg County District Court. Heard in the Court of Appeals 31 October 1996.

Alan B. Edmonds, Associate County Attorney, Mecklenburg County Department of Social Services, for petitioner-appellant/appellee.

W. Frank Porter, P.A., by Lisa C. Bell, Attorney Advocate for respondent-appellant/appellee Guardian Ad Litem for minor child.

WALKER, Judge.

N.A., a minor child, was born addicted to crack cocaine and HIV positive on 12 September 1992 in Mecklenburg County. On 15 September 1992, the Mecklenburg County Department of Social Services (DSS) filed a juvenile petition alleging that N.A. was neglected and dependent. She was subsequently placed in the foster home of Jill Johnson and Sonja Austin. N.A. and her older half brother, M.A., were adjudicated neglected and dependent on 1 December 1992.

On 8 July 1994, the trial court terminated the parental rights of both biological parents of N.A. and M.A., clearing the way for their adoption. M.A. was then placed in the foster-adopt home of Franklin and Sharkeeta Miller (the Millers). On 12 October 1994, the adoption committee of the DSS voted, pursuant to N.C. Gen. Stat. § 7A-659(f) (1995), to move N.A. from her current foster home to the Millers' home in order that the Millers could proceed to adopt her as well as M.A. There is no evidence in the record, however, that the Millers had filed an adoption petition with respect to N.A.

On 13 October 1994, N.A., through her guardian ad litem, filed a motion for an emergency hearing alleging the adoption committee abused its discretion in selecting the Millers as the adoptive parents of N.A., and requested a preliminary injunction prohibiting the DSS from removing N.A. from her current foster home. At a hearing held on 7 November 1994, the trial court granted the preliminary injunction and scheduled the matter for 6 January 1995. After considering the extensive testimony presented at the hearing, the trial court concluded that it was in the best interest of N.A. to remain in the foster home of Jill Johnson and Sonja Austin, but that the DSS had not abused its discretion in its decision to move N.A. to the Millers' home. The court also refused to issue a permanent injunction prohibiting the DSS from removing N.A. from her current foster home. Both the guardian ad litem and the DSS appealed this order, and on 4 October 1995, the trial court granted the guardian ad litem's request for an injunction to prevent N.A. from being moved from her current foster home pending this appeal.

[1] On appeal, the guardian ad litem argues that the trial court erred in failing to find that the DSS abused its discretion in selecting the Millers as the adoptive parents of N.A., in failing to find the DSS's decision contrary to the best interests of N.A., and in failing to issue a permanent injunction prohibiting the DSS from moving N.A. from her current foster home. On the other hand, the DSS contends that the trial court erred in concluding that it was in N.A.'s best interest to remain in her current foster home.

According to N.C. Gen. Stat. § 7A-289.33 (1995), the effect of an order terminating parental rights is set forth as follows:

> [i]f the child had been placed in the custody of . . . a county department of social services or licensed child-placing agency and is in the custody of the agency at the time of the filing of the petition . . . that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of the child as the agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes . . . .

The provisions of Chapter 48 referred to above, N.C. Gen. Stat. § 48-3-705(b)(1) and (2) (1995), state that upon execution, a relinquishment of parental rights by a parent or guardian entitled to place a minor child for adoption vests legal and physical custody

in the agency to whom the rights are relinquished, and that the agency may place the minor for adoption with prospective adoptive parents.

In the present case, since N.A. was in the DSS's custody when her parents' rights were terminated, legal and physical custody of N.A. vested in the DSS upon the trial court entering the order of termination. Our Supreme Court, in *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 707, 281 S.E.2d 370, 375 (1981), has stated that "[l]egal custody never passes to any foster parents charged with the duty of caring for and supervising [a] child. Foster parents are given only physical custody, which the department or agency having legal custody is free to revoke at any time." Thus, when legal and physical custody of N.A. vested in the DSS, it was then authorized to proceed in its discretion with placing N.A. for adoption, and the trial court had no authority to interfere with the DSS's decision to place N.A. with the Millers.

[2] Jurisdiction in adoption cases lies exclusively with the clerk of the superior court. N.C. Gen. Stat. § 48-2-100(a) (1995). Because no adoption petition appears to have been filed in this case and the guardian ad litem was seeking only to prohibit the DSS from moving N.A. from one foster home to another, the trial court should not have entertained the guardian ad litem's request for relief from the DSS's alleged abuse of discretion, or a motion for a permanent injunction. Once an adoption petition has been filed, according to N.C. Gen. Stat. § 7A-659(f),

> [a]ny issue of abuse of discretion by the county department or child-placing agency in the selection process must be raised by the guardian ad litem within 10 days following the date the agency notifies the court and the guardian ad litem in writing of the filing of the adoption petition.

Thus, upon the filing of an adoption petition, the guardian ad litem has ten days from the date written notice of the petition is filed to challenge the DSS's selection process before the clerk of the superior court.

Notwithstanding the question of the trial court's jurisdiction regarding custody of N.A., we need not address this issue further as the trial court refused to interfere with the DSS's decision to place N.A. with the Millers, and the issue of jurisdiction was not raised in either parties' brief.

The injunction entered by the trial court on 4 October 1995 is dissolved and the case is remanded in order that the DSS may proceed with the placement of N.A.

Remanded.

Judges LEWIS and SMITH concur.

STATE OF NORTH CAROLINA v. DANNY LESTER PYATT

No. COA96-213

(Filed 7 January 1997)

1. Criminal § 695 (NCI4th Rev.)— impairing substance—special instructions—oral request—written requirement

The trial court did not err by failing to instruct the jury on the definition of "impairing substance" where defendant, who was arrested and charged with driving while subject to an impairing substance, did not properly request that the definition of "impairing substance" be included in the jury instructions. The only type of request made by defendant for a special instruction was an oral request during the charge conference and this request was insufficient because it was not in writing as required by N.C.G.S. § 15A-1231.

Am Jur 2d, Trial § 1247.

2. Evidence and Witnesses § 1811 (NCI4th)— breathalyzer—impairing substance—willful refusal—admissible

It was not error, much less plain error, for the trial court to instruct the jury in a prosecution for impaired driving that it could consider evidence of defendant's refusal to take an intoxilyzer test without finding that the refusal was willful. N.C.G.S. § 20-139.1(f) does not require a willful refusal before evidence of a refusal is admissible.

Am Jur 2d, Automobiles and Highway Traffic § 379.

Admissibility in criminal case of blood-alcohol test where blood was taken despite defendant's objection or refusal to submit to test. 14 ALR4th 690.

Admissibility in criminal case of evidence that accused refused to take test of intoxication. 26 ALR4th 1112, sec. 1.

3. Automobiles and Other Vehicles § 115 (NCI4th)— motion to dismiss—driving while impaired—revoked license—fine

The trial court did not err in denying defendant's motion to dismiss charges that he was driving while impaired where defendant's basis for dismissal was that it would be double jeopardy because he had previously been punished by having his license revoked and paying a $50 fee. The Supreme Court decided in *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996), that it is not double jeopardy to try an individual for driving while impaired after revoking his license and requiring him to pay a restoration fee for the same offense.

Am Jur 2d, Automobiles and Highway Traffic §§ 137 et seq.

Appeal by defendant from judgment entered 14 September 1995 by Judge Hollis Owens, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 29 October 1996.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery III, for the State.

Roy D. Neill for defendant-appellant.

LEWIS, Judge.

Defendant was arrested and charged with driving while subject to an impairing substance in violation of N.C. Gen. Stat. section 20-138.1. The matter came on for trial in Rutherford County District Court on 2 February 1995 and defendant was found guilty. He appealed to superior court where a jury also returned a guilty verdict. Defendant appeals.

On 27 June 1994, Sergeant J.S. Whiteside of the Forest City Police Department testified that he arrested defendant for driving while impaired and transported him to the intoxilyzer room at the police department. However, when defendant was asked to take the intoxilyzer, he did not blow into the machine long enough to provide a sufficient breath sample, despite Sergeant Whiteside's instructions to blow longer or he would be considered to have refused the test. After two minutes, Sergeant Whiteside marked defendant as refused.

Earlier, after being advised of his Miranda rights, defendant had told Sergeant Whiteside that he had been drinking beer about thirty minutes prior to the time that Whiteside stopped him.

Larry Pyatt, defendant's brother, testified that he and defendant are partners in a wholesale automotive business which re-conditions cars. He further testified that on 27 June 1994, he was with defendant from 6:30 p.m. until 10:30 p.m. and that for most of that time they were painting cars. Mr. Pyatt testified that his brother consumed two beers between 7:30 p.m. and 8:30 p.m., but did not seem affected by them. He also stated that the area in which defendant painted was not ventilated, had no fans and was kept air-tight.

Dr. Hugh Burford, an expert witness in pharmacology, testified that prolonged exposure to substances in the paints used by defendant could result in impaired motor skills, slurred speech and shortness of breath. He further acknowledged on cross-examination that, based on evidence of what defendant was exposed to, it was possible that at the time he was operating the car, he was impaired.

[1] Defendant first argues that as a result of the trial court's failure to define "impairing substance" for the jury, he was "substantially prejudiced." We find no error.

In *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988), the Supreme Court stated:

> N.C.G.S. § 15A-1231 which provides for conferences on jury instructions says, "any party may tender written instructions." Superior and District Court Rules, Rule 21, which deals with jury instruction conferences, says, "If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference." The defendant in this case did not submit his request for instructions in writing. We hold it was not error for the court not to charge on this feature of the case.

Martin, 322 N.C. at 237, 367 S.E.2d at 623.

We find this analysis equally applicable in the present case. It appears from the record that the only type of request made by defendant for his special instruction was an oral request during the charge conference. As *Martin* dictates, this is insufficient.

Additionally, a copy of the requested written instruction, if it was presented to the trial court, is a necessary part of the record on appeal in cases, such as this one, where it is unclear from the tran-

script exactly what instruction was requested. It does not appear from defendant's oral request at the charge conference that he ever actually requested that the definition of "impairing substance" be included in the jury instructions, as he now claims. If we cannot determine what was requested of the trial court, we cannot review the issue on appeal. *See* N.C.R. App. P. 10(b)(1) (1997) (requiring a timely request from trial court for appellate review); *see also, State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete.")

For these reasons, we cannot review defendant's assignments of error based on the alleged insufficient instructions.

[2] Defendant next maintains that the trial court erred in instructing the jury that it could consider defendant's refusal to take the intoxilyzer test without finding that the refusal was willful. Defendant did not object to this instruction, so it is reviewable for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). " 'The plain error rule . . . is always to be applied cautiously,' and 'it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v. Wilkinson*, 344 N.C. 198, 221, 474 S.E.2d 375, 387 (1996) (citations omitted).

"N.C.G.S. § 20-139.1(f) (1993) provides that evidence of a defendant's refusal to submit to a chemical analysis is admissible against him in a DWI prosecution." *State v. O'Rourke*, 114 N.C. App. 435, 438, 442 S.E.2d 137, 138 (1994). Defendant argues that because "willful refusal" is required before a driver's license is revoked under N.C. Gen. Stat. section 20-16.2, the requirement of a "willful" refusal should be read into G.S. 20-139.1.

However, G.S. 20-139.1(f) does not require a willful refusal before evidence of a refusal is admissible and we will not read in this additional requirement. The controlling factor in all statutory construction is the intent of the legislature. *In re Estate of Bryant*, 116 N.C. App. 329, 334, 447 S.E.2d 468, 470 (1994). " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968)).

Applying these tenets of statutory construction to the present case, we determine that the language in G.S. 20-139.1(f) is clear and unambiguous and not subject to judicial interpretation. Additionally, elsewhere in G.S. 20-139.1, the General Assembly used the term "willful refusal." *See* G.S. § 20-139.1(b3) (1993). Obviously, if it had intended to require a "willful" refusal in G.S. 20-139.1(f), it would have done so. We therefore conclude that there was no error, much less plain error, in the trial court's instructions. Defendant's assignment of error is overruled.

[3] Finally, defendant contends that his motion to dismiss should have been granted to prevent a violation of the prohibition against double jeopardy. He argues that the charge against him should have been dismissed since he had previously been punished by having his license revoked and paying a $50 fee. This issue has been decided otherwise by the Supreme Court in *State v. Oliver*, 343 N.C. 202, 210, 470 S.E.2d 16, 21 (1996), and we are bound thereby.

No error.

Judges WALKER and SMITH concur.

WILLIAM MARCH; EARL CRISHER AND WIFE, GALE CRISHER; THOMAS F. SALP AND WIFE, BECKY SALP; W. RICHARD LOMAX; PAUL LESNER AND WIFE, MARGARET LESNER; BILLY CONES AND WIFE, NATALIE CONES; CHARLES WHITE AND WIFE, NELL WHITE; GENE WORRELL AND WIFE, PAGE WORRELL; AND McCAULEY CAMPEN AND WIFE, RUBY M. CAMPEN, PLAINTIFFS-APPELLEES v. TOWN OF KILL DEVIL HILLS, A MUNICIPAL CORPORATION, DEFENDANT-APPELLANT

No. COA96-158

(Filed 7 January 1997)

Highways, Streets, and Roads § 30 (NCI4th)— on-street parking—not parking lot—consistency with street dedication

Forty-four parking spaces established by a town in the center of a boulevard constituted permissible on-street parking consistent with dedication of the boulevard for street purposes and not a parking lot prohibited by the town's zoning ordinance. N.C.G.S. § 160A-301.

Am Jur 2d, Highways, Streets, and Bridges § 10.

Validity and construction of zoning regulations requiring garage or parking space. 74 ALR2d 418.

Zoning: residential off-street parking requirements. 71 ALR4th 529.

Appeal by defendant from judgment entered 28 November 1995 by Judge William C. Griffin, Jr. in Dare County Superior Court. Heard in the Court of Appeals 23 October 1996.

Sharp, Michael, Outten & Graham, L.L.P., by Robert L. Outten, for plaintiffs-appellees.

McCown & McCown, P.A., by Wallace H. McCown; and Michael B. Brough & Associates, by Michael B. Brough; for defendant-appellant.

WALKER, Judge.

Plaintiffs are property owners in the Virginia Dare Shores subdivision in the Town of Kill Devil Hills (the Town). The plat for this subdivision, recorded in 1927, shows a street 100 feet wide known as Hayman Boulevard. The offer of dedication created by the recording of this plat had been accepted by the Town. Hayman Boulevard runs east and west between N.C. Highway 12 and U.S. Highway 158, but was unpaved and not open as a through street between these two highways before this action arose. The Town proposed to open Hayman Boulevard as a through street between N.C. 12 and U.S. 158 with forty-four parking spaces in the center of the street between two travel lanes. Plaintiffs filed a complaint seeking to enjoin the Town from constructing the proposed improvements to Hayman Boulevard. Plaintiffs' motion for summary judgment was granted and defendant's motion for judgment on the pleadings was denied. The judgment states that the trial court reviewed "the pleadings, the evidence presented and arguments of counsel." Thus, we treat defendant's motion likewise as a motion for summary judgment. *Minor v. Minor*, 70 N.C. App. 76, 318 S.E.2d 865, *cert. denied*, 312 N.C. 495, 322 S.E.2d 558 (1984).

Pursuant to N.C.R. Civ. P. 56 (c), "[s]ummary judgment is the device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Johnson v.*

Insurance Co., 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of material fact by the record properly before the court. *Id.* at 252-53, 266 S.E.2d at 615 (*citing Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975)). In this case, the facts are not disputed and only questions of law exist.

Plaintiffs contend that by establishing forty-four parking spaces on this street, the Town created a parking lot and not on-street parking. On the other hand, the Town argues that these parking spaces are incidental to and consistent with the opening of the remaining section of Hayman Boulevard as a street.

The plaintiffs, as purchasers of lots pursuant to this plat, have a right in common with all other citizens to use this dedicated street along with a right of reasonable access to the street for ingress and egress to their property. *Wofford v. State Highway Commission*, 263 N.C. 677, 680, 140 S.E.2d 376, 379 (1965). Even though this section of Hayman Boulevard was not opened and used as a through street for many years, it has long been established in this State that when a street has been dedicated and a municipality has opened it, and it has been used continuously for many years, although the use may not have extended to the full width of the street, the unused portion has not, by reason of nonuser, lost the character of a street for which it was originally dedicated. *Salisbury v. Barnhardt*, 249 N.C. 549, 107 S.E.2d 297, (1959); *Insurance Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E.2d 13 (1940). Thus, the Town is authorized to open the remaining portion of the Hayman Boulevard right-of-way for street purposes as long as the plaintiffs' access to their properties is not unreasonably inhibited. Plaintiffs make no such assertion with regard to the opening of Hayman Boulevard as a street, but only object to the Town providing forty-four parking spaces on this street.

Section 21-2.1 of the Town's zoning ordinance defines a parking lot as "[a]n area or plot of land used for the temporary placement of motor vehicles." However, the Town is authorized by N.C. Gen. Stat. § 160A-301 (1979) to regulate and permit the parking of vehicles on public streets. Subsection (a) of this statute entitled "On-street parking" provides, "[a] city may by ordinance regulate, restrict, and prohibit the parking of vehicles on the public streets, alleys, and bridges within the city. . . ." Plaintiffs' concede that if these forty-four spaces are found to provide parking ancillary to a street rather than a parking lot, it would be within the Town's right to improve Hayman

Boulevard in such a manner. Notwithstanding this concession, plaintiffs contend that the Town does not have the authority to use a right-of-way dedicated for street purposes as a parking lot in violation of the Town's zoning ordinance. However, the definition of parking lot provided in the Town's zoning ordinance does not define when or under what circumstances the number of parking spaces provided on a street would transform it into a parking lot and we decline to provide our own definition.

In *Spicer v. Goldsboro*, 226 N.C. 557, 39 S.E.2d 526 (1946), when faced with a challenge to the City's decision to make improvements within its own right-of-way, our Supreme Court stated:

> It is true plaintiffs allege the action of defendants in directing that the area in question be prepared for paving was arbitrary and capricious. But this is a conclusion unsupported by the evidence. The aldermen had the authority to act. They spoke in respect to a matter within their exclusive jurisdiction. It is presumed they acted in good faith. No fact or circumstance which tends to rebut that presumption is made to appear.

Id. at 560, 39 S.E.2d at 528. In the case at hand, the decision of the Town to undertake the improvement project on Hayman Boulevard was a legitimate exercise of the Town's governmental discretion.

Further, according to McQuillan, *The Law of Municipal Corporations*, Third Edition, Volume 11A § 33.74, in order to "constitute misuser or diversion, the use made of the dedicated property must be inconsistent with the purposes of the dedication or substantially interfere with it." We conclude that the parking improvements made by the Town constitute permissible on-street parking and are consistent with the opening of Hayman Boulevard for street purposes. As such, the trial court erred in granting plaintiffs' motion for summary judgment and in denying defendant's motion which was treated as a motion for summary judgment.

Reversed and remanded.

Judges LEWIS and MARTIN, Mark D. concur.

COE v. HIGHLAND SCHOOL ASSOC. LTD. PART.

[125 N.C. App. 155 (1997)]

MICHAEL G. COE T/A COE ELECTRIC & PLUMBING CO., PLAINTIFF V. HIGHLAND SCHOOL ASSOCIATES LIMITED PARTNERSHIP, CARROLL B. LITTLE, JAMES A. MEZZANOTTE, RICHARD J. REIMAN AND BILLY P. SHADRICK, DEFENDANTS

No. COA96-292

(Filed 7 January 1997)

1. Limitations, Repose and Laches § 13 (NCI4th)— electrical and plumbing work—letter new promise to pay—statute of limitations tolled

The trial court properly denied the defendant debtors' motion for a directed verdict in a claim to recover monies owed where the defendants wrote a letter proposing or offering to pay all creditors, including plaintiff, the principal amount in full due to them plus 6% interest in two equal installments and plaintiff made his claim more than three years after the electrical and plumbing work for the defendants was completed by plaintiff. The language in the defendants' letter manifested a definite and unqualified intention to pay the debt and constituted a new promise to pay and a new contract. Pursuant to N.C.G.S. § 1-26, a new promise to pay an existing debt tolls the three-year statute of limitations for asserting a claim.

Am Jur 2d, Limitation of Actions §§ 319-329.

Part payment or promise to pay judgment as affecting the running of statute of limitations. 45 ALR2d 967.

Necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in acknowledgment or new promise to pay. 21 ALR4th 1121.

2. Limitations, Repose and Laches § 13 (NCI4th)— letter—new promise to pay—amount due—tolling of statute of limitations

The defendant's letter to plaintiff indicating it would pay all creditors, including plaintiff, the "principal amount" in full due to them plus 6% in two equal installments was sufficient to satisfy the requirement of N.C.G.S. § 1-26 that the debtor notify the creditor, in writing, of the amount due. It was not necessary that the writing specifically state the amount owed. It was sufficient that the writing referred to some other means by which the nature and amount of the debt could be ascertained.

Am Jur 2d, Limitation of Actions §§ 334-337.

Necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in acknowledgment or new promise to pay. 21 ALR4th 1121.

Appeal by defendants from judgment entered 13 October 1995 in Forsyth County Superior Court by Judge William Z. Wood, Jr. Heard in the Court of Appeals 20 November 1996.

Robert Tally, P.C., by Robert Tally, for plaintiff-appellee.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Gaither S. Walser, for defendant-appellants.

GREENE, Judge.

Highland School Associates Limited Partnership, Carroll B. Little, James A. Mezzanotte, Richard J. Reiman and Billy P. Shadrick (collectively defendants) appeal from a judgment in the amount of $11,258.46 for the benefit of Michael G. Coe (plaintiff).

Pursuant to a contract the plaintiff performed certain electrical and plumbing work for the defendants and completed that work on 2 January 1991. During the course of the work, the plaintiff provided the defendants with invoices totaling $11,258.46. On or about 20 June 1991, the defendants' counsel sent a letter to the plaintiff stating in pertinent part:

> We have . . . informed you that the partnership has been negotiating a loan, the proceeds of which would be used to pay all creditors approximately seventy-five cents on the dollar. Recently, however, the negotiations regarding the loan have collapsed and bankruptcy appears likely. The Partnership, however, is attempting to avoid bankruptcy and work payment out with all creditors.
>
> In an effort to avoid bankruptcy, the Partnership proposes to pay all creditors the principal amount in full due to them plus 6% interest. No attorneys' fees or late penalties will be paid. Payment will be made in two equal installments in March of 1992 and March of 1993. The Partnership also intends to give a promissory note secured by the property to each creditor. The funds to make the installment payments under the Partnership's proposal will be derived from syndication proceeds received by the Partnership over the next several years.

The last line of the 20 June 1991 letter (letter) requested that the plaintiff sign the "appropriate response below" and return the letter at the "earliest convenience." At the bottom of the page there were two lines: "Accepted" and "Rejected." The plaintiff signed his name in the space marked "Accepted."

After defendants failed to make any of the proposed payments (as set forth in the letter), plaintiff filed this complaint on 5 July 1994 seeking to recover the money owed. At the pre-trial conference the parties stipulated that the amount owing on the debt was $11,258.46. At trial the defendants moved that the plaintiff's claim be dismissed (motion for directed verdict) on the grounds that the claim was barred by the statute of limitations in that it had been filed more than three years after the last work was completed. The trial court denied the motion on the grounds that the letter tolled the running of the statute of limitations.

[1] The issue is whether a letter to a creditor (plaintiff) written by a debtor (defendant) was a new promise to pay the existing debt which tolled the statute of limitations for the plaintiff's claim pursuant to N.C. Gen. Stat. § 1-26 (1996).

Although the statute of limitations on contract obligations is three years, N.C.G.S. § 1-52(1) (1996), a new promise to pay or partial payment of an existing debt may extend the time to collect the debt up to three years from the time of the new promise or partial payment. *See* N.C.G.S. § 1-26 (1996); *see also Smith v. Moore*, 204 N.C. 695, 696, 169 S.E. 634, 635 (1933). However, "[n]o acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby." N.C.G.S. § 1-26. The writing must (1) "show the nature and amount of the debt[,] or must distinctly refer to some writing, or to some other means, by which the nature and amount of it can be ascertained," *American Multimedia, Inc. v. Freedom Distrib., Inc.*, 95 N.C. App. 750, 752, 384 S.E.2d 32, 33 (1989) (quoting *Faison v. Bowden*, 72 N.C. 405, 407 (1875)), *disc. rev. denied*, 326 N.C. 46, 389 S.E.2d 84 (1990), and (2) "manifest a *definite* and *unqualified* intention to pay the debt." *Id.* (emphasis added).

The defendants argue that the letter was an "inquiry letter . . . to determine if what [they] proposed in [the] letter was feasible[,]" and that any promises made in the letter are not sufficiently definite to toll the statute of limitations. We disagree. The letter "proposes" or offers to "pay all creditors [including this plaintiff] the principal

amount in full due to them plus 6% interest," *Black's Law Dictionary*, 1097 (5th ed. 1979) (defines "proposal" as an "offer"), and to do so ("payments will be made") "in two equal installments in March of 1992 and March of 1993." This language manifests a "definite and unqualified" intention to pay the debt.

[2] The defendants next argue that because the letter does not state the amount owed to the plaintiff, it does not qualify under N.C. Gen. Stat. § 1-26. We disagree. It is not necessary that the writing specifically state the amount owed. It is sufficient that the writing refer to some other means by which the nature and amount of the debt can be ascertained. In this case the letter referred to the "principal amount" of the debt which has never been in dispute.

No error.

Judges WYNN and MARTIN, JOHN C., concur.

STATE OF NORTH CAROLINA v. CHARLIE W. HICKS

No. COA96-92

(Filed 7 January 1997)

Indictment, Information, and Criminal Pleadings § 36 (NCI4th)—amendment—not prejudicial—not substantial—habitual felon—defendant's age—no error

The trial court did not err in allowing the State to amend its habitual felon indictment to correctly specify that one of the defendant's felonies was committed prior to his eighteenth birthday. It is permissible to amend an indictment so long as the amendment does not substantially alter the charge set forth in the indictment. N.C.G.S. § 15A-923

Am Jur 2d, Indictments and Informations §§ 166 et seq.

Comment Note.—Power of court to make or permit amendment of indictment. 17 ALR3d 1181.

Appeal by defendant from judgment entered 6 November 1995 by Judge Zoro J. Guice, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 22 October 1996.

Attorney General Michael F. Easley, by Assistant Attorney General David R. Minges, for the State.

Assistant Public Defender John H. Russell, Jr. for defendant-appellee.

WALKER, Judge.

On 16 February 1994, while serving sentences for felony convictions, defendant escaped from the Dallas Prison Unit. On 7 August 1995, defendant was indicted on felony escape and habitual felon charges. The felony escape indictment stated that defendant's felony conviction was imposed on 23 January 1986 in Gaston County.

At trial, the State introduced three convictions in support of the habitual felon allegation: (1) a breaking and entering conviction from Gaston County on 23 January 1986, (2) an assault with a deadly weapon on a law enforcement officer, and (3) a felony larceny conviction. On 6 November 1995, defendant was convicted and pursuant to a plea agreement, he then pled guilty to felony escape.

Defendant contends that the trial court erred in allowing the State to use the 1986 breaking and entering felony in both the felony escape indictment and as one of the three felonies used to sustain the charge of habitual felon. Defendant relies on N.C. Gen. Stat. § 15A-1340.4 (a)(1) to support his contention. This statute prohibited the use of a felony conviction to show an aggravating factor at sentencing when that same felony conviction had previously been used to prove an element of the offense. Defendant argues that the same prohibition should apply here and that the State should not be allowed to use the same underlying felony to prove felony escape and to establish the defendant as an habitual felon. We need not address this precise issue as we cannot conclude from the record that the same felony was used to prove both charges.

The record does reveal that on 23 January 1986, defendant was convicted of two felonies—breaking and entering and common law robbery. The felony escape indictment does not identify the felony for which the defendant was serving a sentence. The record also does not reveal any objection by the defendant to the breaking and entering conviction being used for the habitual felon charge or any objection by the defendant at the sentencing hearing to require the State to elect which felony it intended to use. Thus, we cannot conclude that the breaking and entering felony was used twice.

The habitual felon indictment originally alleged that all of the previous felony convictions were committed after the defendant reached the age of eighteen. Defendant contends that the State should not have been permitted to amend the indictment to allege that all but one of the previous felony convictions were committed after the defendant reached the age of eighteen.

Our Supreme Court discussed the issue of when an amendment to an indictment would be allowed in *State v. Snyder*, 343 N.C. 61, 468 S.E.2d 221 (1996). The Court initially noted that N.C. Gen. Stat. § 15A-923 (e) (1988) provides that a bill of indictment may not be amended and that the term "amendment" . . . means any change in the indictment which would substantially alter the charge set forth in the indictment. *Id.* at 65, 468 S.E.2d at 224 (*citing State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)). Further, in *Snyder*, the Court stated that:

> an indictment . . . is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in the event of conviction.

Id. at 65-66, 468 S.E.2d at 224 (*quoting State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984)).

In the case at hand, the amendment to the indictment against defendant did not substantially alter the charge of habitual felon. The three underlying felonies required to constitute the offense of habitual felon remained the same. The only change was to specify correctly that one of the felonies was committed prior to the defendant's eighteenth birthday. Defendant failed to show that he was prejudiced by the trial court allowing the State to amend the habitual felon indictment.

No error.

Judges LEWIS and MARTIN, Mark D. concur.

STATE OF NORTH CAROLINA v. TONY DOUGLAS CALDWELL

No. COA96-726

(Filed 7 January 1997)

Criminal Law § 1097 (NCI4th Rev.)— no abuse of discretion—first degree burglary—failure to find factors in mitigation—Structured Sentencing Act—legislative intent—no deviation from presumptive sentencing

The trial court did not abuse its discretion by failing to find factors in mitigation for sentencing where the defendant was convicted of first-degree burglary and sentenced to a minimum of eighty-nine months' and a maximum of one hundred sixteen months' active imprisonment, a term within the presumptive range under the Structured Sentencing Act. Pursuant to N.C.G.S. § 15A-1340.13(e) the legislature intended the trial court to take into account factors in aggravation and mitigation only when deviating from the presumptive range in sentencing.

Am Jur 2d, Criminal Law §§ 525 et seq.

Appeal by defendant from judgment entered 6 December 1995 by Judge Joe Freeman Britt in Orange County Superior Court. Heard in the Court of Appeals 2 December 1996.

Attorney General Michael F. Easley, by Associate Attorney General Melanie L. Vtipil, for the State.

Public Defender James E. Williams, Jr., by Assistant Public Defender M. Patricia DeVine, for defendant appellant.

SMITH, Judge.

Defendant was convicted of first-degree burglary and sentenced to a minimum of eighty-nine months' and a maximum of one hundred sixteen months' active imprisonment, a term within the presumptive range under the Structured Sentencing Act.

The circumstances surrounding defendant's arrest and conviction are not pertinent to the issue raised on appeal and will not be discussed herein. Defendant's sole argument on appeal is that the trial court abused its discretion by failing to find factors in mitigation for sentencing purposes. Defendant recognizes that the sentence imposed was within the presumptive range under the Structured

Sentencing Act, and as such is discretionary with the trial court. *See* N.C. Gen. Stat. § 15A-1340.17(c)(2) (Cum. Supp. 1996) ("A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted . . . ."). However, he contends that because sentences imposed under the Act result in time which will actually be served, the trial court's discretion should be curtailed. Accordingly, defendant asserts that even when sentencing within the presumptive range, the trial court should be required to take into account evidence of aggravating and/or mitigating factors in imposing sentence. For the following reasons, we find no abuse of discretion by the trial court.

We are mindful that by virtue of the recency of the enactment of the Structured Sentencing Act, many of its intricacies will be the subject of much interpretation in the future. However, we also recognize that absent precedent, we are bound by the plain language of the act in determining the legislative intent. "In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished. The best indicia of that legislative purpose are the language of the act and what the act seeks to accomplish." *Wagoner v. Hiatt*, 111 N.C. App. 448, 450, 432 S.E.2d 417, 418 (1993). It is clear from our examination of the language of the Act that the legislature intended the trial court to take into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.

N.C. Gen Stat. § 15A-1340.13(e) (Cum. Supp. 1996) states that "[t]he court may deviate from the presumptive range of minimum sentences . . . if it finds, pursuant to G.S. 15A-1340.16, that aggravating or mitigating circumstances support such a deviation." Further, N.C. Gen. Stat. § 15A-1340.16 permits the court to consider evidence of aggravating and/or mitigating factors if appropriate, "but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a) (Cum. Supp. 1996). Finally, we note that the court is only required to make written findings in aggravation or mitigation "if, in its discretion, it departs from the presumptive range of sentences . . . ." N.C. Gen. Stat. § 15A-1340.16(c) (Cum. Supp. 1996).

It is clear from the plain language of these statutes that the Legislature intended to provide the trial court with a window of discretion to be exercised when sentencing a criminal defendant within the presumptive range. It is not the province of this Court to impose

the additional requirement that the trial court justify its decision by making findings of aggravation and mitigation subject to appellate review.

For these reasons, we find defendant received a fair trial and sentencing, free from prejudicial error.

No error.

Judges WYNN and MARTIN, Mark D., concur.

KURT HART SAXON, PLAINTIFF v. COURTNEY SMITH AND COURTNEY SMITH, LTD., DEFENDANTS

No. COA95-1312

(Filed 21 January 1997)

1. Appeal and Error § 112 (NCI4th)— jurisdiction—motion to dismiss—right of immediate appeal

An interested party has the right of immediate appeal from an adverse ruling as to jurisdiction over the person or property of defendant, but such appeal is limited to a determination of whether North Carolina statutes permit our courts to entertain the action and, if so, whether that violates due process. N.C.G.S. § 1-277(b).

Am Jur 2d, Appellate Review § 147.

Appealability of order relating to transfer, on jurisdictional grounds, of cause from one state court to another. 78 ALR2d 1204.

2. Courts § 15.2 (NCI4th)— personal jurisdiction—sale of Iron Frame Henry rifle—publication of newsletter—actions for libel and slander, abuse of process, and intentional infliction of emotional distress

The trial court did not err in an action for libel and slander, malicious prosecution, abuse of process, and intentional infliction of emotional distress arising from a dispute over the purchase of a collectible gun and the publication of a newsletter by denying defendants' motion to dismiss for lack of jurisdiction

where plaintiff's claims may be properly characterized as alleging injuries to person or property within the purview of N.C.G.S. § 1-75.4; libel and slander is generally held to occur wherever the offending material is circulated and defendants admitted that the newsletter which contained the allegedly defamatory material was distributed to approximately 100 residents in North Carolina; abuse of process occurs within the jurisdiction in which the process is served, notwithstanding that it may have originated in another jurisdiction and, although defendant contends that he simply alerted Virginia authorities to plaintiff's actions, the trial court's unchallenged findings were that defendants communicated complaints and information regarding plaintiff to law enforcement officials in Virginia which caused North Carolina criminal process to be issued; as to the intentional infliction of emotional distress and malicious prosecution claims, defendants' distribution of the newsletter in North Carolina and registering of a complaint with law enforcement authorities were actions directed at plaintiff within this state and the alleged resultant harm occurred in North Carolina.

Am Jur 2d, Process §§ 178, 186-194.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state. 83 ALR4th 1006.

3. Courts § 14 (NCI4th)— personal jurisdiction—sale of Iron Frame Henry rifle—publication of newsletter—minimum contacts

The exercise of personal jurisdiction over Virginia defendants on claims for libel and slander, malicious prosecution, abuse of process, and intentional infliction of emotional distress arising from a dispute over the purchase of a collectible gun and the publication of a newsletter did not violate due process where the quantity of defendants' contacts with North Carolina may not have been extensive, but was sufficient for purposes of N.C.G.S. § 1-75.4, especially considering that the alleged injury under each claim was suffered by plaintiff within North Carolina.

Am Jur 2d, Process §§ 178, 186-194.

Propriety, under due process clause of Fourteenth Amendment, of forum state's assertion or exercise of jurisdiction over nonresident defendant in defamation action. 79 L. Ed. 2d 992.

4. Courts § 19 (NCI4th)— Virginia action for fraud and breach of warranty—North Carolina claims including defamation—N.C. stay denied—no abuse of process

There was no abuse of discretion where a trial court denied a motion to stay a North Carolina action pending resolution of a Virginia complaint. N.C.G.S. § 1-75.12(a).

Am Jur 2d, Courts § 95.

Stay of civil proceedings pending determination of action in another state or country. 19 ALR2d 301.

Appeal by defendant from order entered 17 August 1995 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 1996.

James, McElroy & Diehl, P.A., by Ann L. Hester and Edward T. Hinson, Jr., for plaintiff-appellee.

Morris, York, Williams, Surles, & Brearley, by John P. Barringer and Joseph N. Crosswhite, for Defendant-appellant.

JOHN, Judge.

Defendants appeal the trial court's denial of their motions to dismiss for lack of personal jurisdiction and to stay prosecution pending conclusion of related litigation in Virginia. We affirm.

The allegations of plaintiff's complaint, defendants' answer, and discovery conducted by the parties reflect the following pertinent information: Plaintiff, a resident of Mecklenburg County, North Carolina, is an antique firearms dealer, while defendant Courtney Smith (Smith) is a gun dealer who operates defendant Courtney Smith, Ltd., in Henrico County, Virginia. Plaintiff made purchases from defendants who were vendors at gun shows in Mecklenburg County, North Carolina in August 1993 and February 1994. At a February 1993 gun show in Richmond, Virginia, plaintiff first mentioned to Smith that he owned a rifle which an expert had identified to plaintiff as an Iron Frame Henry Rifle (the rifle). Smith subsequently contacted plaintiff, both by telephone and letter from Virginia and, following negotiations, purchased the rifle for $40,000. The gun was delivered by plaintiff to Smith at a gun show in Richmond. Thereafter, Smith solicited the opinion of firearms examiner Eric Vaule and was informed the rifle was not an original Iron Frame Henry. According to plaintiff, a second appraiser, Norm Vegley,

declared the gun to be an authentic Iron Frame Henry rifle that had been "restored." Smith demanded that the purchase price be refunded, but plaintiff refused.

In May 1994, Smith initiated a civil action against plaintiff in Henrico County, Virginia, asserting fraud, breach of warranty, and breach of duty to deal in good faith and fair dealing. At filing of the parties' appellate briefs, this matter remained pending in the Virginia trial court.

In addition, as the result of Smith's complaint to the Henrico County, Virginia police department, a warrant was issued for plaintiff's arrest. Plaintiff alleged law enforcement officials were not informed two experts had declared the rifle to be authentic, but that Smith had represented plaintiff to be armed and dangerous. Plaintiff also asserted Smith encouraged Virginia law enforcement officers to "arrange for a bond appropriately [*sic.*] to the amount indicated by the fraud," *i.e.*, that Smith had attempted to use the criminal process to secure payment of his alleged claim. A fugitive arrest warrant was eventually obtained against plaintiff which was served by the Matthews, North Carolina Police Department. All charges against plaintiff were ultimately dropped or dismissed by Henrico County.

Plaintiff further alleged defendants published the following report in the September or November 1994 issue of their quarterly newsletter, entitled "News, Views and Just Things":

> THE GREAT 40 thou FRAUD . . . most of you now know or have heard of the big rip off involving me with the purchase of a fake gun from one our southern brothers. Well, now, seems like this gent won't make the deal "right". The system does work a little slow in resolving matters like this but the process is in progress . . .CRIMINAL FRAUD will be answered to the POLICE . . . (warrant for his arrest is outstanding) CIVIL FRAUD will be answered in COURT and as my lawyer lets me, I'll be giving you up to date reports, naming dates, time and above all "the NAME" of this gentleman . . . A real jewel.

Smith acknowledged preparing and sending the newsletter to "friends, customers, dealers and those who have attended or who express an interest" in gun shows, and stated the mailing list for the publication contained approximately 1,500 persons, "less than 7% [of whom] reside in North Carolina."

Plaintiff filed the instant action 7 March 1995, alleging claims of libel and slander, malicious prosecution, abuse of process, and intentional infliction of emotional distress. Defendants' 28 April 1995 answer included a motion to dismiss under N.C.G.S. § 1A-1 Rule 12(b)(2) (1990) for lack of personal jurisdiction, as well as a motion to stay the proceedings under N.C.G.S. § 1-75.12(a) (1996) pending outcome of the Virginia litigation.

The trial court denied both motions in a 17 August 1995 order, which recited, *inter alia*, the following:

> 1. . . . In the case of the claims for malicious prosecution, abuse of process and intentional infliction of emotional distress, the Court finds that these are actions claiming injury to person within this state arising out of acts or omissions alleged to have occurred outside the state by the Defendants.
>
> 2. In the claim of slander and libel, the Court finds that such claim is for an action within this state arising out of an act or omission outside this state by Defendants and might also be construed to be an act or omission committed by Defendants within this state. (Plaintiff bases his claim for slander and libel in part upon a written communication alleged to have been authored by Defendants and sent to newsletter subscribers within the State of North Carolina communicating allegedly libelous material concerning Plaintiff. Plaintiff's claim for slander and libel also includes allegations of communications made in Virginia which lead to harm in North Carolina).
>
> 3. Defendants solicited or carried out service activities within North Carolina at or about the time of the injury claimed as follows:
>
> (a) Defendants solicited Plaintiff by telephone to request that he sell them the rifle at issue in this case; and
>
> (b) Defendants participated in a gun show in North Carolina, offering for sale firearms within this state.
>
> 4. Defendants communicated complaints and information regarding Plaintiff to law enforcement officials in Virginia which allegedly were intended to and did cause North Carolina criminal process to be issued against the Plaintiff and the Plaintiff to be arrested in North Carolina.

> BASED ON THE FOREGOING FINDINGS OF FACT, the Court concludes as a matter of law that jurisdiction over Defendants and the claims alleged is conferred by North Carolina's Long Arm Statute, N.C.G.S. § 1-75.4, and the exercise of that statutorily conferred power will not violate the due process clause of the United States Constitution because Defendants have sufficient minimum contacts with North Carolina so that the maintenance of this suit does not offend traditional notions of fair play and substantial justice.

Defendants filed timely notice of appeal.

[1] Defendants raise two arguments on appeal. They first contend the trial court erred by denying the motion to dismiss "where defendants lack[ed] sufficient minimum contact" with North Carolina "to justify the State exercising personal jurisdiction over them." Second, defendants challenge the court's denial of their motion to stay. We discuss each question separately.

> Initially, we observe that
>
> [a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant. . . .

N.C.G.S. § 1-277(b) (1996). Such appeal is limited to a determination of whether North Carolina statutes permit our courts "to entertain this action against defendant[s], and, if so, whether this exercise of jurisdiction violates due process." *Styleco, Inc. v. Stoutco, Inc.*, 62 N.C. App. 525, 526, 302 S.E.2d 888, 889, *disc. review denied*, 309 N.C. 825, 310 S.E.2d 358 (1983). Accordingly, we first examine the applicable statutory provisions.

[2] N.C.G.S. § 1-75.4 (1996), commonly referred to as the "long arm" statute, *Dillon v. Funding Corp.* 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977), provides in relevant part that:

> A court of this State having jurisdiction over the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) 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.

(4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this state or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

a. Solicitation or services activities were carried on within this State by or on behalf of the defendant; or

b. Products, materials or things processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.

Upon challenge to personal jurisdiction by a defendant, the plaintiff assumes "the burden of proving *prima facie* that a statutory basis for jurisdiction exists." *Godwin v. Walls*, 118 N.C. App. 341, 347, 455 S.E.2d 473, 481, *disc. review allowed*, 341 N.C. 419, 461 S.E.2d 757 (1995) (citation omitted). Defendants herein have set forth no assignments of error attacking the trial court's findings of fact supporting its determination of jurisdiction over each cause of action advanced by plaintiff. The court's findings are thus presumed to be correct. *See Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986) (failure of appellant "to except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence . . . will result in a waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact").

Notwithstanding their failure to challenge the court's findings, defendants argue generally that "there simply is no evidence that the Defendants committed one or more acts within North Carolina" so as to confer personal jurisdiction under G.S. § 1-75.4. In support of this assertion, defendants discuss at length cases holding that personal jurisdiction is not conferred by signing a contract with a North Carolina resident, *Robinson v. Hinkley*, 119 N.C. App. 434, 436, 458 S.E.2d 715, 716 (1995), nor by mere telephone contact with an individual located in North Carolina, *Curvcraft, Inc. v. J.C.F. and Assoc., Inc.*, 84 N.C. App. 450, 452, 352 S.E.2d 848, 849 (1987), nor by placing advertisements in a periodical. *Hankins v. Somers*, 39 N.C. App. 617, 620-21, 251 S.E.2d 640, 643 (1979). However, these cases speak to per-

sonal jurisdiction in the context of a contractual relationship and are inapposite.

As noted above, plaintiff has asserted claims of libel and slander, abuse of process, malicious prosecution and intentional infliction of emotional distress. G.S. § 1-75.4 is to be accorded a liberal construction, *Vishay Intertechnology, Inc. v. Delta Intern. Corp.*, 696 F.2d 1062, 1065 (4th Cir. 1982), and the term "injury to person or property" as used in the statute

> should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages.

Sherwood v. Sherwood, 29 N.C. App. 112, 115, 223 S.E.2d 509, 512 (1976). While defendants do not raise the issue, we believe plaintiff's claims may properly be characterized as alleging "injur[ies] to person or property" within the purview of the statute. *See id.* at 116, 223 S.E.2d at 512 ("injury to person or property" includes claim based upon marital abandonment); *Golding v. Taylor*, 19 N.C. App. 245, 247, 198 S.E.2d 478, 479, *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973) (actions for alienation of affection and criminal conversation which involve wrongs willfully inflicted and the deprivation of marital companionship and cohabitation fall within statute); and *Godwin*, 118 N.C. App. at 350, 455 S.E.2d at 480 (claims of negligent infliction of emotional distress and loss of consortium properly classified as "injur[ies] to person or property" under statute).

Turning to plaintiff's libel and slander cause of action, the tort "is generally held to occur wherever the offending material is circulated." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777, 79 L. Ed. 2d 790, 799 (1984) (citing Restatement (Second) of Torts § 577A, Comment *a* (1977)). We note Smith admitted in his affidavit that defendants' newsletter, containing the allegedly defamatory material, was distributed to approximately 100 residents of North Carolina. Accordingly, defendants' alleged publication of defamatory material in North Carolina would constitute a "claim[] [for] injury to person . . . within this State arising out of an act . . . within this State by the defendant[s]," thus conferring personal jurisdiction over defendants under G.S. § 1-75.4(3).

The trial court also determined alternatively that personal jurisdiction regarding plaintiff's libel and slander claim was conferred

pursuant to G.S. § 1-75.4(4). As we uphold the trial court ruling under G.S. § 1-75.4(3), the independent basis for the trial court's decision may be treated as surplusage and need not be discussed further.

Abuse of process is tortious conduct occurring in the jurisdiction within which the process is served, notwithstanding that it may have originated in another jurisdiction. *Vishay*, 696 F.2d at 1067-68. Defendants attempt to distinguish *Vishay* on grounds the California plaintiff therein brought a civil breach of contract action in that state and served process for that civil action in North Carolina. Defendants argue Smith simply alerted Virginia law enforcement officials regarding plaintiff's alleged actions, and insist that neither defendant

> personally initiated criminal actions against Plaintiff and there is no evidence that a request to extradite to North Carolina was ever asserted or that Defendants even demanded criminal action be taken.

Defendants' argument cannot be sustained.

We again observe that defendants failed to assign error to the trial court's findings and thus waived any argument directed at insufficiency of the evidence to support those findings. *See Concrete Service*, 79 N.C. App. at 684, 340 S.E.2d at 759-60. The court found as fact that

> defendants communicated complaints and information regarding Plaintiff to law enforcement officials in Virginia which . . . did cause North Carolina criminal process to be issued against the Plaintiff and Plaintiff to be arrested in North Carolina.

This uncontested finding, in addition to the court's unchallenged findings regarding defendants' contacts with this State, support imposition of personal jurisdiction over defendants pursuant to G.S. § 1-75.4(4) as to plaintiff's abuse of process claim, *i.e.*, as an out-of-state act alleged to have caused injury to plaintiff within North Carolina.

Moreover, this Court in *Moore v. City of Creedmoor*, 120 N.C. App. 27, 460 S.E.2d 899 (1995), *disc. review allowed*, 342 N.C. 658, 467 S.E.2d 718 (1996), recently rejected an argument similar to that of defendants. In *Moore*, we held that evidence tending to show defendant "initiated" or "instituted, procured or participated in," *id.* at 39, 460 S.E.2d at 906, as opposed to "actually filed," an earlier nuisance abatement action brought by the city would satisfy, for purposes of

surviving summary judgment, the "initiated" element of a malicious prosecution claim based upon the prior civil nuisance suit. In similar vein, we believe plaintiff's detailed allegations of Smith's direct role in "initiating" the Virginia criminal proceedings were sufficient for purposes of overcoming defendants' N.C.R. Civ. P. 12(b)(2) to challenge to plaintiff's abuse of process claim.

Personal jurisdiction likewise was properly assumed over defendants under G.S. § 1-75.4(4) regarding plaintiff's intentional infliction of emotional distress and malicious prosecution claims in that North Carolina was the situs of the tortious injury alleged in each. Defendants' distribution of the newsletter in North Carolina and registering of a complaint with law enforcement authorities were actions directed at plaintiff within this state. The alleged resultant harm occurred in North Carolina, the residence of plaintiff, not Virginia, the location of defendants. As the United States Supreme Court stated in *Calder v. Jones*, 465 U.S. 783, 788-89, 79 L. Ed. 2d 804, 811-12 (1984):

> [h]ere, the plaintiff is the focus of the activities of the defendant out of which the suit arises . . . the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

See also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 541 (1985) (defendant given fair warning his conduct may subject him to jurisdiction of foreign state when "defendant has 'purposefully directed' his activities at residents of the forum . . ., and the litigation results from alleged injuries that 'arise out of or relate to' those activities"), and *Keeton*, 465 U.S. at 774, 79 L. Ed. 2d at 797 (publisher who distributes magazines in distant state accountable in that state for damages arising therein from allegedly defamatory story).

[3] Having concluded plaintiff met his initial burden of a *prima facie* showing that personal jurisdiction over defendants was conferred under G.S. § 1-75.4 as to each of plaintiff's claims, we turn to the second prong of the two-part analysis applicable to personal jurisdiction questions, i.e., whether the exercise of personal jurisdiction over

defendants pursuant to the statute is violative of due process. *Styleco*, 62 N.C. App. at 526, 302 S.E.2d at 889.

Under our "long arm" statute, North Carolina courts may obtain personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the United States Constitution. *Trust Co. v. McDaniel*, 18 N.C. App. 644, 646, 197 S.E.2d 556, 558 (1973), *overruled on other grounds*, *Buying Group, Inc. v. Coleman*, 296 N.C. 510, 517-18, 251 S.E.2d 610, 615-16 (1979). Due process requires that the prospective defendant have "minimum contacts" with the forum state "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (citations omitted). The existence of "minimum contacts" depends upon the particular facts of each individual case. *Coleman*, 296 N.C. at 517-18, 251 S.E.2d at 615-16. Among appropriate factors to be considered are the quantity and nature of the contact, the relationship between the contact and the cause of action, the interest of the forum state, the convenience of the parties, and the location of witnesses and material evidence. *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 531, 265 S.E.2d 476, 479 (1980) (citations omitted).

We have determined above that, while the quantity of defendants' contacts with North Carolina may not have been extensive, they were sufficient for purposes of G.S. § 1-75.4, especially considering that the alleged injury under each claim was suffered by plaintiff within this State. *See Centura Bank*, 119 N.C. App. at 213-14, 458 S.E.2d at 18. This latter circumstance demonstrates a decided relationship between the contacts and plaintiff's claims and likewise favors plaintiff when weighing factors of the convenience of parties and location of witnesses and evidence. Moreover, North Carolina has a strong interest in protecting its citizens from local injury caused by the tortious conduct of foreign citizens:

> In light of the powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors, the court has more readily found assertions of jurisdiction constitutional in tort cases.

Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 609, 334 S.E.2d 91, 93 (1985) (state has strong interest in protecting persons doing business in North Carolina against employee fraud notwithstanding that contact limited to mailing fraudulent claims into this state). In sum, we do not believe maintenance of plaintiff's claims against defendants,

under the circumstances *sub judice*, in any way "offends traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316, 90 L. Ed. at 102.

[4] Finally, we address defendants' contention that the trial court erred by denying their motion to stay the instant action pending resolution of the Virginia complaint filed by Smith against plaintiff. The decision of whether to order such a stay under G.S. § 1-75.12(a) was committed to the court's sound discretion. *Management, Inc. v. Development Co.*, 46 N.C. App. 707, 711, 266 S.E.2d 368, 370, *disc. review denied and appeal dismissed*, 301 N.C. 93, 273 S.E.2d 299 (1980). Electing to treat defendants' assignment of error directed to this issue as a petition for writ of certiorari, *see* N.C.G.S. § 1-75.12(c) (review of denial of motion is "by means of a writ of certiorari"), we perceive no abuse of discretion in the denial of defendants' motion.

Affirmed.

Judges GREENE and MARTIN, Mark D., concur.

WILMINGTON STAR-NEWS, INC. D/B/A THE WILMINGTON MORNING STAR v. NEW HANOVER REGIONAL MEDICAL CENTER, INC., A NON-PROFIT CORPORATION D/B/A NEW HANOVER REGIONAL MEDICAL CENTER v. PHP, INC.

No. COA96-542

(21 January 1997)

1. Records of Instruments, Documents, or Things § 4 (NCI4th)— hospital price lists—Public Records Act—not a private document

A summary judgment for plaintiff newspaper which ordered disclosure of an HMO's price lists by defendant hospital was affirmed where the hospital (Medical Center), which admits that it is a public hospital subject to the North Carolina Public Records Act, and the HMO (PHP) negotiated a hospital participation agreement; the agreement specified that the terms of the agreement were confidential; price lists were included as appendices; the plaintiff requested a complete copy of the agreement; the hospital delivered a copy which did not include the appendices; plaintiff sought access under the Public Records Act; the

hospital filed a third party complaint against the HMO seeking reimbursement of fees and expenses; the HMO responded with a counterclaim seeking a declaratory judgment that the price lists are trade secrets and not subject to disclosure; and the trial court granted plaintiff's motion for summary judgment, ordered immediate disclosure, and subsequently stayed enforcement of that order pending appeal. A reasonable trier of fact could conclude that the price lists constitute trade secrets; however, the information must also be the property of a private person as defined by N.C.G.S. § 132-1.2 in order to be exempted from disclosure. The plain language suggests a legislative intent to limit this exclusion to nongovernmental agencies, it is not disputed that the hospital is a governmental agency within the meaning of the Public Records Act, and it would defy logic to insist that negotiated price lists belong solely to the HMO and not also to the hospital. Because the price lists are not the property of a single person with the meaning of N.C.G.S. § 132-1.2(2), the respondents are not entitled to the benefit of the statutory exemption from disclosure.

Am Jur 2d, Records and Recording Laws §§ 1-7.

2. Appeal and Error § 187 (NCI4th)— Public Records Act—order of disclosure—trial court stay pending appeal

The trial court possessed the legal authority to stay its own orders pending appeal in a case under the Public Records Act involving a price list negotiated between a public hospital and an HMO. Plaintiff newspaper cited no authority for its contention that the general principals of civil procedure do not apply in Public Records Act litigation unless specifically incorporated in the text of the statutes and fails to consider that statutes in derogation of the common law and statutes depriving courts of jurisdiction are strictly construed. N.C.G.S. § 1A-1, Rule 62(d).

Am Jur 2d, Appellate Review §§ 143, 144.

Appeal by respondents from order entered 19 March 1995 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 7 October 1996.

Petitioner Wilmington Star-News, Inc. (Morning Star) is a North Carolina corporation that publishes The Wilmington Morning Star, a daily newspaper of general circulation serving New Hanover County and the surrounding area. Respondent New Hanover Regional Medical Center (Medical Center) is a nonprofit, full service, acute

care hospital located in New Hanover County, North Carolina. Medical Center admits that it is a public hospital subject to the North Carolina Public Records Act. Third-party respondent PHP, Inc. (PHP) is a North Carolina corporation authorized to operate a health maintenance organization under Article 67 of Chapter 58 of the North Carolina General Statutes. PHP operates an extensive managed health care organization (HMO) throughout North Carolina from its principal place of business in Guilford County, North Carolina.

In April 1994, Medical Center and PHP began negotiating the terms of a Hospital Participation Agreement wherein Medical Center promised to provide health care services to PHP members at certain specified prices. The agreement was to include price lists specifying the costs and reimbursement rates at which certain Medical Center services would be provided to participating PHP customers. In September 1994, Susan B. Craft, Vice President of Operations of PHP, provided a proposed Hospital Participation Agreement to Mr. James Eyerman, a representative of Medical Center, which included the proposed price lists for hospital services. Section 10.8 of the proposed agreement specified that the terms of the agreement were confidential between Medical Center and PHP and that the terms shall not be divulged to anyone not a party to the agreement. Ms. Craft also advised Mr. Eyerman that the particular pricing information included in the agreement was confidential and should not be disclosed. Medical Center, through Mr. Eyerman, agreed to protect the confidentiality of the agreement. On 7 November 1994, Medical Center and PHP executed a Hospital Participation Agreement effective 1 January 1995 and expiring 31 December 1997. Attached to that agreement were several appendices listing the negotiated prices for hospital services.

On 9 January 1995, Morning Star requested Medical Center to provide a complete copy of the agreement between Medical Center and PHP from the hospital, including the appendices containing the price lists. Medical Center contacted PHP before providing any information to Morning Star. PHP advised Medical Center that the confidential pricing information contained in the appendices to the agreement were trade secrets of PHP and that disclosure of that information to Morning Star may subject Medical Center to liability for misappropriation for trade secrets. On 18 January 1995, Medical Center delivered to Morning Star a copy of the agreement but did not include the appendices containing the price lists designated as trade secrets by PHP.

On 17 May 1995, Morning Star filed an Application for an Order Compelling Disclosure of Public Records in New Hanover County Superior Court seeking access to the appendices pursuant to the North Carolina Public Records Act. Medical Center responded and filed a third party complaint against PHP requesting reimbursement of any fees and expenses assessed against it as a result of this litigation. PHP responded with a Counterclaim for Declaratory relief requesting that the trial court enter an order declaring that the subject price lists are trade secrets and not subject to disclosure under the Public Records Act. Morning Star and PHP both moved the court for summary judgment. On 19 March 1995 the trial court denied PHP's motion for summary judgment and granted summary judgment for Morning Star and ordered immediate disclosure of the price lists to Morning Star. Medical Center sought an order staying enforcement of the judgment pending appeal. On 20 March 1995 the trial court granted the requested stay delaying enforcement of its earlier order pending appeal. PHP and Medical Center now appeal the trial court's order granting summary judgment to Morning Star and requiring Medical Center to disclose the price lists. Morning Star appeals the trial court's stay order.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak and Marcus W. Trathen, for petitioner-appellee Wilmington Star-News, Inc.

Marshall, Williams & Gorham, L.L.P., by A. Dumay Gorham, Jr., for respondent-appellant New Hanover Regional Medical Center.

Newson, Graham, Hedrick & Kennon, P.A., by Joel M. Craig and Michelle B. Beischer, for respondent-appellant PHP, Inc.

EAGLES, Judge.

PHP's Appeal

[1] This case of first impression presents the issue of whether price lists in a contract between a public hospital and a private HMO are trade secrets as defined by G.S. 66-152 and not subject to disclosure under the North Carolina Public Records Act pursuant to G.S. 132-1 *et seq.* (1995). Medical Center and PHP do not dispute that Medical Center is subject to the provisions of the Public Records Act; however, they argue, *inter alia*, that the information in dispute is excepted from the Act on the grounds that it concerns "competitive

health care activities" pursuant to G.S. 131E-97.3 (1993), or on the grounds that it constitutes "confidential information" pursuant to G.S. 132-1.2 (1989).

Our standard of review for summary judgment is whether there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Aetna Casualty & Surety Co. v. Welch*, 92 N.C. App. 211, 212, 373 S.E.2d 887, 888 (1988). In ruling on a summary judgment motion, the court should consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. *See Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). The court must view the evidence presented by both parties in the light most favorable to the nonmoving party. *Id.* at 666, 449 S.E.2d at 242.

We note that in 1996 the General Assembly enacted G.S. 131E-99 (1995) of the Hospital Licensure Act entitled "Confidentiality of health care contracts." 1995 S.L. (Regular Session, 1996) c.713, s.2. G.S. 131E-99 provides as follows:

> The financial terms or other competitive health care information in a contract related to the provision of health care between a hospital and a managed care organization, insurance company, employer, or other payer is confidential and not a public record under Chapter 132 of the General Statutes.

However, the legislation specifically provided that this section not affect any litigation pending prior to ratification on 21 June 1996 and shall expire 1 June 1997. 1995 S.L. (Regular Session 1996) c.713, s.4. Therefore, this section provides us with little more than a basis for conjecture as to the legislative intent surrounding the meaning of "competitive health care activities" pursuant to G.S. 131E-97.3.

The section of the Hospital Licensure Act entitled "Confidentiality of competitive health care information" provides as follows:

> Information relating to competitive health care activities by or on behalf of hospitals shall be confidential and not a public record under Chapter 132 of the General Statutes; provided that any contract entered into by or on behalf of a public hospital, as defined in G.S. 159-39, shall be a public record unless otherwise exempted by law.

G.S. 131E-97.3. The plain language of this section exempts certain information from the Public Records Act when two requirements are

met: (1) The material must relate to competitive health care; and (2) the material must not be a contract executed with a public hospital. Here there is an executed contract between Medical Center and PHP. The price lists in dispute are part of that contract. Therefore, G.S. 131E-97.3 does not exempt the price lists from the Public Records Act, but it does not prohibit other exceptions to the Public Records Act.

G.S. 132-1.2 exempts from disclosure confidential information that meets all of the following requirements:

> (1) Constitutes a "trade secret" as defined in G.S. 66-152(3);
>
> (2) Is the property of a private "person" as defined in G.S. 66-152(2);
>
> (3) Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State; *and*
>
> (4) Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

G.S. 132-1.2 (emphasis added).

The term "trade secret" is defined in the Trade Secrets Protection Act as follows:

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique or process that:
>
> a. Derives independent, actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

G.S. 66-152(3) (1992). According to the plain language of G.S. 66-152(3), trade secrets may concern business information that is for-

mulated or compiled and that meets two requirements: (1) The information must have commercial value from not being known or readily ascertainable; and (2) reasonable efforts must be made to keep the information secret. Here in order to survive Morning Star's motion for summary judgment, PHP must allege facts sufficient to allow a reasonable finder of fact to conclude that the negotiated price lists meet these two requirements of a trade secret. *Bank Travel Bank v. McCoy*, 802 F. Supp. 1358, 1360 (E.D.N.C. 1992) (citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 552 (1986)), *order affirmed*, *Amariglio-Dunn v. McCoy*, 4 F.3d 984 (4th Cir. 1993).

No decisions in North Carolina have concluded that a negotiated price list is a trade secret within the meaning of G.S. 66-152(3). Respondents argue that the decisions of *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C. App. 292, 399 S.E.2d 340 (1991) and *N.C. Elec. Membership Corp. v. N.C. Dept. of Economic and Community Dev.*, 108 N.C. App. 711, 425 S.E.2d 440 (1993) support their position that the price lists may constitute trade secrets.

In *Huffines* the Court concluded that general information requested about laboratory experiments on animals did not constitute trade secrets. 101 N.C. App. at 296, 399 S.E.2d at 343. However, the *Huffines* Court commented that such disclosure requests about laboratory experiments may seek patentable information that may constitute trade secrets, and therefore, requests for disclosure of this information should be reviewed on a case by case basis. *Id.* In *N.C. Elec. Membership Corp.* this Court found that documents containing pricing information, market forecasts, and feasibility studies that were developed unilaterally by the party seeking to enjoin disclosure, were trade secrets. 108 N.C. App. at 715, 718, 425 S.E.2d at 442, 444. Neither of these cases concerned information similar to the price lists here, but rather, involved information that was patentable, unilaterally created, business forecasts, feasibility studies, or pricing formulas. Both of these cases imply that a case by case determination of the kind or type of information in dispute is necessary. However, G.S. 66-152(3) seems to require a deeper inquiry.

Other jurisdictions in interpreting similar trade secret statutes have determined the following factors should be considered:

(1) The extent to which information is known outside the business;

(2) the extent to which it is known to employees and others involved in the business;

(3) the extent of measures taken to guard secrecy of the information;

(4) the value of information to business and its competitors;

(5) the amount of effort or money expended in developing the information; and

(6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Ecolab Inc. v. Paolo, 753 F. Supp. 1100, 1111-12 (E.D.N.Y 1991) (citing *Integrated Cash Management Services v. Digital Transactions, Inc.*, 920 F.2d 171, 173 (2nd Cir. 1990); *Eagle Comtronics, Inc. v. Pico, Inc.*, 453 N.Y.S. 2d 470, 472 (1982) (price discount, product use, and preference information constituted trade secrets under New York law)); *see also Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1346 (data on prices bid by each hospital and corresponding calculations used to decide which hospitals to include in PPO were unquestionably sensitive trade secrets), *reh'g denied*, 788 F.2d 1223 (7th Cir. 1986).

Here the pleadings, admissions, affidavits, interrogatories viewed in the light most favorable to PHP and Medical Center indicated the following: The disclosure of the financial terms of a contract between an HMO and a hospital would be of substantial economic benefit to the competitors of that HMO; each HMO member of the North Carolina HMO Association considers the financial terms of its agreements with health care providers to be confidential trade secrets; disclosure of the financial terms of specific contracts between HMOs and health care providers would be detrimental to competition in the industry and would impair the ability of HMOs to control the rising costs of health care; "secret pricing" is more important to vigorous competition in a concentrated market; PHP and Medical Center are in a concentrated market; HMOs in North Carolina and nationally view price terms of their contracts with health providers as extremely important to keep secret; PHP advised the hospital that the pricing information was confidential at the beginning of negotiations over the agreement; the agreement specifies that "the parties agree to maintain the confidentiality of this agreement, and shall not divulge the terms to any third party . . ."; the price lists were accessible only to a

limited number of people; physicians did not have access to the price lists; and it would be extremely difficult for an HMO's competitors to generate this specific information. No testimony revealed the difficulty or amount of money expended to generate the price list. We conclude that in the light most favorable to PHP and Medical Center a reasonable trier of fact could conclude that the price lists constitute trade secrets.

However, in order for information to be exempted from disclosure under the Public Records Act, G.S. 132-1.2 also requires that the confidential information be the "property of a private 'person' as defined in G.S. 66-152(2)." G.S. 66-152(2) defines "person" broadly as "an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity." However, G.S. 132-1.2(2) juxtaposes "private" next to "person." The plain language suggests a legislative intent to limit this exclusion from the Public Records Act to nongovernmental agencies. Here it is not disputed that Medical Center is a governmental agency within the meaning of the Public Records Act. *See* G.S. 132-1; *see also News and Observer Publishing Co. v. Wake County Hospital Sys.*, 55 N.C. App. 1, 248 S.E.2d 542 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151, *cert. denied*, 459 U.S. 803, 74 L. Ed. 2d 42 (1982) (private, non-profit hospital corporation, subject to supervision by Wake County and financed by county bonds, was an agency of county within purview of the Public Records Act). Also, it would defy logic to insist that negotiated price lists belong solely to PHP and not also to Medical Center. We respectfully conclude that because the price lists here are not property of a private person within the meaning of G.S. 132-1.2(2), the respondents are not entitled to the benefit of the statutory exemption from disclosure pursuant to the Public Records Act. The trial court's order compelling disclosure is affirmed.

We recognize that this holding arguably may adversely affect public hospitals' ability to compete with nongovernmental entities but we consider that question an appropriate legislative issue. As to any arguable competitive disadvantage to PHP, we consider appropriate the succinct observation of the United States District Court for the District of Columbia, "[d]isclosure of prices charged the Government is a cost of doing business with the Government." *Recal-Milgo Gov't Sys. v. Small Business Admin.*, 559 F. Supp. 4, 6 (D.C. 1981).

Affirmed.

MORNING STAR'S APPEAL

[2] Morning Star fails to bring forward or advance any argument in its unnumbered second assignment of error that the trial judge abused his discretion in issuing the stay order; therefore, this assignment of error is deemed abandoned pursuant to the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 28(b)(4).

The issue before us is whether the trial court has the legal authority to stay its own orders pending appeal in cases involving the Public Records Act. Morning Star argues that while the General Court of Justice possesses jurisdiction under the Public Records Act to issue an order compelling disclosure of public records, the trial divisions of the Court lack any authority to stay enforcement of their decisions. Morning Star argues that the absence of express statutory language conferring authority to issue stays pending appeal indicates a legislative intent to withhold that authority. In addition, Morning Star argues that the statutory language conferring on the trial court the general statutory power to stay execution of judgments directing the delivery of documents and personal property pursuant to G.S. 1-290 does not apply to public records. We find Morning Star's argument wholly without merit.

Rule 62(d) of the North Carolina Rules of Civil Procedure empowers trial courts to issue stay orders pending appeal as follows:

> When an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of [G.S. 1-289 through 1-295].

Morning Star contends that G.S. 1-290 which concerns the procedure for obtaining a stay from the trial court directing delivery of documents, only applies to private property and not public records. Morning Star cites no authority for its contention that the general principles of civil procedure do not apply in Public Records Act litigation unless specifically incorporated in the text of the statutes. Furthermore, Morning Star fails to consider that statutes in derogation of the common law and statutes depriving courts of jurisdiction are to be strictly construed. *See Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919); *State v. Sullivan*, 110 N.C. 513, 14 S.E. 796 (1892). We hold that the trial court possesses the legal authority to stay its own orders pending appeal in cases involving the Public Records Act. *See News and Observer Publishing Co. v. State ex rel.*

Starling, 312 N.C. 276, 322 S.E.2d 133 (1984); *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992); *N.C. Press Assoc. v. Spangler*, 87 N.C. App. 169, 360 S.E.2d 138 (1987).

Affirmed.

Judges MARTIN, John C., and SMITH concur.

IN THE MATTER OF: THE APPEAL OF SPRINGMOOR, INC. AND AMMONS, INC. FROM THE DENIAL OF APPLICATIONS FOR EXEMPTION BY THE WAKE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1994

No. COA96-113

(Filed 21 January 1997)

1. **Constitutional Law § 51 (NCI4th)— property tax exemption—homes for aged—religious affiliation—constitutionality—standing**

Springmoor, a retirement community for the aged, sick, and infirm, had standing to address the constitutionality of N.C.G.S. § 105-275(32), which exempts from taxation homes for the aged, sick and infirm which are owned, operated and managed by entities including religious bodies, where Springmoor alleged that the statute discriminates against the class of homes which are non-religious and non-Masonic. Although Springmoor is not the owner of the real property, it does own personal property for which an exemption was denied because it was not owned and operated by a Masonic organization or religious body and it has established a genuine grievance and alleged such a personal stake in the outcome that the necessary concrete adverseness can be assured.

Am Jur 2d, Constitutional Law § 202.

2. **Constitutional Law § 119 (NCI4th); Taxation § 28 (NCI4th)— property tax exemption—homes for the aged—religious affiliation—unconstitutional**

N.C.G.S. § 105-275(32)(v), which exempts from property tax homes for the sick, aged, and infirm which are owned, operated, and managed by a religious body, violates the constitutional prohibition against the establishment of religion as found in the First

Amendment of the United States Constitution and Article I, section 13 of the North Carolina Constitution. The constitutional infirmity arises because the statute distinguishes within the class of homes for the aged, sick and infirm those that are religiously affiliated and those that perform essentially the same functions but lack any religious affiliation, granting exemption to the former while denying exemption to the later. The classification is narrowly divided so as to prefer religion over non-religion, no legitimate secular objection sufficient to justify this preference can be identified, and the effect is hardly one of benevolent and secular neutrality. However, applying the doctrine of severability, only subpart (v) is unconstitutional and the remainder of N.C.G.S. § 105-275(32) may stand independent of the unconstitutional subpart.

Am Jur 2d, Constitutional Law §§ 464 et seq.

Appeal by Springmoor, Inc., and Ammons, Inc., from order entered 16 November 1995 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 9 October 1996.

On 27 January 1994, taxpayer Ammons, Inc., ("Ammons") requested a real property tax exemption for its property located at 1500 Sawmill Road in Raleigh, North Carolina. The property was, and still is, leased to taxpayer Springmoor, Inc., ("Springmoor") a North Carolina non-profit corporation, for use as a retirement community for the aged, sick and infirm. Concurrent with Ammons' request for exemption, Springmoor filed a request for a personal property tax exemption on certain items of personal property owned by Springmoor and used in the operation of the home for the aged, sick and infirm.

On 22 February 1994, the Wake County Tax Assessor ("Assessor") denied both requests, and both parties appealed to the Wake County Board of Equalization and Review ("Board"). Thereafter, on 25 April 1994, the Board agreed with the Assessor and denied taxpayers' request for an exemption. On appeal, the North Carolina Property Tax Commission ("Commission") affirmed and set forth the following conclusions of law in its opinion:

1. Springmoor qualifies for exemption under G.S. 105-275(32) under subsections (i) through (iv) and (vi), but does not meet the requirements of subsection (v) of that statute.

2. Springmoor would be entitled to exemption under G.S. 105-275(32) if it were owned and operated by a Masonic organization or if it were affiliated with a religious body.

3. The Court of Appeals has noted that the Property Tax Commission does not have the authority to act upon constitutional challenges to tax statutes. Johnston v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984), cert. denied, 313 N.C. 508, 320 S.E.2d 392 (1985). However, by raising constitutional challenges at this level, Taxpayer preserves them for decision by the appellate Courts. Id., 71 N.C. App. at 713, citing Great American Insurance Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961). Thus, this Commission is limited to opining without deciding the constitutionality of the statutory exclusion for religiously affiliated retirement centers.

This Commission has stated in an earlier case that G.S. 105-275(32) is of doubtful constitutional validity. . . .

The Commission entered this order on 16 November 1995. Taxpayers Springmoor and Ammons filed timely notice of appeal on 7 December 1995 and excepted to the Commission's order on the grounds that G.S. 105-275(32) is unconstitutional. Wake County then cross-assigned error to the Commission's order, asserting that G.S. 105-275(32) is unconstitutional and that, the whole of G.S. 105-275(32) being unconstitutional, taxpayers are therefore not exempt from taxation here.

Wake County Attorney's Office by Deputy County Attorney Shelley T. Eason for appellee/cross-appellant Wake County.

James M. Kimzey for appellants Springmoor and Ammons.

Poyner & Spruill, L.L.P., by Susanne F. Hayes and Robin T. Morris, for amicus curiae Non-Profit Qualifying Homes for the Aging.

EAGLES, Judge.

[1] We first address the threshold question of whether either appellant Springmoor, appellant Ammons, or cross-appellant Wake County, has standing to challenge the constitutionality of G.S. 105-275(32). It is well-established that "in order to challenge the constitutionality of a tax statute, an appellant must be a 'member of the class subject to discrimination.' " *In re Appeal of Moravian Home, Inc.*, 95 N.C. App.

324, 329, 382 S.E.2d 772, 775, *disc. review denied*, 325 N.C. 707, 388 S.E.2d 457 (1989) (quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 772 (1974)).

> "Only those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights. . . ." The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "

Stanley v. Dept. of Conservation and Development, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (citations omitted). Applying this standard we first consider whether appellant taxpayer Springmoor has standing to maintain this appeal.

Springmoor alleges that G.S. 105-275(32) "discriminates against the class of homes for the aged, sick, or infirm, which are non-religious and non-Masonic." *In re Appeal of Barbour*, 112 N.C. App. 368, 373-74, 436 S.E.2d 169, 173 (1993). Springmoor is a member of this class. Although Springmoor is not the owner of the real property on which its home for the aged, sick and infirm is located, Springmoor does own the personal property for which it sought exemption pursuant to G.S. 105-275(32) and Springmoor uses that personal property "in the operation of [the] home." G.S. 105-275(32) (1995). The Commission here reviewed Springmoor's application for exemption accordingly and determined that Springmoor would be entitled to an exemption except that it "does not meet the requirements of subsection (v) of that statute . . ." because Springmoor is not "owned and operated by a Masonic organization or . . . religious body." No party assigns error to the Commission's determination in this regard.

Since Springmoor is a member of the class affected, we believe that Springmoor here has established a "genuine grievance" and "alleged such a personal stake in the outcome of the controversy . . ." that the necessary "concrete adverseness" can be assured. *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650 (citations omitted). Consequently, we conclude that Springmoor is under no disability to challenge the constitutionality of G.S. 105-275(32). Having determined that appellant

Springmoor has standing to challenge the constitutionality of G.S. 105-275(32), we need not consider whether appellant Ammons and cross-appellant Wake County have standing to mount that identical challenge.

[2] We now address the dispositive issue of whether G.S. 105-275(32) is an unconstitutional establishment of religion in violation of either Article I, section 13 of the North Carolina Constitution or of the Establishment Clause of the First Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 14-15, 91 L. Ed. 711, 722-23 (1947). We hold that G.S. 105-275(32)(v) is unconstitutional on its face as violative of both the federal and State Constitutions.

G.S. 105-275 is entitled "[p]roperty classified and excluded from the tax base." The constitutional challenge here is focused solely against G.S. 105-275(32), and more specifically against part (v) of subsection (32). G.S. 105-275(32) provides that the following property shall be exempted from taxation:

> Real and personal property owned by a home for the aged, sick, or infirm, that is exempt from tax under Article 4 of this Chapter, and used in the operation of that home. The term "home for the aged, sick, or infirm" means a self-contained community that (i) is designed for elderly residents; (ii) operates a skilled nursing facility, an intermediate care facility, or a home for the aged; (iii) includes residential dwelling units, recreational facilities, and service facilities; (iv) the charter of which provides that in the event of dissolution, its assets will revert or be conveyed to an entity organized exclusively for charitable, educational, scientific, or religious purposes, and which qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1986; *(v) is owned, operated, and managed by one of the following entities:*
>
> > *A. A congregation, parish, mission, synagogue, temple, or similar local unit of a church or religious body;*
> >
> > *B. A conference, association, division, presbytery, diocese, district, synod, or similar unit of a church or religious body;*
> >
> > *C. A Masonic organization whose property is excluded from taxation pursuant to G.S. 105-275(18); or*

D. A nonprofit corporation governed by a board of directors at least a majority of whose members elected for terms commencing on or before December 31, 1987, shall have been elected or confirmed by, and all of whose members elected for terms commencing after December 31, 1987, shall be selected by, one or more entities described in A., B., or C. of this subdivision, or organized for a religious purpose as defined in G.S. 105-278.3(d)(1); and

(vi) has an active program to generate funds through one or more sources, such as gifts, grants, trusts, bequests, endowment, or an annual giving program, to assist the home in serving persons who might not be able to reside at the home without financial assistance or subsidy.

G.S. 105-275(32) (emphasis added).

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. In *Heritage Village Church v. State*, 299 N.C. 399, 406, 263 S.E.2d 726, 730 (1980), our Supreme Court recognized that, although the language of our State constitution differs from that of the federal constitution, the North Carolina Constitution provides the same protection in Article I, section 13:

> All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

N.C. CONST. art. I, §13. This prohibition against the establishment of religion contained in both the federal and State constitutions provides at least the following limitation on governmental action:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson, 330 U.S. at 15-16, 91 L. Ed. at 723; s*ee Heritage Village*, 299 N.C. at 406, 263 S.E.2d at 730.

At the heart of the Establishment Clause is the requirement that government maintain a position of secular neutrality toward religion such that government should not prefer one religion over another, or religion over non-religion. *E.g.*, *Heritage Village*, 299 N.C. at 406-07, 263 S.E.2d at 730-31; *Epperson v. Arkansas*, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 234 (1968).

> The Legislature oversteps the bounds of this separation when it enacts a regulatory scheme which, whether in purpose, substantive effect, or administrative procedure, tends to "control or interfere" with religious affairs, or to "discriminate" along religious lines, or to constitute a law "respecting" the establishment of religion. Stated simply, the constitutional mandate is one of secular neutrality toward religion.

Heritage Village, 299 N.C. at 406, 263 S.E.2d at 730. For a challenged statute "to pass muster under the strict test of Establishment Clause neutrality, it must pass the three-prong review . . ." first articulated by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 755 (1971). *Heritage Village*, 299 N.C. at 407, 263 S.E.2d at 731. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Lemon*, 403 U.S. at 612-13, 29 L. Ed. 2d at 755 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674, 25 L. Ed. 2d 697, 704 (1970)) (citation omitted).

Applying these criteria to the statutory provision before us, we conclude that G.S. 105-275(32)(v) violates the constitutional prohibition against the establishment of religion as found in both the federal and State constitutions.

In *Walz v. Tax Commission*, the United States Supreme Court upheld a New York law exempting from taxation certain properties used solely for religious worship. 397 U.S. 664, 674, 25 L. Ed. 2d 697, 704 (1970). The statute upheld in *Walz* addressed only the classification of property used solely for religious purposes. Unlike the statute before us here, however, the statute upheld in *Walz* did not "single[] out one particular church or religious group or even churches as such; rather, it . . . granted exemption to all houses of religious wor-

ship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. *Walz*, 397 U.S. at 673, 25 L. Ed. 2d at 703.

Unlike *Walz*, the broad classification of property addressed by the statute in question here is "[r]eal and personal property owned by a home for the aged, sick, or infirm, . . . and used in the operation of that home." G.S. 105-275(32). This broad classification, standing alone without further qualification, would undeniably be a constitutionally permissible classification. The alleged constitutional infirmity here arises because G.S. 105-275(32) distinguishes, within this class of "home[s] for the aged, sick and infirm," between those that are religiously affiliated and those that perform essentially the same functions but lack any religious affiliation, and G.S. 105-275(32) grants exemption to the former while denying exemption to the latter.

As opposed to the broad and undivided classification drawn in *Walz*, the broader classification here is narrowly divided so as to prefer religion over non-religion. In this context, we can identify no legitimate secular objective sufficient to justify this preference. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17, 103 L. Ed. 2d 1, 14 (1989). Moreover, the effect of G.S. 105-275(32)(v) is hardly one of benevolent and secular neutrality. *E.g.*, *Heritage Village*, 299 N.C. at 409, 263 S.E.2d at 732. As the United States Supreme Court stated in *Texas Monthly*, when a statute granting a tax exemption "directs [the exemption] exclusively to religious organizations . . ." the statute generally provides an " 'unjustifiable award[] of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." 489 U.S. at 15, 103 L. Ed. 2d at 13.

The final question we address is whether we must invalidate as unconstitutional all of G.S. 105-275(32) or whether we may constitutionally invalidate only subpart (v) which contains the impermissible religious preference. The issue is one of severability.

"The general proposition must be . . . that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter may be disregarded." *Norfolk Southern R.R. v. Reid*, 187 N.C. 320, 325, 121 S.E. 534, 537 (1924) (citations omitted).

> The question whether the rule of severability shall be applied to save partially unconstitutional legislation from being struck down *in toto* involves, fundamentally, a determination of and conformity with the intent of the legislative body which enacted the legislation. However, in determining what was (or must be deemed to have been) the intention of the legislature, certain tests of severability have been developed. Thus, it is held that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void; and effect may be given to the remaining portions. . . .

State v. Fredell, 283 N.C. 242, 245, 195 S.E.2d 300, 302 (1973) (citation omitted).

Applying these principles here, we conclude that only subpart (v) is unconstitutional and accordingly invalid. The remainder of G.S. 105-275(32) may stand independent of the unconstitutional subpart (v). In reaching this conclusion, we believe the context in which G.S. 105-275(32) was enacted to be particularly significant.

The General Assembly enacted G.S. 105-275(32) "after homes set up as communities to care for the elderly or infirm lost their status as tax-exempt charitable institutions . . . ." *In re Appeal of Barbour*, 112 N.C. App. 368, 378, 436 S.E.2d 169, 176 (1993). By enacting G.S. 105-275(32), the General Assembly clearly intended "to promote communities for the elderly without giving a tax windfall to all residential property owners." *Id.* Therefore, we hold that, after eliminating the invalid part (v) of 105-275(32), the "remaining provisions [of G.S. 105-275(32)] are operative and sufficient to accomplish their proper purpose . . ." of promoting communities for the elderly. This holding, applying the doctrine of severability here, best accords with the purpose of the statute and the clear legislative intent in enacting the statute. We need not address appellants' remaining assignments of error.

Reversed.

Judges MARTIN, JOHN C., and SMITH concur.

STEVEN T. ALT, PLAINTIFF v. JOHN UMSTEAD HOSPITAL, DEFENDANT

No. COA96-416

(Filed 21 January 1997)

1. Judgments § 207 (NCI4th)— restraint of psychiatric patient—prior claims including malicious prosecution and false imprisonment—current claim under Tort Claims Act for negligence—not collaterally estopped

The Industrial Commission did not err by concluding that plaintiff was not collaterally estopped from bringing a negligence claim under the State Tort Claims Act arising from being placed in seclusion and restraints by defendant hospital's employees where summary judgment was granted for individual physicians and officials of defendant hospital in a prior action arising from the same incident in which plaintiff sought damages for malicious prosecution, false imprisonment, and deprivation of constitutional and statutory rights. The dispositive issues in the first action were whether a criminal proceeding initiated against plaintiff was terminated in his favor and whether the individual defendants restrained plaintiff in violation of requisite procedures and in the exercise of professional judgment. In this action, the dispositive issue is whether the actions of defendant's employees conformed to the applicable standards of medical practice among members of the same health care profession with similar training and experience. Moreover, the requirement that the issue must have been raised and actually litigated is not satisfied in that exclusive original jurisdiction of claims against the State or its institutions and agencies in which injury is alleged to have occurred as a result of the negligence of a State employee is vested in the Industrial Commission, so that plaintiff's negligence claim could not have been adjudicated in the prior proceeding.

Am Jur 2d, Judgments §§ 650, 651.

2. Physicians, Surgeons, and Other Health Care Professionals § 123 (NCI4th)— restraint of psychiatric patient—negligence

The Industrial Commission did not err by concluding in a Tort Claims Act suit that defendant's employees were negligent in restraining plaintiff psychiatric patient and that such negligence injured plaintiff where an expert in psychiatry and neurology testified that throughout the psychiatric community, including North

Carolina, seclusion and restraint is an extreme measure used in the control of violent and suicidal behavior, that the initial decision to impose seclusion and restraint on plaintiff was not consistent with the recognized psychiatric standard of practice applicable to institutions such as defendant hospital, and that the failure to release plaintiff within the first three hours was also a violation of the applicable standards of practice. The Commission's findings are conclusive on appeal if supported by any competent evidence, whether or not the evidence would support contrary findings.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 205-220.

Appeal by defendant from the decision and order entered 12 January 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 1997.

Carolina Legal Assistance, Inc., by Deborah Greenblatt, for plaintiff-appellee.

Attorney General Michael F. Easley, by Associate Attorney General Johnathan P. Babb, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff filed this claim under the provisions of the State Tort Claims Act, alleging he had been injured by the medical negligence of defendant John Umstead Hospital and its employees. Specifically, plaintiff alleged that defendant's employees, Dr. Parker and Nurse DeBerry, had failed to comply with the standards of practice in the psychiatric profession regarding the use of seclusion and restraint. Defendant hospital denied plaintiff's allegations of negligence.

This suit is the second legal action to arise out of an incident occurring at defendant hospital on or about 22 February 1990. In *Alt v. Parker*, filed in the Superior Court of Guilford County, plaintiff sought damages against individual physicians and officials at defendant hospital, alleging malicious prosecution, false imprisonment, and deprivation of constitutional and statutory rights. Defendants' motion for summary judgment dismissing all claims was allowed by the trial court, and, by an opinion filed 19 October 1993, this Court affirmed. *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994).

Defendant hospital moved for summary judgment in the present action on the grounds that the dismissal of the claims against the defendants in *Alt v. Parker* was a bar to this action on *res judicata* principles. The motion was denied by the deputy commissioner and the matter proceeded to a hearing. The evidence before the deputy commissioner may be briefly summarized as tending to show the following:

Plaintiff was involuntarily admitted to defendant hospital, a state psychiatric hospital, in November 1989 after he claimed to have taken an overdose of Tylenol. Dr. Parker, defendant's employee, was assigned to be plaintiff's treating psychiatrist. During the course of plaintiff's medical treatment it was discovered that plaintiff was infected with the Human Immunodeficiency Virus (HIV). At all times relevant to this case, plaintiff suffered from mixed personality disorder with narcissistic and histrionic features. Plaintiff did not respect Dr. Parker professionally, and had a poor relationship with other members of the staff. Plaintiff often refused to talk to staff members who had less than a doctoral degree, and openly called staff members derogatory names.

The vocational rehabilitation staff and others at defendant hospital were working with plaintiff to secure a residence and a job for him in the community. On the morning of 22 February 1990, plaintiff missed an appointment for a job interview. That afternoon, Dr. Parker and social worker Carol High, met with plaintiff. At the meeting, Dr. Parker discussed plaintiff's HIV condition with him, and Dr. Parker and Ms. High also confronted plaintiff with their suspicion that he had missed his job interview in order to sabotage his discharge. The meeting ended at approximately 4:00 p.m. with angry words between plaintiff and Dr. Parker and Ms. High. Shortly thereafter, Dr. Parker wrote a discharge order for plaintiff effective that day with a note stating, "Patient does not appear to be an acute danger to himself or others and did not voice suicidal or homicidal thoughts during the encounter." At approximately 5:00 p.m., Dr. Parker amended the order for plaintiff's brother to pick up plaintiff the following day.

At approximately 5:25 p.m., plaintiff threw his dinner tray against the wall of the ward. A health care technician reported plaintiff's behavior to Nurse DeBerry, who then ordered that plaintiff be placed in seclusion and restraints. Nurse DeBerry called Dr. Parker and informed him of plaintiff's behavior, who gave Nurse DeBerry verbal authorization for plaintiff to be secluded and restrained up to eight

hours. At 11:40 p.m., Dr. Parker visited plaintiff in the seclusion room. Plaintiff remained in four-point leather restraints throughout the night.

Plaintiff offered evidence that he had sustained emotional injury as a result of the incident. The parties offered conflicting evidence as to whether the actions of Dr. Parker and Nurse DeBerry in placing plaintiff in seclusion and restraint conformed to the standards of professional psychiatric practice applicable to institutions such as defendant.

The deputy commissioner denied plaintiff's claim in a Decision and Order dated 18 January 1995. Plaintiff appealed to the Full Commission. By a Decision and Order filed 12 January 1996, the Full Commission reversed the deputy commissioner's decision. The Commission made the following findings of fact:

> 17. The decision of Dr. Parker and Nurse DeBerry to place plaintiff into seclusion and restraints at about 5:25 p.m. on February 22nd, 1990 was not in keeping with community standards of medical practice and was not justified by plaintiff's behavior, the state rules, or hospital policies. Throwing a tray and shouting obscenities do not constitute imminent danger to others or to a patient so as to justify the use of seclusion and restraint under psychiatric and medical standards of practice in February 1990. The behavior of Nurse DeBerry, smarting from being called names by her patient and unable to get her patient to be compliant, was one of punishment rather than treatment. Dr. Parker aided and abetted in this punishment. Irrational actions by a psychiatric patient are to be expected, and what might call for punishment in a mentally stable patient does not justify punishment of a mental deficient patient.
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> . . .
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> 21. The failure of Defendants DeBerry and Parker to release plaintiff from four-point restraints during the first three hours of his restraint was a violation of acceptable professional standards. Between 5:30 p.m. when plaintiff was placed into seclusion and restraints and 11:30 p.m. on February 22nd, 1990, Dr. Parker failed to visit or examine plaintiff, notwithstanding the fact that he was aware of plaintiff's several requests to see him and notwithstanding the fact that he was on the grounds of John Umstead Hospital the entire time. Under the facts and circum-

stances in this case, and having given verbal authorization to Nurse DeBerry to seclude and restrain plaintiff, Dr. Parker should have seen Mr. Alt immediately. His failure to do so within three hours of ordering seclusion and restraint was a departure from accepted standards.

Based on these findings, the Full Commission concluded:

1. . . . Dr. Parker and Nurse DeBerry of John Umstead Hospital were negligent in their care of plaintiff Stephen Alt inasmuch as their implementation of seclusion and restraint upon plaintiff on 22 and 23 February 1990 was not reasonable and in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in similar communities in February of 1990. G.S. § 143-291 *et seq.*

2. Defendant argues that the essential elements of plaintiff's claim under the tort claims act have been determined in *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993) and that plaintiff is collaterally estopped from relitigation of the same issues and facts. We disagree. The issues were not the same. The suit was for malicious prosecution (not involved here), false imprisonment (only collaterally involved, since a hospital and its staff can be not guilty of false imprisonment but guilty of negligence based on the same facts), and deprivation of due process (not involved here). The Industrial Commission is the court of original jurisdiction in state tort claims. G.S. § 143-291 *et seq.* The instant case is the first time the court of original jurisdiction has considered the facts of the instant case . . . .

3. As the result of being negligently restrained on 22 and 23 February 1990, plaintiff sustained mental and emotional damages entitling him to be paid an amount equal to $5,000.00 by defendant as compensation. *Id.*

Defendant appeals from the Decision and Order of the Full Commission.

Defendant's assignments of error raise two questions: (1) whether the Full Commission erred in finding plaintiff was not collaterally estopped from bringing this medical negligence claim; and (2) whether the evidence supports the Commission's finding that the placing of plaintiff in seclusion and restraints by defendant's employees was a departure from acceptable standards, supporting its legal conclusion that plaintiff was injured as a result of defendant's

employees' negligent acts. Defendant's remaining assignment of error, relating to the deputy commissioner's denial of its motion for summary judgment, has been abandoned by its failure to advance any argument in support of the assignment of error. N.C.R. App. P. 28(b)(5).

[1] Defendant contends the Full Commission erred in concluding that plaintiff was not collaterally estopped from bringing his negligence claim. Defendant argues that our decision in *Alt v. Parker, supra,* affirming summary judgment in favor of defendant on plaintiff's claims for malicious prosecution, false imprisonment and deprivation of due process, precludes plaintiff from bringing his medical negligence claim before the Industrial Commission.

The elements of collateral estoppel are: (1) the prior suit resulted in a judgment on the merits; (2) identical issues are involved; (3) the issue was actually litigated and necessary to the judgment; and (4) the issue was actually determined. *Thomas M. McInnis & Associates, Inc., v. Hall,* 318 N.C. 421, 349 S.E.2d 552 (1986).

Collateral estoppel does not apply in the instant case because the second requirement that the issues in the two actions be identical is not met. Although the factual allegations underlying the two claims are the same, different issues are involved. In plaintiff's first action, the dispositive issues, were whether a criminal proceeding initiated against plaintiff was terminated in his favor, and whether the individual defendants, who were employees of defendant hospital, restrained defendant in violation of requisite procedures and in the exercise of professional judgment. In the instant action, the dispositive issue is whether the actions of defendant's employees conformed to the applicable standards of medical practice among members of the same health care profession with similar training and experience. The issues are quite distinct.

Moreover, the third requirement that the issue must have been raised and actually litigated is not satisfied. Pursuant to the State Tort Claims Act, exclusive original jurisdiction of claims against the State or its institutions and agencies, in which injury is alleged to have occurred as a result of the negligence of an employee of the State, is vested in the North Carolina Industrial Commission. N.C. Gen. Stat. § 143-291 *et seq.* (1996). Thus, plaintiff's negligence claim against defendant hospital could not have been adjudicated in the prior proceeding because the Superior Court had no jurisdiction over a tort claim against the State.

[2] Defendant hospital next argues that there was no competent evidence to support the Commission's findings that defendant's employees, Dr. Parker and Nurse DeBerry, had not acted in accordance with the applicable standards of practice in placing plaintiff in seclusion and restraint. Thus, defendant hospital contends, the Commission erred in its legal conclusion that defendant's employees were negligent and that such negligence injured plaintiff.

Appellate review of Industrial Commission decisions is limited to a determination of whether there was any competent evidence before the Commission to support the Commission's findings of fact and whether those findings support its legal conclusions and decision. N.C. Gen. Stat. § 143-293; *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence, whether or not the evidence would support contrary findings. *Id.* "Negligence is a mixed question of law and fact, and we must determine whether the facts found by the Industrial Commission support its conclusion of negligence." *Woodlard v. N.C. Dept. of Transportation*, 93 N.C. App. 214, 218, 377 S.E.2d 267, 269, *cert. denied*, 325 N.C. 230, 381 S.E.2d 792 (1989).

Plaintiff presented evidence tending to show that Dr. Parker had noted, in his progress notes dated 22 February 1990 at 4:00 p.m., that plaintiff did not appear to be an acute danger to himself or others and did not voice suicidal or homicidal thoughts during the encounter between plaintiff, Dr. Parker and Ms. High. The seclusion and restraint notes dated 22 February 1990 at 5:30 p.m. states that plaintiff may have seclusion and restraint for up to eight hours "for out of control behavior" and that plaintiff may be released when he can "contract for appropriate behavior and is calm."

Dr. Kenneth J. Tardiff, tendered as an expert in psychiatry and neurology, testified that throughout the psychiatric community, including North Carolina, seclusion and restraint "is an extreme measure used in terms of the control of violence or suicidal behavior." Dr. Tardiff testified that he was of the opinion that the initial decision to impose seclusion and restraint on plaintiff was not consistent with the recognized psychiatric standards of practice applicable to institutions such as defendant hospital. Dr. Tardiff further testified that Dr. Parker and Nurse DeBerry's failure to release plaintiff within the first three hours of his seclusion and restraint was also a violation of the applicable standards of practice. This evidence supports the

Commission's finding that the actions of defendant's employees in placing plaintiff in seclusion and restraints was not in keeping with the applicable psychiatric standards of practice. Those findings, in turn, support the Commission's conclusion that Dr. Parker and Nurse DeBerry breached the duty of care owed to plaintiff, entitling plaintiff to damages for the emotional injuries sustained by him. Accordingly, the Commission's award must be affirmed.

Affirmed.

Judges EAGLES and GREENE concur.

TOMMY EDWARD HAAS, JR., PLAINTIFF v. JOHN GREGORY CLAYTON, DEFENDANT

No. COA96-119

(Filed 21 January 1997)

Automobiles and Other Vehicles § 310 (NCI4th)— plaintiff struck while helping stranded motorist—instruction on wilfully impeding traffic—erroneous

The trial court erred in a negligence action arising from plaintiff's being struck by an automobile while helping to push a disabled vehicle off the roadway by giving the pattern jury instruction on willfully impeding traffic. This instruction derives its authority from N.C.G.S § 20-174.1(a), which was originally enacted as a response to the protests of college students and others in the mid-1960's. Both the case law interpreting the statute and its legislative history indicate that particular emphasis is placed on the word willfully; the statute contemplates something more than a thoughtless, heedless or inadvertent act. Plaintiff placed himself in the road while assisting the stranded motorist and undoubtedly knew that he was potentially in harm's way. However, there is no evidence indicating that plaintiff intentionally impeded traffic in the context of prior decisions under this statute; in fact, the record indicates that plaintiff was attempting to help remove an impediment to the flow of traffic. Since this instruction applied to the question of plaintiff's contributory negligence and the jury found plaintiff to be contributorily negligent,

the case was remanded for a new trial, although it was noted that there was no implication that plaintiff's conduct may not be considered as evidence of contributory negligence.

Am Jur 2d, Automobiles and Highway Traffic §§ 442, 443.

Contributory negligence of one standing in highway to attempt to warn approaching motorists of dangerous situation. 53 ALR2d 1002.

Liability of motorist colliding with person engaged about stalled or disabled vehicle on or near highway. 27 ALR3d 12.

Appeal by plaintiff from judgment entered 16 June 1995 by Judge Beverly T. Beal, in Caldwell County Superior Court. Heard in the Court of Appeals 9 October 1996.

Robbins & Hamby, P.A., by Dale L. Hamby, for plaintiff appellant.

Todd, Vanderbloemen & Brady, P.A., by Bruce W. Vanderbloemen, for defendant appellee.

SMITH, Judge.

On the evening of 27 October 1991, plaintiff Tommy Edward Haas, Jr., was an attendee at his brother's twenty-first birthday party. While at the party, plaintiff consumed some beer. After watching the World Series, plaintiff left the party and went to a convenience store to purchase more beer. While at the convenience store, plaintiff was asked to help a stranded motorist push his disabled vehicle out of the roadway.

During plaintiff's efforts to help the stranded motorist push his car from U.S. Highway 321 North (in Lenoir, North Carolina) into the parking lot of the nearby convenience store, plaintiff was struck, and injured severely, by oncoming motorist John Gregory Clayton (defendant). The evidence at trial indicated that the portion of the car being pushed by plaintiff was in the roadway, although the extent to which the car was in the roadway is a matter of dispute among the parties. Nonetheless, plaintiff admitted at trial to standing in the roadway as he pushed the car.

Plaintiff testified that he looked both ways prior to entering the roadway but saw no oncoming traffic. The evidence at trial indicated that defendant's speed was approximately forty-five miles per hour at impact, and no skid marks were evident at the impact area. Defendant testified that he did not see plaintiff in the roadway prior to colliding with him.

The police officer investigating the accident scene, Robert L. Spencer of the Lenoir Police Department, testified that "contributing circumstances" to the accident were plaintiff's "alcohol use [and plaintiff] impeding the flow of traffic." Officer Spencer testified that defendant's view of the disabled vehicle was not obstructed, and that defendant was not in violation of any traffic laws when he struck plaintiff. The jury found that defendant was negligent, but that plaintiff was contributorily negligent, and that defendant did not have the last clear chance to avoid the accident.

Defendant assigns error to the trial court's use of two jury instructions, to wit: North Carolina Motor Vehicle Negligence Pattern Jury Instruction 104.24 (N.C.P.I., Civ.) (willfully impeding traffic), and N.C.P.I., Civ. 211.76 (pedestrian lookout). The trial court informed the jury that violation of the terms of either instruction constituted "negligence within itself." We reach only plaintiff's assignments of error concerning N.C.P.I., Civ. 104.24, as we hold that this instruction was inapplicable to the facts presented here. Since this instruction applied to the question of plaintiff's contributory negligence, and the jury found plaintiff to be contributorily negligent, we reverse and remand for a new trial.

The trial court instructed the jury, per N.C.P.I., Civ. 104.24, as follows: "Members of the jury, the Motor Vehicle Law provides that no person shall willfully stand upon a highway in such a manner as to impede the regular flow of traffic. A violation of this law is negligence within itself." This pattern instruction derives its authority from N.C. Gen. Stat. § 20-174.1(a) (1993), which establishes criminal penalties for persons who: "willfully stand, sit, or lie upon the highway or street in such a manner as to impede the regular flow of traffic."

N.C. Gen. Stat. § 20-174.1(a) was originally enacted by our General Assembly as a response to the protests of college students and others in the mid-1960's. *See* Daniel H. Pollitt, *Legal Problems in Southern Desegregation: The Chapel Hill Story*, 43 N.C.L. Rev. 689, 711, 711 n.93 (1965) (discussing enactment of § 20-174.1 as an anti-protest mechanism). The legislature's original purpose in enacting

§ 20-174.1 is borne out by appellate case law, as almost every case involving this statute arises out of civil disobedience protests of some sort. *See, e.g., In Re Burrus*, 4 N.C. App. 523, 524-25, 167 S.E.2d 454, 455, *affirmed by* 275 N.C. 517, 169 S.E.2d 879 (1969); *State v. Spencer*, 7 N.C. App. 282, 285, 172 S.E.2d 280, 282, *judgment modified in part*, 276 N.C. 535, 173 S.E.2d 765 (1970).

Both the case law interpreting § 20-174.1, and its legislative history, indicate that particular emphasis is placed on the *mens rea* term included in the statute, *viz.*, the word "willfully." The *Spencer* Court, construing § 20-174.1 "with regard to the wrongful conduct which the[] [statute was] intended to suppress," stated: "The purpose of G.S. 20-174.1 is obviously to make it unlawful for a person to wilfully place his body upon a street or highway in such a manner *as to purposely impede* the regular flow of traffic." *Spencer*, 7 N.C. App. at 285, 172 S.E.2d at 282 (emphasis added). The *Burrus* Court also had a specific intent standard in mind when it applied § 20-174.1 to the "concerted demonstration by Negroes of Hyde County to assert their defiance of law and order and to disrupt the normal economic and social life of Hyde County by a *wilful, intentional and flagrant disregard* and violation of laws duly enacted . . . ." *In Re Burrus*, 4 N.C. App. at 528, 167 S.E.2d at 457 (emphasis added).

These cases evince an understanding that the willfulness component in § 20-174.1 involves a specific intent on behalf of the acting party. In *Screws v. United States*, 325 U.S. 91, 101, 89 L. Ed. 1495, 1502 (1945), the United States Supreme Court "pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' " *Id.* (quoting *Spies v. United States*, 317 U.S. 492, 497, 87 L. Ed. 418, 422 (1943). Often, such contexts dictate that "willfulness" must "denote[] an act which is intentional rather than accidental" or inadvertent, and when used in a criminal statute, "it generally means an act done with a bad purpose." *Screws*, 325 U.S. at 101, 89 L. Ed. at 1502.

In this instance, we believe the statute contemplates something more than a thoughtless, heedless or inadvertent act. This belief is bolstered, if not mandated, by this Court's prior holding in *Self v. Dixon*, 39 N.C. App. 679, 681, 251 S.E.2d 661, 662 (1979). In *Self*, a woman was pushing a baby in a stroller, apparently against traffic along the shoulder of a road, when the child dropped something into the road. As the woman stooped to pick up the dropped item, part of her body was " 'half off and half on the pavement.' " *Self*, 39 N.C. App.

at 679-80, 251 S.E.2d at 662. While in the road, the woman was struck by an oncoming motorist. *Id.*

The trial court in *Self* employed § 20-174.1 and instructed the jury that violation of this statute was contributory negligence or " 'negligence within itself.' " *Self*, 39 N.C. App. at 680, 251 S.E.2d at 662. The *Self* Court determined this instruction was error, since "*Spencer* and other cases involving violations of G.S. 20-174.1 [involved circumstances where] defendants were involved in demonstrations and *purposely impeded* or blocked traffic . . . ." *Id.* at 681, 251 S.E.2d at 662 (emphasis added). Finding that the *Self* plaintiff had not "willfully placed her body on Deaton Street to impede or block traffic in violation of G.S. 20-174.1," the *Self* Court ordered a new trial. *Id.*

The instant factual situation is on all fours with the one in *Self*. Plaintiff did place himself in the road while assisting the stranded motorist. Undoubtedly, plaintiff knew that he was potentially in harm's way. However, there is no evidence in the record indicating that plaintiff *intentionally impeded* traffic in the context discussed by the *In re Burrus* or *Spencer* decisions. In fact, the record indicates plaintiff was attempting to help *remove* an impediment to the flow of traffic when the accident occurred. Thus, we are bound by the *Self* decision. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Therefore, we hold that the instruction given here, N.C.P.I., Civ. 104.24, under the instant circumstances, was error.

We do not mean to imply that plaintiff's conduct may not be considered as evidence of contributory negligence. We reverse only because N.C.P.I., Civ. 104.24 is oriented towards conduct not applicable to these facts.

Reversed and remanded for a new trial.

Judges EAGLES and MARTIN, John C., concur.

CITY OF CHARLOTTE v. COOK

[125 N.C. App. 205 (1997)]

THE CITY OF CHARLOTTE, PLAINTIFF v. J. ERNEST COOK; AND WIFE, RUBY H. COOK, DEFENDANTS

THE CITY OF CHARLOTTE, PLAINTIFF v. J. ERNEST COOK; AND WIFE, RUBY H. COOK, AND CRESCENT ELECTRIC MEMBERSHIP CORPORATION, DEFENDANTS

No. COA96-364

(Filed 21 January 1997)

Eminent Domain § 29 (NCI4th)— condemnation for water system—fee simple title—easement sufficient—abuse of discretion

The trial court's judgments vesting fee simple title in plaintiff were vacated where the City sought to acquire by condemnation a seventy-foot wide strip of defendant's dairy farm for a pipeline and various other lines and cables for a water treatment plant, which would cut off a fifteen-acre tract of land from the rest of the farm. There is nothing in the facts found by the court which would justify taking the property in fee simple rather than by acquiring an easement, and the conclusion that an easement is all the City needed is supported by statements of City representatives at a City Council meeting. It is an abuse of discretion for a condemning authority to condemn a greater estate in land than is necessary to accomplish the intended public purpose.

Am Jur 2d, Eminent Domain §§ 385, 386.

Appeal by defendants from judgments entered 6 December 1995 by Judge Claude S. Sitton in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 December 1996.

City Attorney Dewitt F. McCarley, by Assistant City Attorney R. Susanne Knox and Deputy City Attorney H. Michael Boyd, for plaintiff-appellee.

Bailey, Patterson, Caddell, Hart & Bailey, P.A., by H. Morris Caddell, Jr., for defendants-appellants J. Ernest Cook and Ruby H. Cook; William R. Pope and Crisp, Page & Currin, L.L.P., by Cynthia M. Currin, for defendant-appellant Crescent Electric Membership Corporation.

LEWIS, Judge.

The question presented in this appeal is whether the trial court erred in allowing the City of Charlotte ("the City") to condemn a por-

tion of property belonging to defendant J. Ernest Cook and defendant Ruby H. Cook ("the Cooks") in fee simple in order to construct a pipeline. Because the City's actions constitute an abuse of discretion, we reverse.

The City instituted these condemnation actions under section 7.81 of its charter against the Cooks, the owners of the property, and Crescent Electric Membership Corporation, the holder of an option to purchase a portion of the property. Section 7.81 grants the City the power of eminent domain for "the acquisition of property to be used for . . . water supply and distribution systems" according to the procedure outlined in Article 9, Chapter 136 of the North Carolina General Statutes.

The City sought to acquire a seventy foot wide strip of the Cook's dairy farm ("Cook property") by condemnation of the fee to house a pipeline and various other lines and cables for a new raw water treatment plant in North Mecklenburg County being constructed by the Charlotte-Mecklenburg Utility Department ("CMUD"). The proposed condemnation would cut off a fifteen acre tract of land from the rest of the farm. The defendants opposed the condemnation in fee alleging, inter alia, that the public purpose could be accomplished by an easement. After this matter was heard at the 5 October 1995 term of Mecklenburg County Superior Court, the trial court concluded that plaintiff was entitled to condemn the Cook property in fee simple. Defendants appeal.

Defendants maintain that the City abused its discretion in condemning the Cook property in fee simple because it is not necessary. They contend that an easement would be sufficient to serve the public purpose. We agree.

"Generally, once a public purpose is established the taking is not reviewable by the courts. However, allegations of arbitrary and capricious conduct or of abuse of discretion on the part of the condemnor render the issue subject to judicial review." *Dept. of Transportation v. Overton*, 111 N.C. App. 857, 859, 433 S.E.2d 471, 473 (1993) (citations omitted). An abuse of discretion results when an act is " 'not done according to reason or judgment, but depending upon the will alone' and 'done without reason.' " *Dare County Bd. of Education v. Sakaria*, 118 N.C. App. 609, 615, 456 S.E.2d 842, 846 (1995), *aff'd per curiam*, 342 N.C. 648, 466 S.E.2d 719 (1996) (citations omitted).

To our knowledge, no other North Carolina appellate court has dealt directly with the issue of whether a condemning authority

abuses its discretion by taking a greater estate than is necessary for the public purpose. However, other Courts have recognized the principle that " 'the power to take private property is in every case limited to *such* and *so much* property as is necessary for the public use in question.' " *Highway Comm. v. Equipment Co.*, 281 N.C. 459, 473, 189 S.E.2d 272, 280 (1972) (quoting *Brest v. Jacksonville Expressway Authority*, 194 So. 2d 658 (Fla. App. 1967), *aff'd*, 202 So. 2d 748 (Fla. 1967)); *accord Jennings v. Highway Comm.*, 183 N.C. 68, 76, 110 S.E. 583, 584 (1922). Due to the lack of North Carolina law on this topic, we have looked to other jurisdictions for guidance.

In a similar case, the Supreme Court of Montana has held that a county cannot condemn fee simple title to a defendant's property when an easement would be sufficient to accomplish the public use. *See Silver Bow County v. Hafer*, 532 P.2d 691, 693 (Mont. 1975). In so holding, that court observed, "It is well established that a condemning authority can not acquire a greater interest or estate in the condemned property than the public use requires." *Id.* at 692. To support this assertion and its holding, the court quoted the following language from 3 Nichols on Eminent Domain § 9.2[2]:

> "It necessarily follows from the principle that property cannot constitutionally be taken by eminent domain except for the public use, that no more property can be taken by eminent domain than the public use requires, since all that might be appropriated in excess of the public needs would not be taken for the public use. While considerable latitude is allowed in providing for the anticipated expansion of the requirements of the public, the rule itself is well established, and applies both to the amount of property to be acquired for public use and to the estate or interest acquired in such property. *If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay for more than it needs . . . .*"

Id. at 693.

We adopt the reasoning of the Montana court and hold that it is an abuse of discretion for a condemning authority to condemn a greater estate in land than is necessary to accomplish the intended public purpose. However, whether such an abuse of discretion has occurred should be determined according to the facts of each case.

In the present case, the trial court found the following reasons for the City's taking the property in fee simple:

> a. the depths (up to 40 feet deep) at which the 60-inch diameter pipes will be installed;
>
> b. the number and nature of the facilities that will be located within the pipeline route;
>
> c. the ability to exercise effective control over all uses of the pipeline route by having the ability to determine in advance any proposed used [sic] of the pipeline route which would be permitted by the City;
>
> d. the ability to protect the pipeline facilities more effectively than if the City of Charlotte only had an easement;
>
> e. the cost for acquisition of a fee simple interest were [sic] not anticipated to be significantly different than for the acquisition of an easement;
>
> f. the ability to select the most economical electric power supplier.

We find nothing in these facts which would justify taking the Cook's property in fee simple rather than by acquiring an easement. In fact, after review of the record, we find no justification whatever for the City's fee simple condemnation. The taking by a city of more than can be justified and the paying of tax dollars is not only wasteful but unwise, arbitrary and arguably unconstitutional. Should the facility be abandoned in the future, the farm should not be needlessly divided by a strip of city land. A specially crafted easement will provide the control and protection the City desires with less injury to the Cooks. Furthermore, the equality of cost to the City is no reason to wrongfully deprive an individual of his or her property, nor is the right to select an electrical provider.

Additionally, our conclusion that an easement is all the City needed to acquire is supported by statements of City representatives themselves at a 12 September 1994 City Council Meeting, the minutes of which are an exhibit to the record. At the meeting, the director of CMUD acknowledged that although it was not preferable, it was technically possible to accomplish what was needed with an easement. A deputy city attorney stated that it was "possible that an easement could be used."

We hold that the City abused its discretion by taking fee simple title to the Cook's property because an easement is sufficient to carry out the public use intended. " 'It is not a trivial thing to take another's land.' " *Highway Comm. v. School*, 5 N.C. App. 684, 689, 169 S.E.2d 193, 196 (1969) (quoting *City and County of San Francisco v. Grote*, 52 P. 127 (Cal. 1898), *aff'd*, 276 N.C. 556, 173 S.E.2d 909 (1970).

Accordingly, the trial court's judgments vesting fee simple title in plaintiff are vacated. However, nothing in this opinion shall be read to prohibit the City from seeking an easement.

Judgment vacated.

Judges WALKER and SMITH concur.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
T.D.R.	)	

No. COAP97-96

(Filed 26 March 1997)

The petition filed in this cause by the State of North Carolina on 10 March and designated "Petition for Writ of Certiorari" is allowed for the limited purpose of entering the following order:

Because orders of the district court transferring the jurisdiction over a juvenile to superior court pursuant to N.C. Gen. Stat. 7A-608 (1995) are subject to review only by this Court after entry of a final judgment by the superior court, the superior court is without authority to review transfer orders. See N.C. Gen. Stat. 7A-666 (1995); *In re Andre Green*, 118 N.C.App. 336, 453 S.E. 2d 191 (1995). The order entered 7 February 1997 by Judge David Q. LaBarre, reviewing the district court's order transferring jurisdiction over the juvenile to the superior court, is hereby vacated. The matter is remanded to Superior Court, Durham County, for reinstatement of the indictments dismissed in that order and for further proceedings.

The petition filed in this cause by the State of North Carolina on 19 February 1997 and designated "Petition for Writ of Supersedeas" is dismissed as moot.

It is further ordered that this order be published in its entirety in the North Carolina Court of Appeals Reports.

The above order is therefore certified to the Clerk of District Court of Durham County.

Witness my hand and official seal this the 26th day of March 1997.

s/John H. Connell
Clerk of North Carolina Court of Appeals

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 7 JANUARY 1997

BRADLEY v. HALL No. 96-311	Guilford (92CVS8282)	Reversed
BYNUM v. DURHAM CITY SCHOOLS No. 95-985	Ind. Comm. (017710)	Reversed and Remanded
CANNON v. MARCUS DAVID CORP. No. 95-285	Mecklenburg (92CVD16345FYM)	Reversed and Remanded
CORBETT v. SMITH No. 96-633	Johnston (95CVS00611)	Dismissed
EASON v. BRANCH BANKING & TRUST CO. No. 96-319	Edgecombe (95CVS810)	Affirmed
EATMON v. BECKWITH No. 96-182	Vance (95CVD402)	Remanded
GOLDEN v. REESE No. 96-215	Watauga (95CVM522)	Reversed and Remanded
HERRING v. HAYES No. 95-1053	Pitt (92CVS536)	Affirmed
HOLLOWAY v. N.C. FARM BUREAU MUT. INS. CO. No. 96-356	Wilkes (93CVS100)	Affirmed and Remanded
IN RE BELL No. 96-95	Guilford (94J413)	Affirmed
IN RE BRAKE No. 96-321	Vance (93J66)	Reversed and Remanded
IN RE SWEDEN No. 95-1334	Rutherford (95CVS369)	Reversed and Remanded
INGOLD v. LOWDER No. 96-192	Stanly (95CVS478)	Affirmed
INTEGON SPECIALTY INS. CO. v. EMANUEL No. 96-105	Carteret (93CVS474)	No Error
LAMOREAUX v. ASPLUNDH TREE CO. No. 96-241	Ind. Comm. (381373)	Affirmed

LEWIS v. LEWIS No. 96-793	Catawba (93CVD1822)	No Error
LITTLE v. LITTLE No. 95-1428	Cabarrus (93CVD1831)	Affirmed
LUTIN v. LUTIN No. 95-1219	Gaston (94CVD4069)	Affirmed
MERRILL v. KING No. 96-349	Randolph (94CVS1395)	Reversed and Remanded
PHILLIPS v. FOOD LION No. 96-715	Ind. Comm. (460661)	Affirmed
SMITH v. N.C. DEPT. OF TRANSPORTATION No. 95-960	Ind. Comm. (025079)	Affirmed
STATE v. ALSTON No. 96-709	Alamance (95CRS28649) (95CRS28650)	No Error
STATE v. BEST No. 96-238	Haywood (95CRS2345)	No Error
STATE v. CARR No. 96-722	Forsyth (95CRS5551)	No Error
STATE v. CASHWELL No. 96-198	Forsyth (95CRS9125) (95CRS26223)	No Error
STATE v. CRANE No. 95-1090	Macon (94CRS21) (94CRS138) (94CRS139) (94CRS140) (94CRS141)	No Error
STATE v. DREHER No. 96-833	Gaston (95CRS31734) (96CRS3720)	No Error
STATE v. ESPINOZA No. 96-732	Johnston (95CRS14786)	No Error
STATE v. HANCOCK No. 95-1259	Mecklenburg (93CRS78706)	No Error
STATE v. HARRIS No. 96-613	Yadkin (94CRS3167) (94CRS3378) (94CRS3379) (95CRS1136) (95CRS1137)	No Error

	(95CRS1138) (95CRS1139) (95CRS1521) (95CRS133)	
STATE v. HILL No. 96-752	Orange (94CRS12854) (94CRS12855)	No Error
STATE v. HYLTON No. 96-594	Rockingham (95CRS4460)	No Error
STATE v. JACKSON No. 96-638	Guilford (95CRS44259)	New Trial
STATE v. JOHNSON No. 95-1277	Guilford (95CRS21147) (95CRS21148)	No Error
STATE v. MOORE No. 96-755	Beaufort (95CRS4644) (95CRS4645) (96CRS229)	No Error
STATE v. NOLON No. 95-1023	Craven (92CRS1251)	No Error
STATE v. PERRY No. 96-870	Chatham (95CRS5295)	Affirmed
STATE v. PICKETT No. 96-620	New Hanover (95CRS562)	No Error
STATE v. RAINEY No. 96-804	Wake (95CVS41247)	No error in the trial. Remanded for correction of judgment.
STATE v. SNYDER No. 96-235	Watauga (95CRS2435)	No Error
STATE v. THOMAS No. 96-270	Onslow (94CRS9950)	As to the present case No. 94CRS9950, no error. As to the restitution order, vacated and remanded.
STATE v. WHITTED No. 96-770	Sampson (95CRS4489) (95CRS4490)	No Error
STATE EX REL. WELDIN v. WELDIN No. 95-1055	Currituck (91CVD73)	Affirmed

STEELY v. 4C'S FOOD SERVICE/FLAGSTAR No. 96-152	Ind. Comm. (352511)	Affirmed
STORY v. CENTRAL CAROLINA CLEANING CORP. No. 96-323	Davidson (93CVS173) (WBTS-14099)	Affirmed
WHITE v. WHITE No. 96-80	Bladen (95CVD1)	Affirmed

FILED 21 JANUARY 1997

ANDERSON v. PACKER No. 96-208	Cumberland (95CVS6233)	Affirmed
BATTLE v. DUKE UNIVERSITY No. 96-249	Durham (93CVS3262)	Affirmed
BEVERIDGE v. BI-LO, INC. No. 96-71	Catawba (92CVS2749)	No Error
COUNTRY CLUB LAKE HOMEOWNERS v. LANGSTON No. 96-256	Cumberland (94CVS4914)	We affirm the order granting directed verdict for plaintiffs on defendant's counterclaim and find no error in the trial.
FREDERICK v. DUPLIN MEDICAL ASSN. No. 96-896	Duplin (95CVD417)	Affirmed
FUTRELL v. BERTIE COUNTY BD. OF EDUC. No. 96-314	Ind. Comm. (TA-12569)	Affirmed
HAMBRIGHT v. EDWARDS No. 96-143	Onslow (91CVS1176)	Affirmed
JERNIGAN v. McLAMB'S LP GAS & SUPPLY CO. No. 96-181	Ind. Comm. (083470)	Reversed and Remanded
KENNEDY v. CAROLINA FROZEN FOODS No. 96-23	Ind. Comm. (054312)	Affirmed
NORTH BRIDGE, INC. v. WHER-RENA BOAT SALES No. 96-885	Iredell (93CVS814)	Affirmed

SHARP v. TEAGUE No. 96-753	Dare (92CVS318)	Affirmed
STATE v. BROWN No. 96-860	Guilford (95CRS20605)	No Error
STATE v. FREELAND No. 96-75	Durham (93CRS23406)	Reverse and remand for a new trial
STATE v. GUNTER No. 96-807	Guilford (95CRS28274) (95CRS28275)	No Error
STATE v. HARDWARE No. 96-923	Onslow (94CRS16374)	No Error
STATE v. KNOX No. 96-964	Gaston (95CRS23545)	No Error
STATE v. SIGMON No. 96-888	Alexander (94CRS391) (94CRS392) (94CRS393) (94CRS394) (94CRS395) (94CRS396) (94CRS409)	Affirmed
STATE BD. OF EXAMINERS v. HORTON No. 96-897	Randolph (93CVS861)	Reversed and Remanded
STUART v. CECIL No. 95-1373	Polk (92CVS98)	No Error
SYKES v. TALBOT No. 96-931	Wake (96CVS3118)	Dismissed
WOODSTONE APTS. v. STYWALT No. 95-813	Mecklenburg (94CVD14362)	Affirmed

STATE OF NORTH CAROLINA v. FERNANDO LLAMAS MASON

No. COA95-831

(Filed 4 February 1997)

1. **Constitutional Law § 228 (NCI4th); Criminal Law § 1698 (NCI4th Rev.)— aggravating factor—insufficient evidence at sentencing hearing—finding at resentencing hearing—not double jeopardy**

The trial court's finding of the especially heinous, atrocious, or cruel aggravating factor at a resentencing of defendant for second-degree murder pursuant to the Fair Sentencing Act after the Court of Appeals had ruled that the evidence at the original sentencing hearing was insufficient to support this aggravating factor did not violate defendant's double jeopardy rights under the federal or state constitutions. U.S. Const. amends. V and XIV; N.C. Const. art. I, § 19.

Am Jur 2d, Criminal Law §§ 581-583, 598; Homicide § 554.

2. **Appeal and Error § 561 (NCI4th); Criminal Law § 1698 (NCI4th Rev.)— aggravating factor—insufficient evidence at sentencing hearing—not law of case at resentencing hearing**

A ruling by the Court of Appeals that the evidence in the original sentencing hearing for a second-degree murder was insufficient to support a finding that the offense was especially heinous, atrocious, or cruel did not become the law of the case and preclude the trial court from finding this aggravating factor in a subsequent resentencing hearing where additional evidence was presented at the resentencing hearing which provided the trial court with new and important substantive details relating to the commission of the crime and the victim's suffering.

Am Jur 2d, Homicide § 554.

3. **Criminal Law § 1178 (NCI4th Rev.)— second-degree murder—especially heinous, atrocious, or cruel aggravating factor—sufficiency of evidence**

The evidence presented in a resentencing hearing for second-degree murder was sufficient to support the trial court's finding of the especially heinous, atrocious, or cruel aggravating factor

where it showed that after the victim was kidnapped, driven around for several hours, taunted, hit in the face and head with a gun, and raped twice, she was dragged out of her car by her hair; she suffered severe beatings by all three codefendants, as evidenced by the multiple scrapes and bruises on her body; she was knocked down, kicked in the face, and dragged through the mud; she was told just before she was shot twice that she was being killed "because of the Rodney King thing"; and expert testimony established that she was conscious for at least three to seven minutes after she was shot as she was left lying alone in the street to contemplate her impending death.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554; Trial §§ 572, 1760.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.

Appeal by defendant from judgment entered 8 March 1995 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1996.

Defendant was indicted on 1 June 1992 for murder and first degree kidnapping. On 19 August 1992 he entered a plea of guilty to second degree murder and first degree kidnapping, and he agreed to testify truthfully against his co-defendants if called upon to do so. The State prayed for judgment to be continued to a date certain. At the 6 October 1992 sentencing hearing, the trial court consolidated the offenses and sentenced defendant to life imprisonment, in excess of the presumptive sentence under the Fair Sentencing Act in effect at that time.

At that sentencing hearing, the State summarized the evidence as follows: On 11 May 1992 the victim, Tracy Lynne Brockway, drove her car to a high crime area in Charlotte to purchase drugs. She stopped her car at a corner where defendant was standing with Alphonso Benson and Shelton Crockett, his co-defendants. The victim asked to purchase a twenty-dollar slab of cocaine from defendant, but defendant had no drugs to sell. Defendant told the victim to pull her car over, and he then got into the car with her. Benson approached the car with a .38 caliber revolver and told the victim to move to the back seat of her car. Defendant climbed into the driver's seat, Benson sat

in the front passenger seat, and Crockett sat in the back seat with the victim.

Defendant drove the car around Charlotte, stopping for gas and stopping again at another location where defendant and Benson left the car briefly. When Benson returned to the car he ordered the victim at gunpoint to have non-consensual sex with Crockett. Benson then struck the victim's head with a gun for not making appropriate noises, and she then began making the requested noises.

Defendant then got back in the driver's seat, and Benson directed him to drive to a dark, isolated road behind an apartment complex. Benson dragged the victim from the car, and he, defendant, and Crockett struck the victim about the head and face. Crockett then turned and walked to the car. Defendant told Benson, "let's go." Benson stated that he was going to kill the victim "because of the Rodney King thing," and he shot her twice in the side. Defendant, Benson, and Crockett then drove to a Waffle House and had breakfast. According to Crockett, defendant took twenty dollars from the victim's purse, which had been left on the front car seat.

The State presented only a conclusory summary of the evidence related to the victim's death, based upon a statement that Crockett gave to the police. The prosecutor argued to the trial court at the first sentencing hearing that "this [was] one of the more horrendous crimes that [he had] ever seen." The prosecutor also argued that the evidence reflected premeditation and deliberation. Defendant's counsel urged the trial court to find several statutory and non-statutory mitigating factors.

In originally sentencing defendant, Judge Marcus Johnson consolidated for judgment the offenses of first degree kidnapping and second degree murder. Judge Johnson found as a statutory aggravating factor that "[t]he offense was especially heinous, atrocious or cruel," and found as a non-statutory aggravating factor that the "conduct was extremely gratutious [sic] and sadistic infliction of pain on [the] victim." He also found several mitigating factors, but concluded that the aggravating factors outweighed the mitigating factors. Defendant was sentenced to life in prison.

Defendant appealed to this Court, arguing that the trial court erred in using the same evidence to support the two different factors in aggravation; in finding the statutory aggravating factor that the offense was especially heinous, atrocious or cruel, because it was not

supported by the evidence; and in failing to find as a mitigating factor that defendant played a minor role in the commission of the crime.

This Court reversed and remanded for resentencing based on defendant's first two arguments and thus declined to consider the third. With regard to defendant's second argument, this Court examined the evidence of record to determine "whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). The only evidence presented by the State was the prosecutor's summary of the evidence, based upon a statement Crockett gave to police investigators. This Court held in defendant's first appeal, based on earlier precedents, that the evidence of record was not enough to support a finding that the crime was *especially* heinous, atrocious or cruel.

At the resentencing hearing, the State introduced into evidence the statements given to the police by defendant and Crockett, as well as several photographs of the victim's body and the crime scene. In addition, the State called as witnesses Charlotte Police Investigator Theodore Kennedy, Charlotte Police Crime Scene Search Technician George C. Chapman, and Medical Examiner Dr. James Michael Sullivan. Defendant testified on his own behalf.

Kennedy, who was a homicide investigator, testified that when he arrived on the crime scene on the morning of the murder, he saw the victim lying in the middle of the road. After examining the body, he believed that "the victim was killed by gunshots and from being badly beaten." He described the scene as a construction site where people dump a lot of debris; there were no lights on the road; there were no cars parked in the area; and the closest apartments were about a city block away.

The court then heard testimony from Chapman, who described the crime scene as "an undeveloped, unlived, roadway area," where he took photographs of the scene and the victim. Nine photographs were admitted into evidence without objection, and Chapman testified that they accurately depict the victim's body and the crime scene. The photographs of the victim show multiple scrapes, bruises, and blood on her face and body, and two gunshot wounds on her chest and abdomen. One of the photographs depicts, as Chapman testified, "a muddy area with standing water that is along the curb edge of the roadway having what appeared to be drag marks through that."

Dr. Sullivan, a forensic pathologist and medical examiner, testified as an expert in forensic pathology. Seven photographs that he took were admitted into evidence. Dr. Sullivan testified that the photographs accurately depict the condition of the victim's body prior to autopsy. Several photographs illustrate blunt trauma injuries, including bruises and scrapes, to the left chest area as well as the eye, cheek, temple, and chin areas of the face. Other photographs depict bruises and scrapes on the victim's right elbow, left shoulder, and right forearm areas. The last photograph shows the entrance wounds of the two gunshots in the victim's right chest and abdomen.

Upon an internal examination of the victim's body, Dr. Sullivan found injury to the liver, two large blood vessels, the inferior vena cava and the aorta, and the bowel and kidney caused by one of the gunshots. These injuries resulted in "massive hemorrhaging to the abdominal cavity." The second gunshot wound caused "injury to the right lung with some hemorrhaging to the cavity surrounding the right lung." Dr. Sullivan testified that in his opinion the victim's cause of death was the gunshot wounds to the chest and abdomen, and the mechanism of death—the process the body goes through that causes the death—was internal hemorrhaging. He estimated that the victim probably died within twenty minutes of the gunshot wounds. Finally, Dr. Sullivan gave a "rough estimate" that it took between three and seven minutes for the victim to lose consciousness due to the hemorrhaging. He did not find any injuries to the brain to suggest that the victim lost consciousness as a result of any blunt trauma before the hemorrhaging.

After defendant withdrew an objection to the admission of Crockett's statement into evidence, the court admitted the statement, which had been given in a plea agreement to testify truthfully against Benson, the shooter in the case. The trial court also admitted into evidence a copy of defendant's statement made to a police investigator as part of a plea agreement in which he agreed to testify truthfully against his co-defendants, if called to do so.

Defendant presented character evidence, including testimony from his mother that he was involved in sports and church, and his own testimony that he had no prior criminal convictions and that he was sorry for what happened to the victim. He also presented exhibits including several letters in support of his character that were introduced at the first sentencing hearing, his GED diploma, a report card, and several schooling certificates he received while in prison awaiting trial on the charges in this case. Defendant testified that he

did not know the victim would be killed, and he claimed that he had no control over what happened to her and did not know what to do when Benson and Crockett began to hit her.

Crockett's statement generally follows the summarized version of his testimony presented by the prosecution at the first sentencing hearing, but it is more detailed. Specifically, Crockett stated that when Benson forced the victim to have sex with Crockett, Benson hit the victim in the face with a gun and yelled, "Bitch you are getting ready to give my nigger some pussy"; Benson made a similar command when he forced the victim to have sex with defendant in the back seat of the car; when the victim failed to make moaning noises, Benson again hit her in the head with the gun and yelled at her to make moaning noises; later, when the car was parked on the deserted roadway, Benson dragged the victim out of the car by her hair and struck her in the head with his hand and the gun; Crockett and defendant also hit the victim with their hands; the victim fell into some mud by the curb, and Benson dragged her through the mud into the middle of the street; both Crockett and defendant told Benson, "come on let's go," but Benson said, "No I going to kill this bitch because of the Rodney King thing," and he shot her twice.

Judge John M. Gardner considered the additional evidence presented at the resentencing hearing and found as the only aggravating factor that the offense was especially heinous, atrocious or cruel. He found as statutory mitigating factors that defendant has no record of criminal convictions; defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process; and defendant has been a person of good character or has had a good reputation in the community. As non-statutory mitigating factors, Judge Gardner found that defendant voluntarily agreed to testify against his co-defendants; defendant was not the person who shot the victim; while incarcerated awaiting sentencing defendant obtained his GED and was employed for a year and a half in the prison laundry, and has a good disciplinary record while in prison; and defendant expressed sympathy for the victim's family. Judge Gardner concluded that the aggravating factor outweighed the mitigating factors and sentenced defendant to life in prison. Defendant now appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Emmett B. Haywood, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant appellant.

ARNOLD, Chief Judge.

The sole question on appeal is whether the trial judge erred in finding as a statutory aggravating factor that defendant's second degree murder offense was especially heinous, atrocious or cruel. This case falls under the Fair Sentencing Act, which was in effect at the time of the offense. *See* N.C. Gen. Stat. § 15A-1340.4(a)(1)f (1988). Defendant asserts four theories to support his argument.

[1] Defendant first argues that reconsideration of the same statutory aggravating factor on resentencing violates the guarantees against double jeopardy established in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the North Carolina Constitution. Specifically, he argues that the law applying double jeopardy principles to a resentencing hearing before a jury in a capital case should apply equally to judicial sentencing under the Fair Sentencing Act in this case. We disagree.

In *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), our Supreme Court held that sentencing requirements in a capital case are like elements of a criminal offense, which the jury must find to exist beyond a reasonable doubt. Because the jury has a similar duty to that of deciding the guilt of a defendant, double jeopardy principles apply to determinations of aggravating circumstances in a capital sentencing hearing. *Id.* at 269, 275 S.E.2d at 482. In *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985), the Supreme Court explicitly declined "to extend the rationale of *Silhan* to Fair Sentencing cases." *Id.* at 648, 336 S.E.2d at 387. The Court distinguished capital sentencing hearings from those under the Fair Sentencing Act, noting that the latter "do not have the hallmarks of a trial on guilt or innocence. The judge hears the evidence without a jury. The formal rules of evidence do not apply." *Id.*, 336 S.E.2d at 387-88. Moreover, in resentencing proceedings under the Fair Sentencing Act, "[e]ach of the sentencing hearings [is] a de novo proceeding brought about by the defendant. At such subsequent hearings, the trial court may find aggravating and mitigating factors without regard to the findings in the prior sentencing hearings." *Id.* at 649, 336 S.E.2d at 388.

Defendant urges us to distinguish *Jones* from the case at hand because in *Jones*, the Court addressed the issue of whether double jeopardy bars the finding of aggravating and mitigating factors *different* from those found at an earlier sentencing hearing. In this case, the same aggravating factor was found at both sentencing hearings. Defendant's attempt to distinguish and limit *Jones* on this basis is

unpersuasive. Clearly, the analysis in *Jones* centers on the constitutional distinction between sentencing by a jury in a capital case and sentencing by a judge under the Fair Sentencing Act. Whether the same or different aggravating or mitigating factors are considered in separate sentencing proceedings is irrelevant to the rationale set forth in *Jones*.

[2] Defendant argues next that this Court is bound by "the law of the case" to rule in accordance with our previous ruling that the evidence was insufficient to support a finding that the offense was especially heinous, atrocious or cruel. We disagree.

Defendant contends that this case is governed by *State v. Mitchell*, 67 N.C. App. 549, 313 S.E.2d 201 (1984), in which two aggravating factors were found at an initial sentencing hearing, this Court upheld them on appeal, and the same two factors were found in the resentencing hearing. The *Mitchell* Court found: "In the first appeal these same factors were analyzed and found to be without error. Thus, under the doctrine of the law of the case the earlier ruling of approval is binding upon us." *Id.* at 552, 313 S.E.2d at 203. However, *Mitchell* is distinguishable from the case at hand because the appeal challenged only the *balancing* process of factors found in aggravation and mitigation; the sufficiency of the evidence to support findings of aggravating and mitigating factors was not at issue. *Id.* at 550, 313 S.E.2d at 202.

When, as in *Mitchell*, no new or additional evidence is presented in support of aggravating or mitigating factors in a resentencing hearing this Court may be bound by our ruling on that issue on appeal of the earlier sentencing hearing. Our Supreme Court in *State v. Jackson*, 317 N.C. 1, 6, 343 S.E.2d 814, 817 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987), made an analogous determination in the context of a ruling on the admissibility of evidence:

> Since the evidence relating to the admissibility of the inculpatory statement made by the defendant is virtually identical to the evidence which was previously before us, the doctrine of "the law of the case" applies to make our prior ruling on this issue conclusive. *State v. Wright*, 275 N.C. 242, 166 S.E.2d 681, *cert. denied*, 396 U.S. 934, 24 L.Ed. 2d 232 (1969).

Defendant argues that the evidence presented at the resentencing hearing was "essentially identical" to that presented at the first sen-

tencing hearing. At the resentencing hearing, the prosecutor added to the record written statements by both defendant and Crockett, numerous photographs of the victim and the crime scene, and the testimony of the investigating officers and an expert forensic pathologist. We do not find that this evidence was, as defendant urges, "merely illustration and explanation" of the evidence presented at the first sentencing hearing. Rather, the additional evidence provided the trial court with new and important substantive details relating to the commission of the murder and the victim's suffering. The evidence presented at the resentencing hearing is not identical to that which was previously before this Court, and the doctrine of the law of the case does not bind this Court on the current appeal.

Defendant argues further that the resentencing judge was bound by this Court's ruling that the evidence was insufficient to support as an aggravating factor that the offense was especially heinous, atrocious or cruel. Defendant again bases his argument on the assertion that the evidence at the resentencing hearing was basically identical to that presented in the first sentencing hearing. As we found above, the evidence was not identical, and defendant's premise is flawed.

"[O]n resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court." *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986).

> Of course, if an appellate court has squarely ruled that certain evidence does not support a certain factor, and the *identical* evidence is offered at the resentencing hearing to support the same factor, the trial court is bound by the appellate ruling, not because it is the law of the case, but because it is binding precedent directly on point.

Id. at 756, 338 S.E.2d at 560 (emphasis added). The resentencing judge was not bound by this Court's ruling that there was insufficient evidence to support a finding that the crime was especially heinous, atrocious or cruel, when new evidence was presented to support the same aggravating factor.

[3] Finally, defendant argues that even if the new evidence presented at the resentencing hearing is sufficient "to free the resentencing

judge from this Court's earlier ruling," the evidence is still insufficient to support the aggravating factor that the offense was especially heinous, atrocious or cruel. Such a finding must be supported by a preponderance of the evidence. *State v. Medlin*, 62 N.C. App. 251, 252, 302 S.E.2d 483, 485 (1983) (citing G.S. § 15A-1340.4(a)).

The standard for determining whether an offense is especially heinous, atrocious or cruel is "whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). "Whether death resulted from multiple acts of violence and was immediate are factors properly considered under that standard." *State v. Hines*, 314 N.C. 522, 524, 335 S.E.2d 6, 7 (1985).

In the cases in which our appellate courts have found insufficient evidence to support a finding that the second degree murder was especially heinous, atrocious or cruel, the facts showed that the murder was carried out swiftly, or death or unconsciousness was immediate. *See, e.g., State v. Torres*, 322 N.C. 440, 446, 368 S.E.2d 609, 612 (1988) (shots fired at close range in rapid succession into victim's head and chest, killing him instantly); *State v. Higson*, 310 N.C. 418, 423, 312 S.E.2d 437, 440 (1984) (victim stabbed in the heart after a brief struggle and died that day); *State v. Stanley*, 110 N.C. App. 87, 90, 429 S.E.2d 349, 351 (1993) (victim hit one or two times in the head with a stick, rendered unconscious immediately, and either of the blows could have been fatal); *State v. Nelson*, 76 N.C. App. 371, 375, 333 S.E.2d 499, 502 (1985) (unsuspecting victim shot once in the back), *modified on other grounds and aff'd*, 316 N.C. 350, 341 S.E.2d 561 (1986).

In contrast, the murder in this case occurred after escalating violence, and the victim did not lose consciousness or die immediately. After she was kidnapped, driven around for several hours, taunted, hit in the face and head with a gun, and raped twice, the victim was dragged out of her car by her hair; she suffered severe beatings by all three co-defendants, as evidenced by the multiple scrapes and bruises on her body; she was knocked down, kicked in the face, and dragged through the mud; and she was told just before she was shot twice that she was being killed "because of the Rodney King thing." Expert testimony established that she was conscious for at least three to seven minutes after she was shot, as she was left lying alone in the street to contemplate her impending death.

The evidence fully supports a finding that the victim suffered more physical pain and psychological suffering than normally present in a second degree murder. There was no error in finding as an aggravating factor that the murder was especially heinous, atrocious or cruel.

Affirmed.

Judges EAGLES and MARTIN, Mark D., concur.

ROGER D. WOODS, JR., PLAINTIFF-APPELLANT v. CITY OF WILMINGTON, NORTH CAROLINA, DEFENDANT-APPELLEE

No. COA96-429

(Filed 4 February 1997)

1. Municipal Corporations § 378 (NCI4th)— city employee—nondisciplinary suspension—continued employment—no city code right—termination—procedural due process not required

A city code did not vest an at-will employee placed on a nondisciplinary suspension because of a pending criminal charge against him with a cognizable property interest, protected by the "law of the land" clause of the North Carolina Constitution, in continued employment with the city pending resolution of the criminal charge so as to require that the employee be afforded procedural due process in order for the city to terminate him. N.C. Const. art. I, § 19.

Am Jur 2d, Municipal Corporations, Counties, & Other Political Subdivisions §§ 309 et seq.

2. Municipal Corporations § 378 (NCI4th)— city employee—nondisciplinary suspension—statements by superiors—continued employment—no property interest created

Statements made to a city employee by the city engineer and the city personnel director concerning his nondisciplinary suspension because of a pending criminal charge against him did not give the employee a cognizable property interest in continued

employment protected the "law of the land" clause of the North Carolina Constitution.

Am Jur 2d, Municipal Corporations, Counties, & Other Political Subdivisions §§ 309 et seq.

Appeal by plaintiff from judgment entered 29 February 1996 by Judge James E. Ragan, III, in New Hanover County Superior Court. Heard in the Court of Appeals 8 January 1997.

Virginia R. Hager for plaintiff-appellant.

Michael B. Brough & Associates, by William C. Morgan, Jr., for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff Roger Woods appeals from the trial court's grant of summary judgment to defendant City of Wilmington on plaintiff's claims for violation of the North Carolina Constitution.

On 11 August 1986 plaintiff was hired by defendant as Survey Party Chief in the City Engineering Department. Plaintiff was subsequently promoted to the position of Engineer I. In at least three separate performance reviews—15 June 1990, 13 December 1990, and 24 June 1991—Hugh Caldwell, Jr., (Caldwell) plaintiff's supervisor, rated plaintiff's job performance as "above expected." The December 1989 performance review indicated plaintiff was performing at the "expected" level.

In April 1991 plaintiff began an extra-marital relationship with Teresa Strother (Strother), a co-worker. At that time plaintiff and Strother were still married to, and living with, their respective spouses. On 22 April 1991 plaintiff revealed his relationship with Strother to Caldwell. Two days later Howard Wood (Wood), City Engineer, requested a meeting with plaintiff and Strother. At this meeting Wood, at least in general terms, conveyed that an employee's personal life must not interfere with the discharge of job-related duties. By the end of May 1991, plaintiff and Strother had left their respective spouses and moved in together.

On 25 June 1991 Wood met with plaintiff to discuss a recent phone call from plaintiff's now estranged wife. On 2 July 1991 Wood again met with plaintiff concerning several phone calls that Phillip Strother, Strother's estranged husband, placed to Wood, to the city

manager, and to the mayor. On 15 July 1991 Wood informed plaintiff and Strother they must take the necessary steps to dissuade further phone calls from either ex-spouse.

On 23 September 1991, at approximately 5:21 p.m., plaintiff, driving Strother's car, entered the Phar-Mor parking lot on South College Street in Wilmington. Phillip Strother attacked plaintiff as he was exiting the car. During the ensuing encounter, plaintiff retrieved a pistol from the glove compartment and shot Phillip Strother. Plaintiff was arrested and charged with assault with a deadly weapon with intent to kill inflicting serious injury. Plaintiff was released on $25,000 bond.

On 25 September 1991 Wood notified plaintiff that he was being placed on non-disciplinary suspension, without pay, pursuant to Section 8-166 of the Wilmington City Code (Wilmington Code). Later that day, plaintiff and Wood met with Joe Dixon, City Personnel Officer, to discuss further plaintiff's suspension, specifically the potential effect on plaintiff's insurance and other benefits.

By letter dated 17 February 1992, Wood notified plaintiff he was being terminated effective 1 March 1992, pursuant to Wilmington Code § 8-165. The 17 February letter indicated plaintiff was being terminated because "of the nature of the pending criminal charges, the situation that led to the charges, the disruption that these developments have caused in the work in the Engineering Department, and the potential for further disruptions . . . ." Defendant admits there was:

> no [specific] act or conduct of Plaintiff that occurred between September 25, 1991 and February 17, 1992 [which justified the immediate suspension and subsequent termination of plaintiff]. The act that justified the termination of Plaintiff's employment was his shooting of Phillip Strother on September 23, 1991, and the circumstances leading up to and following that incident.
>
> Plaintiff's supervisors were concerned about the possibility of another confrontation occurring on City premises, perhaps resulting in injury to innocent persons. In view of the potential danger that Plaintiff's presence in the work place presented, it was necessary to remove him from the work place immediately and indefinitely through non-disciplinary suspension.
>
> Plaintiff's continued employment was never dependent on the outcome of his criminal trial.

Further, Wood testified he initiated plaintiff's termination because he "was concerned for the safety of [his] employees, and the safety of anyone else that may come into contact with this situation, whether it be a private citizen on a project or in the office or otherwise." Plaintiff appealed his termination to City Manager William Farris (Farris). By letter dated 16 April 1992, Farris, without a hearing on the matter, "sustained the decision to terminate [plaintiff's] employment with [defendant]."

On 13 May 1992 plaintiff's criminal trial began in New Hanover County Superior Court. On 14 May 1992, at the close of the State's evidence, the trial court dismissed the criminal charges against plaintiff. Plaintiff's attorney subsequently contacted Thomas Pollard (Pollard), City Attorney, concerning the possibility of re-instating plaintiff. After consulting with Farris and Wood, Pollard advised plaintiff, through his attorney, that defendant was not willing to re-hire plaintiff.

On 10 August 1994 plaintiff instituted the present action claiming his termination infringed on rights guaranteed by Article I, Sections 19 (law of the land clause), 24 (right to jury trial), and 30 (right to bear arms) of the North Carolina Constitution. On 29 December 1995 defendant made a motion for summary judgment on plaintiff's claim for violation of his due process rights secured under Article I, Section 19[1] which the trial court subsequently granted.

On appeal, plaintiff contends the trial court erred by granting defendant's motion for summary judgment because plaintiff's termination violated the "law of the land" clause, Article I, Section 19 of the North Carolina Constitution.

Summary judgment is only appropriate when, on the basis of the materials before the trial court, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1990).

It is undisputed that plaintiff was an employee-at-will and, thus, could generally be discharged for arbitrary, irrational, indifferent, or illogical reasons without any legal recourse. *See 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). Further, under the

1. Although not contained in the record on appeal, plaintiff states that his claims for violation of Article I, Sections 24 and 30 were dismissed by the trial court pursuant to N.C.R. Civ. P. 12. Because plaintiff does not assign error to this ruling, we do not consider it on appeal. N.C.R. App. P. 10(a).

present facts and circumstances, plaintiff's termination does not fall within the two narrow, albeit well-recognized, exceptions to the at-will doctrine. *See Sides*, 74 N.C. App. at 339-342, 328 S.E.2d at 824-826; *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 415-417, 417 S.E.2d 277, 280-281 (1992). Accordingly, defendant could lawfully terminate plaintiff unless circumstances existed which elevated, even if only temporarily, plaintiff's employment above mere at-will status.

Toward that end, plaintiff argues that, at the time he was discharged, plaintiff had a property interest, protected by the "law of the land" clause, in continued employment with defendant. Plaintiff therefore concludes that his discharge without a hearing, and before the conclusion of his criminal trial, violated the procedural due process guaranteed by the North Carolina Constitution.

Admittedly, an at-will employee may gain a property interest in continued employment which is protected by Article I, Section 19 of the North Carolina Constitution—the "law of the land" clause. *See Howell*, 106 N.C. App. at 415, 417 S.E.2d at 280; *Kearney v. County of Durham*, 99 N.C. App. 349, 351, 393 S.E.2d 129, 130 (1990). The "law of the land" clause is considered "synonymous" with the Fourteenth Amendment to the United States Constitution. *State v. Smith*, 90 N.C. App. 161, 163, 368 S.E.2d 33, 35 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100, 104 L. Ed. 2d 1007 (1989). Accordingly, decisions of the United States Supreme Court concerning federal due process are highly persuasive aids in interpreting the scope of, and protection accorded by, the "law of the land" clause. *See id.*

"The requirement of procedural due process appl[ies] only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 556 (1972). Although "liberty" and "property" should be accorded broad and expansive meanings, *id.* at 571-572, 33 L. Ed. 2d at 557-558, plaintiff's at-will employment does not, in and of itself, create a cognizable property interest in continued employment, *Howell*, 106 N.C. App. at 417, 417 S.E.2d at 281. "A property interest in employment can, [however], be created by ordinance, or by an implied contract." *Burwell v. Griffin*, 67 N.C. App. 198, 209, 312 S.E.2d 917, 924 (*quoting Bishop v. Wood*, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 690 (1976)), *appeal dismissed and disc. review denied*, 311 N.C. 303, 317 S.E.2d 678 (1984).

Plaintiff, here, asserts that he secured a property interest in continued employment through the provisions of the Wilmington Code or, in the alternative, assurances made by his superiors.

A.

[1] We first consider plaintiff's allegation the Wilmington Code accorded him a cognizable property interest in continued employment.

Notably, plaintiff's argument, taken to its logical conclusion, presents an apparent anomaly—an employee properly placed on non-disciplinary suspension under section 8-166 for alleged improper behavior secures a constitutionally protected property interest in continued employment when his or her co-workers remain mere at-will employees and, thus, subject to termination at defendant's whim. In support of his proposition, plaintiff relies heavily on (1) this Court's decision in *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417 S.E.2d 277 (1992), and (2) sections 8-156(b) and 8-166 of the Wilmington Code.

1.

In *Howell*, plaintiff, a police captain, was discharged after distributing a somewhat inflammatory memorandum to the chief of police and all sworn officers. *Howell*, 106 N.C. App. at 412, 417 S.E.2d at 278. Eight days after his termination, plaintiff dispatched a written request for hearing to the town attorney, town manager, mayor, and the town board. *Id.* at 413, 417 S.E.2d at 279. It was undisputed that, prior to plaintiff's dismissal, defendant adopted a Personnel Policies and Procedures Manual creating a grievance procedure "[t]o provide a means whereby any employee who feels that he/she has been subjected to unfair . . . treatment may secure a hearing without delay . . . ." *Id.* at 415, 417 S.E.2d at 280. In fact, the personnel manual expressly required a hearing to take place within twenty-five days of the incident leading to the employee's dismissal. *Id.*

In the present case, the Wilmington Code does not expressly require the city manager to grant all discharged employees a hearing. Rather, "[t]he city manager, at his discretion, may or may not hear the employee but will render a decision to the aggrieved employee within the ten (10) working days following receipt of the grievance . . . ." Wilmington City Code § 8-164 (1983). Therefore, despite plaintiff's protestations to the contrary, this Court's decision in *Howell* does not necessitate reversal of the trial court's grant of summary judgment.

2.

The express policy behind the Wilmington Code is to ensure the city "act[s] with integrity and justice toward each employee, and each employee . . . compl[ies] with instructions, policies, . . . and standards of personal conduct necessary for satisfactory completion of the job." Wilmington City Code § 8-156(b) (1983). When, as here, an employee is involved in a criminal proceeding, section 8-166 provides:

> During the investigation, hearing, or trial of an employee on any criminal charge or during the course of any civil action involving an employee, the department head may suspend the employee without pay for the duration of the proceeding as a nondisciplinary action. Full recovery of pay and benefits for the period of nondisciplinary suspension is authorized if the suspension is terminated with full reinstatement of the employee.

Wilmington City Code § 8-166 (1983) (emphasis added).

Section 8-166 does not, on its face, elevate a suspended employee above at-will status or limit defendant's right to terminate an employee on non-disciplinary suspension pursuant to section 8-165 (immediate termination). Further, by listing the stages of a criminal proceeding—investigation, hearing, and trial—in the disjunctive, section 8-166 implies an employee may be removed from suspended status at any stage of the criminal proceeding. Simply put, the plain language of section 8-166 does not expressly foreclose defendant from making personnel decisions, *e.g.*, termination, prior to the resolution of the criminal proceedings which initially necessitated that employee's suspension. Therefore, section 8-166 does not vest plaintiff, or any other employee suspended under section 8-166, with a cognizable property interest in continued employment pending resolution of the criminal proceeding instituted against that employee.

B.

[2] We next consider plaintiff's assertion that statements made by his superiors concerning his non-disciplinary suspension imbued him with a reasonable expectation he would not be terminated, if at all, until the conclusion of his criminal trial.

The United States Supreme Court has stated that a "person's interest in a benefit is a 'property' interest for due process purposes if there are . . . mutually explicit understandings that support his

claim of entitlement to the benefit . . . ." *Perry v. Sindermann*, 408 U.S. 593, 601, 33 L. Ed. 2d 570, 580 (1972). *See also Burwell*, 67 N.C. App. at 209, 312 S.E.2d at 924 (property interest can be created by implied contract). Statements by a superior, however, "cannot form the basis of a 'mutually explicit understanding' unless th[ose] official[s] [have] the authority to make the representations." *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1408 (7th Cir. 1994). In fact, the officials must possess the actual authority to alter the employment relationship because a municipality cannot be liable for an *ultra vires* representation by one city employee to a subordinate. *Id. See also Moody v. Transylvania County*, 271 N.C. 384, 388, 156 S.E.2d 716, 719 (1967) (*ultra vires* contract is wholly void as against a municipality); *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 553, 344 S.E.2d 821, 827 ("municipality cannot be [] liable for breach of an express contract . . . when the official making the contract has exceeded his or her authority by entering into such a contract."), *disc. review denied*, 318 N.C. 417, 349 S.E.2d 598 (1986).

In the present case, plaintiff contends that certain statements made by Wood and Joe Dixon, Director of Personnel, evidence an understanding that plaintiff's employment status was not merely at-will during his non-disciplinary suspension. Even assuming that Wood and Dixon made such statements, the Wilmington Code clearly indicates Wood and Dixon did not have the actual authority to alter plaintiff's employment relationship with defendant.

First, as to Wood, the Wilmington Code delegates "[t]he authority to suspend, remove and take other actions . . ." to the head of engineering. Wilmington City Code § 8-157 (1983). Second, Dixon, as Personnel Director, is responsible for reviewing and recommending "to the city manager policies and revisions for pay, classification and personnel administration. Under the direction of the city manager, the personnel director shall develop and administer such procedures as are necessary to assure fairness and honesty in . . . maintaining an effective and responsible work force." Wilmington City Code § 8-7 (1983). Notably, however, the city council is vested with the sole authority "to establish a . . . system of personnel administration . . . [and] personnel ordinances, including [] position classification . . . ." Wilmington City Code § 8-5 (1983). Although the city council and, at least arguably, the city manager, *see* Wilmington City Code § 8-6 (1983), *Fittshur*, 31 F.3d at 1408, have the authority to alter plaintiff's employment-at-will status, it is readily apparent neither Wood nor Dixon was vested with the requisite authority. Therefore, under

Fittshur, *Moody*, and *Pritchard*, neither Dixon nor Wood could legally alter plaintiff's at-will employment status with defendant.

Plaintiff nonetheless argues that section 8-157 specifically delegates the authority to alter his employment status to department heads, like Dixon and Wood. To the contrary, section 8-157 delegates only "[t]he authority to suspend, remove and take other actions outlined in this chapter . . . ." Wilmington City Code § 8-157 (1983). Because the authority to alter an employee's at-will status is not among the "other actions" expressly delineated in the remaining pertinent provisions of the Wilmington Code, plaintiff's argument must fail.

Accordingly, we conclude plaintiff did not possess a cognizable property interest in continued employment protected by the North Carolina Constitution.

C.

Even though plaintiff did not possess a constitutionally protected property interest in continued employment, plaintiff must receive, at a minimum, the process mandated by the Wilmington Code. *Burwell*, 67 N.C. App. at 209-210, 312 S.E.2d at 924. Careful review of the present record indicates that plaintiff was terminated in accordance with the procedures set forth in Wilmington Code § 8-165.

Accordingly, as plaintiff is an employee-at-will, defendant's actions do not implicate Article I, Section 19, of the North Carolina Constitution and defendant complied with its own internal termination procedures, the trial court did not err in granting summary judgment to defendant.

Affirmed.

Judges LEWIS and WALKER concur.

WENDY H. POOLE, PLAINTIFF v. COPLAND, INC. AND JOHN HAYNES, DEFENDANTS

No. COA95-693

(Filed 4 February 1997)

1. Intentional Infliction of Mental Distress § 2.1 (NCI4th)—expert testimony—causation of emotional distress—use of could and might

Testimony by plaintiff's experts that alleged harassment "could" or "might" have triggered plaintiff's severe emotional distress was sufficient to show that the harassment caused the emotional distress where additional evidence presented by plaintiff supported the experts' testimony.

Am Jur 2d, Expert and Opinion Evidence § 129.

2. Intentional Infliction of Mental Distress § 3.2 (NCI4th)—thin skull rule—application to mental injury case—exacerbation of preexisting mental condition

The "thin skull" rule can be applied to mental as well as physical injury cases; therefore, a defendant may be liable in an action for the intentional infliction of emotional distress for aggravation or exacerbation of a preexisting mental condition, and the trial court did not err by giving an instruction defining severe emotional distress as including exacerbation of a preexisting dissociative disorder.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 25, 27; Negligence § 500.

3. Intentional Infliction of Mental Distress § 3.2 (NCI4th)—exacerbation of dissociative disorder—peculiar susceptibility

Where the trial court instructed the jury in an action for the intentional infliction of emotional distress by sexual harassment that severe emotional distress includes exacerbation of a preexisting dissociative disorder, the court should also have given a peculiar susceptibility proximate cause instruction on the issue of liability requiring the jury to find that the alleged sexual harassment could reasonably be expected to injure a person of ordinary mental condition.

Am Jur 2d, Damages § 281; Fright Shock, and Mental Disturbance § 27.

On-the-job sexual harrassment as violation of state civil rights law. 18 ALR4th 328.

4. Intentional Infliction of Mental Distress § 3.1 (NCI4th)—sexual harassment—employee and employer—ratification and negligent retention—separate issues

In an action for the intentional infliction of emotional distress by sexual harassment at work, the trial court did not err by submitting separate damages issues to the jury as to defendant employee and defendant employer where plaintiff sought recovery against the employer under theories of independent negligence in retaining the harassing employee and of vicarious liability for ratifying the employee's tortious conduct. However, the trial court should also have submitted separate damages issues for ratification and negligent retention because plaintiff's recovery under the theory of ratification was limited to the amount of damages awarded against the employee, while plaintiff could recover all damages she could prove were proximately caused by the employer's negligent retention of the employee.

Am Jur 2d, Employment Relationship §§ 469, 476.

Employer's knowledge of employee's past criminal record as affecting liability for employee's tortious conduct. 48 ALR3d 359.

On-the-job sexual harassment as violation of state civil rights law. 18 ALR4th 328.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress. 52 ALR4th 853.

Appeal by defendant Copland, Inc. from judgment entered 16 November 1994 by Judge Orlando F. Hudson in Alamance County Superior Court. Heard in the Court of Appeals 13 May 1996.

Plaintiff Wendy Poole brought this action alleging negligent infliction of emotional distress by defendant John Haynes, a coworker, and ratification of Haynes' conduct and negligent retention and supervision by their employer, defendant Copland, Inc.

Ms. Poole, then twenty-three years old, began work at Copland, Inc. (Copland) in November 1989. According to the trial testimony of

Ms. Poole, she met defendant Haynes during her first week on the job and they had a conversation regarding Camaro automobiles versus Mustangs. Haynes commented that Ms. Poole "looked like the type of person that needed somebody to go up inside of [her] about two car lengths deep." Ms. Poole testified she was "kind of in shock" and told Haynes he "[didn't] need to be talking like [that]" in front of her. She asked a coworker if Haynes talked that way in front of everyone, and the coworker replied: "Yeah, we've just got immune to it." Poole reported the incident to her supervisor, Bill White.

Ms. Poole testified to numerous other similar incidents, including an occasion when Haynes asked Ms. Poole if she was happily married and whether she had "had a man lately." Haynes told her: "You haven't had a man until you've had me . . . I've got twelve inches hanging." Another time, Ms. Poole turned around to find Haynes standing behind her with his pants unzipped. She asked Haynes what he was doing, and he replied: "Well, I was going to show you what a real man felt like . . . ." Later, Haynes told her that once she "had" him, she would never go back to her husband. She testified he told her that her husband, Kevin, "had better hold tight to me at night because [Haynes] would slide in right beside of Kevin and f--- my eyes out and make Kevin like it." Ms. Poole reported these incidents to Bill White, but he told her that Haynes "was just a youngun', to ignore him," and that Haynes "was only picking."

Haynes asked Ms. Poole if she was a natural redhead and said: "There's not but one way for me to find out that you're a true redhead . . . I just need to see your p---y hair." Haynes asked Ms. Poole if she gave "blow jobs." On another occasion, Ms. Poole and several others were in Bill White's office when Haynes grabbed his crotch and asked her: "[H]ave you made up your mind whether or not you want some of this or not?" Ms. Poole told White: "Bill, you see. You see I'm not lying. Why do you let this go on?" According to Poole, White laughed, telling her to let it go, and that Haynes was "just joking."

Ms. Poole testified the harassment continued throughout her employment at Copland. While working at Copland, she testified "I got to where I couldn't eat. I was throwing up green phlegm all the time. My bowels wouldn't move." She often came home from work crying, she had nightmares and trouble sleeping, she did not want to go to work in the mornings, and her relationship with her husband suffered.

Ms. Poole's employment at Copland ended 14 November 1990. The previous day, there had been a confrontation in Copland's parking lot between Haynes, Poole's husband, and another man. As the Pooles were leaving the parking lot, Haynes grabbed his crotch and made an obscene gesture at Ms. Poole. That night, the Pooles telephoned Melvin Butler, a manager at a plant operated by another division of Copland. Ms. Poole had telephoned Butler on an earlier occasion to complain about Haynes' conduct. In a partially tape-recorded conversation played for the jury, Ms. Poole reported Haynes' actions to Butler. The next day, in a meeting with Butler, Bill White, and Jim Copland, III, president of Copland, Haynes admitted grabbing his crotch the previous day and was terminated. After word spread that Haynes had been fired, Ms. Poole testified that other workers on the plant floor began cursing her, spitting at her, and throwing papers at her. Following a heated confrontation with Bill White, Ms. Poole contended she was fired.

Ms. Poole filed this action 16 September 1992. At trial, evidence was presented that prior to Ms. Poole's employment at Copland: 1) she had been sexually molested by a neighbor at age nine; 2) she had given birth to a child out-of-wedlock at age fifteen; 3) at age sixteen, she married her child's father, a physically abusive drug addict; 4) she was molested by an uncle at age eighteen; 5) also at age eighteen, she was brutally raped by her father's friend over a period of two weeks in which she was kept locked in a closet with her hands and feet taped and only taken out of the closet to be raped; 6) at age nineteen, she was beaten by her father with a cue stick, fracturing her arm in two places; and 7) she divorced her first husband at age twenty-one. Ms. Poole also presented testimony from three expert witnesses.

Kim Ragland, a psychologist at the mental health center who met with Ms. Poole, testified Ms. Poole told her she had been molested as a child and that the harassment at Copland brought all of the bad memories back, that she could not stop crying, and that she was having trouble with her marriage. On direct examination, Ms. Ragland was asked: "And do you have an opinion as to whether or not her experiences at Copland in terms of the harassment that she suffered there, do you have an opinion whether or not that would trigger bad feelings and memories of these things that occurred in her past?" Ms. Ragland replied: "I would think that it could." When asked if she thought a diagnosis of posttraumatic stress disorder would be possible based on the reported harassment at Copland, even if a person had no prior history of sexual abuse, Ms. Ragland testified: "I think

that it's possible, yes." Ms. Ragland was also asked: "So is your opinion that a person of ordinary sensibilities with no prior sexual history could be affected the same way by similar conduct?" She replied: "Yes." She also testified that sexual harassment in the workplace was a stressor which could trigger posttraumatic stress disorder, major depression, and exacerbate a preexisting disorder or depression.

Dr. Dianne Litaker, staff psychiatrist at the Alamance-Caswell Area Mental Health Center, testified she diagnosed Ms. Poole as suffering from posttraumatic stress disorder and major depression. Dr. Daniel Blake, a psychiatrist in private practice, testified he examined Ms. Poole in November 1993 and diagnosed her as suffering from dissociative disorder and posttraumatic stress disorder complicated by depression. During the redirect examination of Dr. Blake, the following exchange occurred:

> Q. Will or would sexual harassment or could sexual harassment that is experienced by Mrs. Poole in her employment at Copland Fabrics—
>
> A. Uh-huh.
>
> Q. —have triggered the dissociative disorder and posttraumatic stress disorder that you have explained?
>
> A. You're close to right. Now the—the dissociative disorder was almost certainly present since her childhood, but it was not manifest to where people around her would recognize it . . . .

Ms. Poole also presented medical expert testimony related to her suffering from irritable bowel syndrome, which Dr. Robert Elliot testified can be caused or aggravated by stress.

Defendants presented numerous coworkers of Ms. Poole and Haynes who testified they never witnessed any sexual harassment by Haynes and who contradicted the testimony of Ms. Poole regarding various incidents at work. The jury found Haynes liable for intentional infliction of emotional distress and awarded Ms. Poole $2,000 in actual damages and $5,000 in punitive damages against Haynes. The jury also found Copland liable for ratification of Haynes' conduct and negligent retention of Haynes, and awarded Ms. Poole $50,000 in actual damages and $250,000 in punitive damages from Copland. From this judgment, defendant Copland appeals. Defendant Haynes filed no appeal.

Hunt and White, by Octavis White, and Daniel H. Monroe, for plaintiff-appellee.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Denis E. Jacobson, and Schoch & Woodruff, L.L.P., by Arch K. Schoch, Jr., for defendant-appellant Copland, Inc.

McGEE, Judge.

Copland argues the trial court erred by: 1) denying Copland's motions for a directed verdict and judgment notwithstanding the verdict based upon an alleged insufficiency of evidence of causation; 2) failing to properly instruct the jury on the issue of liability regarding intentional infliction of emotional distress; 3) improperly instructing the jury on causation; 4) instructing the jury twice on the issue of damages and submitting separate damages issues to the jury as to each defendant; and 5) denying Copeland's post-trial motions for a new trial or amendment of the judgment based upon an alleged improper and inconsistent verdict. Upon review of the record, briefs, transcript and exhibits, we agree the trial court erred in its instructions to the jury and hold Copland is entitled to a new trial. Because some of the other issues are likely to recur at trial, we also discuss them.

We first note Ms. Poole contends Copland has no standing to contest the issue of causation of Ms. Poole's injury by Haynes' conduct because Haynes did not appeal the decision against him. However, she cites no authority for this contention and we do not consider it. N.C.R. App. P. 28(b)(5).

In this case, plaintiff accused defendant Haynes in her complaint of negligent infliction of emotional distress. After presentation of the evidence at trial, the jury was instructed as to the issue of intentional infliction of emotional distress and this issue was submitted to the jury. Plaintiff also alleged defendant Copland ratified Haynes' actions and that Copland negligently retained and supervised Haynes. To establish a claim for intentional infliction of emotional distress, a plaintiff must prove: 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). On appeal, Copland does not argue Ms. Poole failed to present sufficient evidence of extreme and outrageous conduct or severe emotional distress. Instead, Copland's arguments focus on the element of causation.

I.

[1] Copland first argues the plaintiff presented insufficient evidence of causation to justify submission of the case to the jury, and therefore, the trial court should have granted Copland's motions for directed verdict and judgment notwithstanding the verdict. Copland contends the testimony of plaintiff's experts that the harassment alleged to have occurred "could have" or "might have" triggered Ms. Poole's severe emotional distress is insufficient to show the harassment caused the emotional distress, especially in light of the number of other factors in her life capable of causing severe emotional distress.

In ruling on a defendant's motion for a directed verdict, the trial court should deny the motion if the evidence, in the light most favorable to the non-moving party, provides more than a scintilla of competent evidence to support the plaintiff's *prima facie* case. *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 433-34, 378 S.E.2d 232, 233-34 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990). The same standard is applied to motions for judgment notwithstanding the verdict. *Id.* at 434, 378 S.E.2d at 234. Here, we find plaintiff's evidence was sufficient to send the case to the jury.

Expert witness testimony regarding causation which is based on mere speculation or possibility is incompetent. *Ballenger v. Burris Industries*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984). However, "could" or "might" may be used when the expert witness lacks certainty. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence*, § 189 (4th ed. 1993). Whether "could" or "might" will be considered sufficient depends upon the general state of the evidence. *Id.* at § 189, n. 330; *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 202, 392 S.E.2d 657, 659 (1990).

Cases finding "could" or "might" expert testimony to be sufficient often share a common theme—additional evidence which tends to support the expert's testimony. *See, e.g., Mann v. Transportation Co. and Tillet v. Transportation Co.*, 283 N.C. 734, 198 S.E.2d 558 (1973) (expert's testimony that preexisting defect "could or might have" caused steering system to fail, along with testimony of driver and plaintiff that driver turned the wheel but bus would not turn, held sufficient to send case to the jury); *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E.2d 541 (1964) (expert psychiatric testimony that accident "may have had an influence" on plaintiff's condition not sufficient

standing alone, but when combined with expert's testimony on cross-examination and testimony of other lay witnesses, enough for jury to infer plaintiff's amnesia resulted from the accident); *Kennedy v. Martin Marietta Chemicals*, 34 N.C. App. 177, 237 S.E.2d 542 (1977) (expert testimony that inhaling of gases could have triggered decedent's heart attack, combined with evidence of color of decedent's lungs and quick breathing by decedent, held competent to support Industrial Commission's finding that a sudden deprivation of oxygen accelerated or aggravated decedent's preexisting heart condition). Cases finding "could" or "might" expert testimony insufficient generally have additional evidence or testimony showing the expert's opinion to be a guess or mere speculation. *See, e.g., Maharias v. Storage Company*, 257 N.C. 767, 127 S.E.2d 548 (1962) (expert's testimony that a pile of rags could have caused a fire through spontaneous combustion held insufficient when expert also testified on cross-examination that he did not know where the rags were before the fire and that the fire "could have happened from any one of a number of causes"); *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 392 S.E.2d 657 (1990) (expert's testimony that plaintiff's inhalation of a chemical could have caused her impairment held insufficient where expert also testified he could not relate plaintiff's impairment to any specific etiology and that he could not say yes or no whether plaintiff's decreased pulmonary function resulted from an inhaled chemical).

In this case, the record provides additional evidence supporting the testimony of plaintiff's experts that the harassment could have or might have caused the severe emotional distress. In discussing her emotional state both before and after beginning her employment at Copland, Ms. Poole testified:

> As you've already been told, I was molested when I was nine. I was brutally raped when I was eighteen years old. I married my little girl's father who was a drug addict and he beat me, and I never knew what happiness was until I married my husband now, Kevin, but I had blocked these out of my mind. It was like I had started over, turned over a new leaf. I didn't let this bother me, but due to the fact of being sexually harassed, gestures, and things [Haynes] would say, it was like a water wheel bringing up bad memories of being taped, . . . my mouth being binded [sic], and only being taken out of a closet to be raped for two weeks, two weeks straight. I had forgotten all about these things. I had pushed them in—just like pushing it under a rug. I had started

> up—started a whole new life with my husband. We were going to church, doing great, and then every day I'd get up, cry having to go to work, cry coming home.
>
> . . .
>
> Before I went to work at Copland, me and my husband were like on a continuous honeymoon until I started being harassed and it brought back up memories of being raped, being molested. It got to where I couldn't be intimate with my husband for as much as three months at a time.

She also testified her husband had no knowledge of her being molested and raped until the problems at Copland began and he asked her to tell him what was happening with her. Ms. Poole's therapist, Kim Ragland, testified that according to Ms. Poole's medical records, Ms. Poole reported at the time she began receiving treatment that she "was doing fine prior to the sexual harassment," but "that basically she was reliving all of the things from the past because of [the harassment]." Dr. Dianne Litaker, staff psychiatrist at the Alamance-Caswell Area Mental Health Center, testified Ms. Poole reported the harassment triggered her problems and her symptoms began during the time she was being harassed on the job. Dr. Daniel Blake, a psychiatrist who saw Ms. Poole in November 1993, testified Ms. Poole told him her symptoms were triggered by what occurred during her employment at Copland and that "[i]t was Mrs. Poole's firm feeling that the sexual harassment over a period of months without being able to enforce reasonable boundaries led to her psychological stress . . . ." In light of this additional evidence, plaintiff's experts' testimony that the harassment could have or might have triggered Ms. Poole's severe emotional distress was sufficient on the issue of causation to take the case to the jury. Therefore, the trial court properly denied Copland's motions for directed verdict and judgment notwithstanding the verdict. This assignment of error is overruled.

II.

[2] Copland next argues the trial court erred in its instructions to the jury on the issue of liability for intentional infliction of emotional distress. The trial court first instructed the jury that in order to find defendants responsible for intentional infliction of emotional distress, they must find the presence of the three elements listed in *Dickens* and discussed above. The court further instructed on proxi-

mate cause and intent pursuant to the pattern jury instructions. The court then defined severe emotional distress as follows:

> Severe emotional distress means any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so, including, but not limited to, posttraumatic stress disorder, exacerbation of a preexisting dissociative disorder, and major depression.

This instruction regarding the definition of severe emotional distress would allow recovery upon a finding that defendants' actions exacerbated a preexisting dissociative disorder. Copland contends this impermissibly allows recovery under a "thin skull plaintiff" theory, which Copland argues is not available in cases of intentional infliction of severe emotional distress. In the alternative, Copland argues the court should have given an instruction on peculiar susceptibility.

We disagree with Copland's contention that the thin skull rule applies only to physical injuries and does not apply to mental injury claims. We see no reason to treat mental injury any differently than physical injury. As our Supreme Court has said: " '[M]ental 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 . . . ." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 292-93, 395 S.E.2d 85, 90 (1990). The North Carolina Pattern Jury Instructions For Civil Cases, in the footnote to the instruction for Proximate Cause—Peculiar Susceptibility, defines injury as including "all legally recognized forms of personal harm, including activation or reactivation of a disease or aggravation of an existing condition." N.C.P.I., Civ. 102.20. Therefore, the thin skull rule can be applied to mental injury cases, and contrary to Copland's arguments, a defendant may be liable for aggravation or exacerbation of a preexisting mental condition. We find no error in the trial court's instruction defining severe emotional distress.

[3] However, we agree with Copland that where the trial court instructs the jury that severe emotional distress includes exacerbation of a preexisting dissociative disorder, the court must also instruct on peculiar susceptibility. Copland requested an instruction based on N.C.P.I., Civ. 102.20 stating that the jury must find that defendants' negligent conduct, under the same or similar circumstances, could reasonably have been expected to injure a person of ordinary mental condition. The court's failure to give an instruction

on this issue unfairly prejudiced the defendants, particularly in light of the expert testimony presented.

In this case, Dr. Blake testified he diagnosed Ms. Poole as suffering from a dissociative disorder and posttraumatic stress disorder complicated by depression, with dissociative disorder being the primary diagnosis. Dr. Blake testified that dissociative disorders begin in childhood and are a result of the mind dealing with traumatic experiences by dissociating the memory of the event into separate parts. Then, later in life, an event or series of events cause the parts to come back together and the person reexperiences the traumatic event. As long as the parts are dissociated, the person is not aware of the memory and does not have to face the memory of the traumatic experience unless they suffer an abreaction, commonly know as a "flashback." Dr. Blake testified that almost anything could serve as a triggering event for an abreaction, and gave as an example a Vietnam veteran hearing the sound of a helicopter and suddenly being lost in time back in Vietnam. Dr. Blake further testified sexual harassment at Copland could have triggered an abreaction.

In light of this testimony, the jury could determine that almost any action or event could serve as a triggering event resulting in exacerbation of Ms. Poole's preexisting dissociative disorder. However, in order to be liable for intentional infliction of emotional distress, a defendant's actions, in and of themselves, must be capable of causing and in fact must cause severe emotional distress. *See Dickens*, 302 N.C. at 452, 276 S.E.2d at 335. Therefore, the trial court should have given a peculiar susceptibility proximate cause instruction on the issue of liability requiring the jury to find the alleged conduct could reasonably be expected to injure a person of ordinary mental condition. Because the instructions, as given, would impermissibly allow the jury to find defendants liable for intentional infliction of emotional distress based upon exacerbation of a preexisting dissociative disorder without determining the harassment would injure a person of ordinary susceptibility, Copland is entitled to a new trial.

Copland also argues the trial court erred in giving the pattern jury instruction regarding proximate cause, N.C.P.I, Civ. 202.19, and failing to give Copland's requested instruction. We agree with plaintiff that Copland's proposed instruction was more in the nature of a jury argument. However, as discussed above, the trial court should have given a proximate cause instruction regarding peculiar susceptibility. Such an instruction at a new trial should cover Copland's concerns regarding "but for" causation.

III.

[4] Lastly, Copland argues the trial court erred in twice instructing the jury on actual damages, separately as to each defendant, and submitting separate actual damages issues to the jury. Copland contends this led to an inconsistent verdict in that the jury awarded different damages amounts against each defendant. Copland also argues the trial court erred by denying Copland's various post-trial motions.

The jury found Copland responsible for both ratification of Haynes' conduct and negligent retention of Haynes. Copland argues that recovery under both theories is purely derivative and that Copland can only be held liable for the damages actually inflicted by Haynes as found by the jury. Under a theory of ratification, just as under a theory of *respondeat superior*, an employer is held vicariously liable for an employee's tortious acts. 27 Am. Jur. 2d, *Employment Relationship* §§ 459 and 460 (1996). When an employer's liability is solely derivative under a theory of vicarious liability, such as *respondeat superior* or ratification, the liability of the employer cannot exceed the liability of the employee. *See* 19 Strong's N.C. Index 4th *Labor and Employment* § 224 (1992); *Pinnix v. Griffin*, 221 N.C. 348, 351, 20 S.E.2d 366, 369 (1942). However, although recovery under a theory of negligent retention of an employee is derivative in the sense that the employee must have committed a tortious act, *see Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 123-24, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140-41 (1986), the employer's liability is not vicarious, as in *respondeat superior*, but is primary liability based upon the employer's own negligence. David A. Logan and Wayne A. Logan, *North Carolina Torts* § 30.10 (1996); *see also Hogan*, 79 N.C. App. at 495-96, 340 S.E.2d at 124 (negligent hiring and retention is an independent theory of negligence which allows recovery against the employer where no liability would otherwise exist). Because Ms. Poole also sought recovery for the independent negligence of Copland in retaining Haynes, the trial court did not err in submitting separate damages issues for each defendant. However, since the trial court submitted separate damages issues as to each defendant, it should have also submitted separate damages issues to the jury on the issues of ratification and negligent retention by Copland. While Ms. Poole may recover all damages she can prove were proximately caused by Copland's negligent retention of Haynes, her recovery under a theory of ratification is limited to the amount of damages awarded against Haynes. *See Pinnix, supra.*

Since Haynes has not appealed, the award in favor of Ms. Poole and against Haynes in the amount of $2,000 in actual damages and $5,000 in punitive damages must stand. However, upon a new trial a jury could find, and the jury in the first trial apparently did find, that Ms. Poole was more injured by Copland's negligent failure to take action to stop the harassment than by Haynes' actions. Therefore, if the issues of ratification and negligent retention are both submitted to the jury at the new trial, because the maximum recovery against Copland under a theory of ratification is limited by *res judicata* to the amount awarded against Haynes in the first trial, *see Pinnix*, 221 N.C. 348, 20 S.E.2d 366, the trial court must submit separate damages issues under each theory.

For the reasons stated, defendant Copland is awarded a new trial.

New Trial.

Chief Judge ARNOLD and Judge JOHN concur.

DOUGLAS H. McMILLIAN AND MARGARET S. McMILLIAN, PLAINTIFFS V. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. COA96-383

(Filed 4 February 1997)

1. Insurance § 509 (NCI4th)— employee injured in automobile accident—UM coverages—no reduction for workers' compensation—subrogation for compensation carrier

The amount of uninsured motorist (UM) coverage for a passenger injured in an automobile accident in the course and scope of his employment should not be reduced by the amount of workers' compensation benefits paid to the passenger where the UM coverage was provided by personal automobile policies paid for by the passenger and driver rather than by business automobile policies, even though the policies contained a workers' compensation exclusion. However, the workers' compensation carrier was entitled, pursuant to N.C.G.S. § 97-10.2, to be subrogated to

any payment, including UM insurance proceeds, made to plaintiff by or on behalf of a third party as a result of plaintiff's injury.

Am Jur 2d, Automobile Insurance §§ 293 et seq.

Insured's right to bring direct action against insurer for uninsured motorist benefits. 73 ALR3d 632.

Who is "member" or "resident" of same "family" or "household," within nofault or uninsured motorist provisions of motor vehicle insurance policy. 96 ALR3d 804.

Applicability of uninsured motorist statutes to self-insurers. 27 ALR4th 1266.

2. **Insurance § 509 (NCI4th)— UM coverage—loss of consortium**

If an injured passenger's wife is awarded damages for loss of consortium, the UM carriers for personal automobile policies issued to the passenger and driver would be liable to her to the extent that the coverages are not exhausted.

Am Jur 2d, Automobile Insurance §§ 293 et seq.

Insured's right to bring direct action against insurer for uninsured motorist benefits. 73 ALR3d 632.

Who is "member" or "resident" of same "family" or "household," within nofault or uninsured motorist provisions of motor vehicle insurance policy. 96 ALR3d 804.

Applicability of uninsured motorist statutes to self-insurers. 27 ALR4th 1266.

Appeal by plaintiffs from judgment entered 25 January 1996 by Judge Howard R. Greeson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 6 January 1997.

Robert S. Hodgman and Associates, by Robert S. Hodgman, for plaintiff appellants.

Henson & Henson, L.L.P., by Perry C. Henson, Jr., and Rachel Scott Decker, for defendant appellee North Carolina Farm Bureau Mutual Insurance Company.

Smith Helms Mulliss & Moore, L.L.P., by Stephen P. Millikin, for defendant appellee Allstate Insurance Company.

SMITH, Judge.

This is a declaratory judgment action wherein the insurance companies involved seek to determine their obligations arising out of an automobile accident. On 2 April 1990 plaintiff Douglas H. McMillian was injured in an automobile accident in the course and scope of his employment. Plaintiff was a passenger in a car driven by James Laymond Boswell, a fellow employee. Mr. Boswell's vehicle collided with an automobile driven by Emanuel Canty, Jr., on North Carolina Highway 87 near Reidsville in Rockingham County, North Carolina. At the time of the collision, plaintiff was an employee of Winn-Dixie Stores, Inc., (Winn-Dixie). Winn-Dixie is a self-insured employer. Plaintiff Douglas H. McMillian filed a workers' compensation claim with the Industrial Commission, which action is still pending. As of 30 October 1995, plaintiff was still receiving weekly compensation of a temporary nature. As of 9 June 1993, plaintiff had been paid benefits in excess of $78,000.00.

Defendant Allstate Insurance Company (Allstate) provided uninsured motorist coverage (UM) in the names of Douglas H. and Margaret S. McMillian. Two vehicles, both registered in the name of Douglas McMillian were insured by the policy. The effective date of the policy was 22 October 1989. The policy provided coverage from 15 November 1989 to 15 May 1990 in the amount of $25,000.00 UM coverage for bodily injury and property damage. The Allstate policy contains the following exclusion:

> Any amount otherwise payable for damages under this coverage shall be reduced by all sums:
>
> * * * *
>
> 2. Paid or payable because of the bodily injury under any of the following or similar law:
>
> a. workers' compensation law . . . .

Defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau) insured the automobile owned and operated by James L. Boswell. The coverage period of the policy was from 1 March 1990 to September 1990. The vehicles covered by the policy were a 1979 Ford pickup truck, a 1983 Ford Escort and the 1983 Oldsmobile which was involved in the accident. The policy provided UM/underinsured motorists (UIM) insurance coverage for bodily injuries in the amount of $50,000.00 per person. The Farm Bureau policy contains the following exclusion:

Any amount otherwise payable for damages under this coverage shall be reduced by all sums:

* * * *

2. Paid or payable because of the bodily injury under any of the following or similar law:

a. workers' compensation law . . . .

Plaintiffs brought an action against defendants Emanuel Canty, Jr., and James Laymond Boswell alleging personal injuries arising out of the automobile accident. Plaintiffs sought damages for the personal injury of Douglas H. McMillian and for loss of consortium on behalf of Margaret S. McMillian. Plaintiffs' complaint in the underlying action against Boswell has been dismissed, presumably because in the case of ordinary negligence on the part of a fellow employee, plaintiff is barred from bringing an action against the fellow employee because recovery is limited by the Workers' Compensation Act. *Abernathy v. Consolidated Freightways, Corp.*, 321 N.C. 236, 240, 362 S.E.2d 559, 561 (1987); *Bass v. Ingold*, 232 N.C. 295, 299, 60 S.E.2d 114, 117 (1950); *Burgess v. Gibbs*, 262 N.C. 462, 467, 137 S.E.2d 806, 809 (1964). Plaintiffs' claim against defendant Canty is still pending.

Plaintiffs instituted this declaratory judgment action, to determine the coverage available under the automobile policies issued to plaintiffs and to defendant Boswell. The declaratory judgment action was heard 30 October 1995. The trial court ruled that plaintiffs were entitled to interpolicy stacking of UM coverage under the Allstate and Farm Bureau policies. However, both policies prohibit intrapolicy stacking of UM coverage, notwithstanding that multiple vehicles were listed in both policies. Plaintiffs have not assigned error to this issue and we do not address the same. The trial court also determined that the $50,000.00 Farm Bureau UM coverage and the $25,000.00 Allstate UM coverage were applicable to plaintiffs' claims against defendant Canty, but that the combined coverages of $75,000.00 were to be reduced by the $78,000.00 in workers' compensation benefits already paid to plaintiff Douglas H. McMillian. From this order plaintiffs appeal.

[1] Plaintiffs first argue that the trial court erred in reducing the amount of UM coverage by the amount of workers' compensation benefits paid to plaintiff because the applicable policies were personal rather than business policies. We agree and reverse the ruling of the trial court.

The general purpose of the Workers' Compensation Act, in respect to compensation for disability, is to substitute, for common-law or statutory rights of action and grounds of liability, a system of money payments by way of financial relief for loss of capacity to earn wages. There is no compensation provided for physical pain or discomfort. *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867 (1943). "[O]ne of the purposes of the [Workers'] Compensation Act is to relieve against hardship rather than to afford full compensation for injury. The fixing of maximum and minimum awards in industry is a compromise." *Kellams v. Carolina Metal Products, Inc.*, 248 N.C. 199, 203, 102 S.E.2d 841, 844 (1958).

The fundamental purpose of the Motor Vehicle Safety and Financial Responsibility Act of 1953, N.C. Gen. Stat. § 20-279.1 to -.39, " 'is to compensate the innocent victims of financially irresponsible motorists.' " *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 133, 392 S.E.2d 647, 648 (*quoting Nationwide Insurance Co. v. Aetna Casualty Co.*, 283 N.C. 87, 90, 194 S.E.2d 834, 836 (1973)), *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990); *see also Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 625-26, 298 S.E.2d 56, 59 (1982), *cert. denied*, 307 N.C. 698, 301 S.E.2d 101 (1983) (purpose and scope of act). "Although uninsured/underinsured motorist coverage can be specifically rejected by an insured, it is not voluntary insurance governed exclusively by the terms of the particular insurance contract." *Id.* at 133, 392 S.E.2d at 649 (*citing Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 272-73, 172 S.E.2d 284, 286-87 (1970); *Nationwide Ins. Co. v. Chantos*, 293 N.C. 431, 440-41, 238 S.E.2d 597, 603-04 (1977)). "The provisions of the Motor Vehicle Safety and Financial Responsibility Act are, in effect, written " 'into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail.' " *Id.* (*quoting Chantos*, 293 N.C. at 441, 238 S.E.2d at 604 (1977)). N.C. Gen. Stat. § 20-279.21(b)(4) (1993) provides that

> [u]nderinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur

> when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.
>
> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

Id.

> Section 20-279.21(b)(4) allows an insurer to reduce its uninsured/underinsured coverage only by the amount of liability insurance in force at the time of the accident. Moreover, our courts have repeatedly held that where policy terms purporting to exclude certain risks from uninsured/underinsured coverage are in conflict with the provisions of the Motor Vehicle Safety and Financial Responsibility Act such exclusions are unenforceable.

Ohio Casualty, 99 N.C. App. at 133-34, 392 S.E.2d at 649 (citations omitted). N.C. Gen. Stat. § 20-279.21(e) (1993) provides that motor vehicle liability policies, "need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workers' compensation law." Our Supreme Court has found two public policies inherent in this provision. "First, the section relieves the employer of the burden of paying double premiums (one to its workers' compensation carrier and one to its automobile liability policy carrier), and second, the section denies the windfall of a double recovery to the employee." *Manning v. Fletcher*, 324 N.C. 513, 517, 379 S.E.2d 854, 856, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 517 (1989).

In *Manning* our Supreme Court held that an insurance carrier could reduce the UIM liability in a business automobile insurance policy by the amount received by the insured in workers' compensation benefits. *Id.* at 518, 379 S.E.2d at 857. However, in subsequent cases this Court, distinguishing *Manning*, has found a reduction for workers' compensation benefits *improper* in cases dealing with per-

sonal liability policies, even where the policy contains a workers' compensation exclusion. *Sproles v. Green*, 100 N.C. App. 96, 105-07, 394 S.E.2d 691, 697-99 (1990), *rev'd in part on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991); *Ohio Casualty*, 99 N.C. App. at 136-37, 392 S.E.2d at 650-51; *Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 47, 54-55, 434 S.E.2d 625, 630 (1993); *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 506, 435 S.E.2d 826, 828 (1993).

In *Ohio Casualty*, relying on the public policies set forth in *Manning*, this Court declined to permit a reduction for workers' compensation benefits. *Ohio Casualty*, 99 N.C. App. at 136-37, 392 S.E.2d at 651. Because the insured herself paid for the liability insurance policy and the workers' compensation carrier had a lien on the insurance proceeds, the Court determined there would be no double recovery. *Id.*

This Court also refused to reduce the insurance proceeds by the amount of workers' compensation benefits in *Sproles*. In that case, we held that *Manning* did not apply because the policy at issue was not a business policy, but was a personal automobile policy and there was no double recovery because the damages exceeded the insurance available. *Sproles*, 100 N.C. App. at 106-07, 394 S.E.2d at 697.

This Court in *Bailey*, held that Nationwide's liability as the UM carrier could not be reduced by the amount of workers' compensation benefits paid to plaintiff by Aetna. *Bailey*, 112 N.C. App. at 54-55, 434 S.E.2d at 630. In reaching this holding we stated the following:

> In *Sproles* . . . our Court considered a case in which the plaintiffs were hurt in an automobile accident arising out of their employment and caused by a third party tortfeasor who had minimum bodily injury limits of insurance. The insurance company (USF&G) which held the UIM policy on the plaintiff driver's car attempted to have its liability reduced by monies paid to the plaintiff by her workers' compensation carrier. Our Court disallowed this, and said:
>
> > In this case USF&G's policy is not a business policy, it is a "Personal Auto Policy"; the policy was not paid for by [plaintiff's] employer, she and her husband paid for it; the workers' compensation insurance was not provided by USF&G or an affiliate; and [plaintiff's] damages have been established at an amount far in excess of any kind of insurance that is available to her. . . . In this case

> USF&G was paid to insure [plaintiff] against being damaged by a financially irresponsible motorist and while her damages by such a motorist remain unpaid USF&G's obligation to her should not be reduced or eliminated because part of her loss has been paid by someone else.

Id. (citations omitted).

In the present case the policies at issue are personal liability/UM policies paid for by the McMillians and by Boswell. On 1 March 1995 when plaintiffs filed their complaint, Douglas McMillian had received workers' compensation benefits in an amount that exceeded $78,000.00. This amount continues in the nature of weekly payments of compensation and medical bills. Allstate's and Farm Bureau's obligations to plaintiffs should not be reduced or eliminated because part of their loss has been paid by Winn-Dixie. Defendants improperly argue that *Brantley v. Starling*, 336 N.C. 567, 444 S.E.2d 170 (1994), requires that the UM coverage be reduced. However, in this case, the UM coverage and the workers' compensation coverage were provided by separate and unaffiliated carriers. Further, the UM policies at issue here are personal automobile policies and were not purchased by the employer. In *Brantley* the UIM and workers' compensation policies were both issued by North Carolina Farm Bureau and the plaintiff attempted to recover from the employer's business automobile insurance policy. *Id.* at 568, 444 S.E.2d at 170. The instant case is distinguishable and we hold that plaintiffs are entitled to recover the UM policy limits from Allstate and Farm Bureau. Additionally, pursuant to N.C. Gen. Stat. § 97-10.2 (1991), the workers' compensation insurance carrier (here Winn-Dixie) is entitled to be subrogated, upon reimbursement of the employee, to any payment, including UM/UIM motorist insurance proceeds, made to the employee by or on behalf of a third party as a result of the employee's injury. Thus, plaintiffs' recovery will not be a windfall or double recovery if Winn-Dixie opts to enforce its lien.

Plaintiffs' second assignment of error is that the trial court erred in holding that the UM coverage did not have to compensate plaintiff for damages uncompensated by workers' compensation. We disagree. In light of the above discussion, the UM carriers are liable for damages in excess of the workers' compensation amount possibly up to the amount of their coverage.

[2] Plaintiffs' third assignment of error is that the trial court erred in holding that the UM coverage did not have to compensate Mrs.

McMillian for her loss of consortium. We disagree. Because no final judgment has been entered in this case, we cannot say whether the UM carriers must compensate Mrs. McMillian for her loss of consortium. If Mrs. McMillian is awarded damages, the UM carriers would be liable to her to the extent that the coverages are not exhausted. *South Carolina Insurance Co. v. White*, 82 N.C. App. 122, 124, 345 S.E.2d 414, 415 (1986).

Reversed.

Chief Judge ARNOLD and Judge WYNN concur.

JUAN ANTONIO LOPEZ SALAS AND MARIA RESENDEZ, PLAINTIFFS v. DAVID McGEE, BOTH INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE WAKE COUNTY SHERIFF'S DEPARTMENT; GARY W. TOLER, BOTH INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE WAKE COUNTY SHERIFF'S DEPARTMENT; JOHN H. BAKER IN HIS OFFICIAL CAPACITY AS THE SHERIFF OF WAKE COUNTY; CHRISTY BROWDER HICKS, BOTH INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS AN EMPLOYEE OF THE N.C. DEPARTMENT OF REVENUE; RICHARD W. RIDDLE, BOTH INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE N.C. DEPARTMENT OF REVENUE; AND JANICE H. FAULKNER, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE N.C. DEPARTMENT OF REVENUE

No. COA95-188

(Filed 4 February 1997)

Taxation §§ 211, 217 (NCI4th)— controlled substance tax — jeopardy assessment—failure to request hearing—failure to pay tax—trial court without jurisdiction

The trial court had no jurisdiction to hear plaintiffs' claim challenging a controlled substance jeopardy tax assessment on constitutional grounds where (1) plaintiffs were given written notice of their right to request a hearing before the Secretary of Revenue pursuant to N.C.G.S. § 105-241.1(g) but failed to request a hearing, and (2) plaintiffs failed to contest the tax assessment under N.C.G.S. § 105-267 by first paying the tax and then seeking a refund from the Department of Revenue.

Am Jur 2d, Federal Tax Enforcement § 59; Administrative Law § 423.

Judge GREENE concurring.

Appeal by plaintiffs from order allowing defendants' motions for summary judgment entered 7 November 1994 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 14 November 1995.

David H. Rogers, Esq., for plaintiff-appellants.

Attorney General Michael F. Easley, by Assistant Attorney General Christopher E. Allen, for defendant-appellees.

McGEE, Judge.

On 5 April 1994 plaintiff, Juan Antonio Lopez Salas, was indicted by a Wake County grand jury on one count of conspiracy to traffic in marijuana by transportation and three counts of conspiracy to maintain a motor vehicle for the purposes of using, keeping and/or selling a controlled substance.

On 6 April 1994, the defendant law enforcement officers from the Wake County Sheriff's Department, along with the defendant N.C. Department of Revenue employees, arrived at plaintiffs' home and placed Juan Antonio Salas under arrest. They personally delivered a Notice of Controlled Substance Tax Assessment to Salas and his wife, plaintiff Maria Resendez, in the amount of $3,916,887.52 pursuant to N.C. Gen. Stat. § 105-241.1(a) and (b).

The Department of Revenue employees demanded immediate payment from plaintiffs pursuant to N.C. Gen. Stat. § 105-113.111. When plaintiffs stated they were unable to pay, the Revenue employees issued a Warrant For Collection Of Taxes under N.C. Gen. Stat. § 105-242(a) to both plaintiffs, which again listed the tax, penalty and interest the Department stated the plaintiffs owed to the State of North Carolina. Revenue employees seized all of plaintiffs' property, including the property of their minor son, under the jeopardy assessment provisions of N.C. Gen. Stat. § 105-241.1(g).

Plaintiffs filed no objection to the assessment and did not request a hearing. Revenue employees delivered to plaintiffs a notice of intent to levy upon the plaintiffs' mobile home on 12 May 1994.

On 23 May 1994, plaintiffs filed suit in Wake County Superior Court against defendants pursuant to 42 U.S.C. § 1983 alleging violations of their civil rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 19 of the North Carolina Constitution. The complaint also alleged

intentional infliction of emotional distress and requested punitive damages from defendants. On 24 May 1994, plaintiffs filed a motion for a temporary restraining order and preliminary injunction to prevent defendants from levying upon plaintiffs' property, including their mobile home. A temporary restraining order was granted 24 May 1994. On 2 June 1994, a hearing on the motion for a preliminary injunction was held. An order was entered which, in effect, directed that (1) no levy be made on the mobile home for one year or "until such time that it is determined that plaintiffs have been in actual or constructive possession of controlled substances;" (2) the property taken from plaintiffs' ten-year-old son be returned; and (3) all proceeds received from the sale of plaintiffs' personal property be held in escrow by the Department of Revenue "pending further review by the court."

Plaintiffs amended their complaint on 7 June 1994, alleging that Article 2D, Chapter 105 of the North Carolina General Statutes, the Controlled Substance Tax, is unconstitutional and that N.C. Gen. Stat. § 105-267 is unconstitutional, both facially and as it was applied to plaintiffs in that it constituted a taking of their property without due process and in violation of their civil rights. Plaintiffs also filed a motion for partial summary judgment on 7 June 1994.

On 8 August 1994, defendants McGee, Toler and Baker filed their answer, a motion to dismiss, and a motion for sanctions. Later that month, defendants Hicks, Riddle and Faulkner filed a motion for summary judgment. A hearing was held 31 October 1994 and Judge Donald W. Stephens entered an order allowing defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment and defendants' motion for sanctions. From this order, plaintiffs appeal.

The issue presented by plaintiffs is whether G.S. 105-267, when applied to the controlled substance tax procedure, is constitutional. Plaintiffs' due process claim rests on their contention that the only avenue for contesting a jeopardy tax assessment is under G.S. 105-267, which prevents a court from taking jurisdiction over a contested tax assessment suit unless the aggrieved taxpayer first pays the tax and then seeks a refund from the North Carolina Department of Revenue.

G.S. 105-267 specifically states that "[n]o court of this State shall entertain a suit of any kind brought for the purpose of preventing the

collection of any tax imposed in this Subchapter." Our Courts have interpreted this provision to mean "there shall be no injunctive or declaratory relief to prevent the collection of a tax, *i.e.*, the taxpayer must pay the tax and bring suit for a refund." *Enterprises, Inc. v. Dept. of Motor Vehicles*, 290 N.C. 450, 455, 226 S.E.2d 336, 339 (1976). G.S. 105-267 states that after paying the tax, a refund may be demanded from the Secretary of Revenue within thirty days after payment of the tax and if the refund is not made within ninety days, the taxpayer may sue the Secretary of Revenue in the courts of this state for the amount so demanded. In this case, plaintiffs did not pay, and stated they could not pay, the assessed tax and therefore they were unable to avail themselves of the procedures mandated in G.S. 105-267.

The constitutionality of G.S. 105-267 was upheld by our Supreme Court in *Swanson v. State of North Carolina*, 335 N.C. 674, 684, 441 S.E.2d 537, 543, *cert. denied*, —— U.S. ——, 130 L. Ed. 2d 598 (1994). The Supreme Court stated "the refund procedure provided in section 105-267 is free from any constitutional infirmity." *Swanson*, 335 N.C. at 684, 441 S.E.2d at 543. The Court recognized that this statute requires paying the tax before challenging the legality or constitutionality of a tax, but said, "[w]e are convinced this procedure comports with due process under the United States Supreme Court's jurisprudence on the subject as it relates to taxation. That Court has long held that postdeprivation remedies in the area of taxation can comport with due process." *Id.* Even in cases where the taxpayer is challenging the constitutionality of a tax, failure to comply with the "State's statutory postpayment refund demand procedure" set forth in the statute bars the court from hearing the taxpayer's claim. *Swanson*, 335 N.C. at 680-681, 441 S.E.2d at 540-41; *See also 47th Street Photo, Inc. v. Powers*, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990), *disc. review denied, motion to dismiss allowed*, 329 N.C. 268, 407 S.E.2d 835 (1991) (holding "a constitutional defense to a tax does not exempt a plaintiff from the mandatory procedure for challenging the tax set out in § 105-267"); *Bailey v. State Of North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), *cert. denied*, 504 U.S. 911, 118 L. Ed. 2d 547 (1992).

In addition to the procedures in G.S. 105-267, the plaintiffs in this case had another avenue to contest their controlled substance tax assessment. Here, the Department of Revenue proceeded under the jeopardy tax assessment procedures in G.S. 105-241.1(g). This statute states "the Secretary [of Revenue] may at any time within the appli-

cable period of limitations immediately assess any tax the Secretary finds is due from a taxpayer if the Secretary determines that collection of the tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State." G.S. 105-241.1(g). Under this additional option in G.S. 105-241.1(g) for a taxpayer to contest a controlled substance jeopardy tax assessment, the taxpayer may request "a hearing on the jeopardy assessment by following the procedure described in the notice."

The pre-printed portion of the Notice Of Controlled Substance Tax Assessment that was personally delivered to the plaintiffs in this case set forth the following hearing procedure available in G.S. 105-241.1:

> This assessment is proposed pursuant to G.S. 105-113.111 .... If you desire a hearing before the Secretary of Revenue with respect to this proposed assessment, you must submit a written request for hearing within thirty days after the date of this notice, as provided by G.S. 105-241.1. Your request should set forth in detail your objection to the assessment and must be timely served upon the Secretary of Revenue. Unless your application for hearing is filed within the time stated, this proposed assessment will become final and conclusive.
>
> In the event you fail to respond immediately to this proposed assessment by remitting the full amount shown due or by posting a bond, collection may proceed pursuant to G.S. 105-241.1(g) or G.S. 105-242 without regard to whether you have requested a hearing.

On the day the assessment was imposed, plaintiffs were presented written documents informing them of their right to a hearing before the Secretary of Revenue but they did not request a hearing. After more than thirty days had passed without a hearing having been requested by plaintiffs, Revenue employees proceeded with a notice to levy upon plaintiffs' mobile home.

Plaintiffs had two procedures available to them for challenging their controlled substance jeopardy tax assessment. They failed to avail themselves of the hearing procedures provided for in G.S. 105-241.1(g) for a hearing before the Secretary of Revenue. Therefore, their other option was to contest their tax assessment under G.S. 105-267, requiring them to first pay the tax before seeking a refund. The plaintiffs did not comply with the statutory refund

demand procedure in G.S. 105-267, nor did they use the hearing provisions before the Secretary of Revenue in G.S. 105-241.1(g). Therefore, the trial court was barred from hearing their action. The trial court did not err in granting defendants' motion for summary judgment.

Affirmed.

Judge GREENE concurs with a separate opinion.

Judge MARTIN, MARK D. concurs.

Judge GREENE concurring:

Section 105-241.1(g) of the North Carolina General Statutes provides that the Secretary of Revenue "may" give the taxpayer notice of a proposed jeopardy assessment and pursuant to that notice the taxpayer may request a hearing. In this case, the notice was given and the taxpayers did not request a hearing. I therefore agree with the majority that in this case, because the taxpayers had a right to a hearing and did not request one, summary judgment was properly entered for the defendants.

I do note, however, that the taxpayers' due process rights would have been violated had the Secretary not given the taxpayers notice and an opportunity to be heard on the assessment. In those situations where the Secretary proceeds without notice (which the statute suggests she may), the taxpayer is permitted to question the assessment only upon payment of the tax, N.C.G.S. § 105-267 (1995), and there is no evidence that the taxpayers had the ability to pay the large assessment in question. In this event, there would be no practical method to question the tax and this would be violative of the taxpayers' due process rights. *See General Textile Printing & Process. v. Rocky Mount*, 908 F. Supp. 1295, 1304 (E.D.N.C. 1995) (statute imposing prerequisite on party that he cannot meet " 'shock[s] the conscience' [and] offend[s] 'a sense of justice' ").

LEWIS KURTZMAN, PLAINTIFF v. APPLIED ANALYTICAL INDUSTRIES, INC., DEFENDANT

No. COA96-50

(Filed 4 February 1997)

1. Labor and Employment § 65 (NCI4th)— employment at will—additional consideration exception—sufficient evidence

The "additional consideration" exception to the employment-at-will doctrine was applicable in plaintiff's action for breach of an employment contract where plaintiff's evidence tended to show that plaintiff, who had a secure position with another company, was actively recruited by defendant employer and was persuaded to sell his home in New England and relocate to North Carolina; negotiations between plaintiff and defendant were extensive; and plaintiff was told by defendant's top management that the job was a career position with tremendous long-term growth potential for him, that he had a job as long as he did his job, that plaintiff would be part of a team making valuable contributions toward the future growth of defendant, and that plaintiff's job was a secure position in which plaintiff could not lose and for which the long-term gain would outweigh the short-term losses. Plaintiff's recovery was not barred because an employment application which he signed eight days after beginning work for defendant contained language that "employment can be terminated for any reason" where plaintiff was not asked to complete an employment application before he began working for defendant; plaintiff did not consider the language applicable to him because of the numerous assurances he had received from defendant's top management; and, at the time he signed the application, plaintiff had already resigned his former position and had temporarily relocated in this state while his wife attempted to sell their home in New England.

Am Jur 2d, Employment Relationship §§ 10 et seq.

2. Labor and Employment § 72 (NCI4th)— breach of contract—damages—future income—sufficient evidence

Evidence of plaintiff's future income was not too speculative to support the jury's award of $350,000 to plaintiff for defendant employer's breach of an employment contract where plaintiff tes-

tified he was a capable employee who planned to work until retirement; plaintiff offered proof of his age and salary at the time of his termination by defendant; plaintiff presented evidence showing the efforts he made to find other employment and the wages he was able to earn upon termination by defendant; and expert testimony was offered to illustrate plaintiff's past and future losses.

Am Jur 2d, Employment Relationship §§ 52 et seq.

Elements and meansure of damages in action by schoolteacher for wrongful discharge. 22 ALR3d 1047.

Damages recoverable for wrongful discharge of at-will employee. 44 ALR4th 1131.

3. Judgments § 652 (NCI4th)— breach of contract—prejudgment interest

Plaintiff was entitled to prejudgment interest from the date of defendant employer's breach of his employment contract. N.C.G.S. § 24-5(a).

Am Jur 2d, Employment Relationship §§ 10 et seq.

Appeal by defendant and cross appeal by plaintiff from judgments and orders entered by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court.

Defendant appeals from (1) the judgment and amended judgment entered 26 June 1995 and 3 August 1995 respectively; (2) the 4 August 1995 order denying defendant's motion to set aside verdict and judgment and alternative motion for new trial; and (3) all other orders and rulings adverse to defendant by the trial court during the trial and post-trial motion phases of the litigation. Cross appeal by plaintiff is from the Superior Court's 3 August 1995 amended judgment denying prejudgment interest.

Heard in the Court of Appeals 26 September 1996.

Shipman & Umbaugh, L.L.P., by Gary K. Shipman, Jennifer L. Umbaugh and Carl W. Hodges, II, for plaintiff-appellee/appellant.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Frank H. Lancaster, for defendant-appellant/appellee.

McGEE, Judge.

This is an employment contract dispute in which plaintiff, Lewis Kurtzman, brought several claims against defendant, Applied Analytical Industries, Inc. (AAI) including his claim for breach of employment contract. AAI is a company based in Wilmington, North Carolina that provides scientific services to assist clients in securing FDA approval of pharmaceutical products. Although there was conflicting testimony at trial, there was evidence of the following employment arrangement between plaintiff and defendant. In late 1991, AAI contacted plaintiff about leaving his position as national sales manager of E.M. Separations Technology, a Rhode Island company. After some initial reluctance and extensive negotiations which included job security assurances from AAI, plaintiff accepted a position as director of sales for AAI with a minimum yearly salary of $125,000.

Plaintiff found temporary housing in Wilmington and began his employment with AAI on 30 March 1992. A few months later, he and his wife sold their home in Massachusetts and made a permanent move to Wilmington. Eight days after beginning his employment with AAI, plaintiff was asked to complete an employment application which included language that employees could be terminated for any reason deemed sufficient by AAI. Plaintiff signed the application, but considered it a simple formality since he had (1) already engaged in extensive negotiations which included assurances as to job security; (2) already accepted a position with AAI; (3) resigned from his employment with E.M. Separations Technology; and (4) relocated from Massachusetts to Wilmington.

On 2 November 1992, AAI terminated plaintiff. Despite extensive efforts, plaintiff was unable to secure different employment, so he started a consulting business which paid substantially less than the salary he received while working at AAI. On 2 February 1993, plaintiff filed suit against AAI alleging breach of employment contract, tortious interference with contractual relations, intentional infliction of emotional distress and by amendment, negligent misrepresentation. All claims except the breach of contract action were dismissed either voluntarily or by summary judgment. The remaining claim for breach of contract proceeded to a jury trial. On 1 June 1995, the jury returned a verdict in plaintiff's favor and awarded him $350,000.00 in damages.

The trial court entered judgment on the jury verdict on 26 June 1995 and subsequently amended judgment on 3 August 1995 to

include an award of post-judgment interest. AAI moved the trial court to set aside the verdict or, in the alternative, for a new trial. These motions were denied. Both plaintiff and AAI have appealed to this Court. AAI contends the trial court erred (1) in denying its motion for directed verdict and (2) in allowing the $350,000.00 award to stand because it is too speculative. Plaintiff has appealed the trial court's denial of prejudgment interest from the date of the breach of contract.

I. Denial of the Directed Verdict

[1] The question this Court must consider with a motion for directed verdict is whether the evidence was sufficient to entitle plaintiff to have a jury pass on the matter. *Smith v. Price*, 74 N.C. App. 413, 418, 328 S.E.2d 811, 815 (1985), *aff'd in part and rev'd in part on other grounds*, 315 N.C. 523, 340 S.E.2d 408 (1986). The evidence is to be reviewed in a light most favorable to the non-moving party and the non-movant is entitled to every inference which may legitimately be drawn from the evidence. *Id.* All conflicts are resolved in favor of the non-movant. *Id.*

In arguing the trial court erred in denying its motion for directed verdict, AAI contends North Carolina is an employment-at-will state with relatively few exceptions. AAI argues plaintiff's heavy reliance on *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985) as allowing an exception to employment-at-will in cases where the employee gives special consideration such as removing his residence from one place to another in order to accept employment is misguided and that under these facts, *Sides* is inapplicable. AAI contends this Court's holding in *Sides* is narrow and creates an exception to employment-at-will for public policy reasons in cases where the employee is asked to engage in unlawful behavior. Furthermore, AAI argues any reference in *Sides* to "removal of residence" is dicta and not part of the Court's holding. AAI urges "the 'removal of residence' concept would be an unsound basis on which to base an exception to the principle of employment-at-will [and] further, such an exception would be contrary to precedent." We disagree.

North Carolina is an employment-at-will state. An employee who is not offered employment for a definite term is considered "an employee at will and may be discharged without reason." *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446 (1989). This rule is subject to several exceptions including an "addi-

tional consideration" exception. *Mortensen v. Magneti Marelli U.S.A.*, 122 N.C. App. 486, 488, 470 S.E.2d 354, 356, *disc. review denied*, 344 N.C. 438, 476 S.E.2d 120 (1996). In *Mortensen* we said:

> The providing of additional consideration by the employee does not convert every employment-at-will agreement into an enforceable contract. If, however, the employment agreement expressly or impliedly provides that the employment will be permanent, for life or terminable only for cause *and* the employee gives an independent valuable consideration other than his services for the position, *see Sides v. Duke University*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985); *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 658-59, 412 S.E.2d 97, 101 (1991), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992); *Tuttle v. Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 2-9 at 60-63 (3d ed. 1987); *see also* 30 C.J.S. *Employer-Employee* § 43, at 83 (1992), the employment can be terminated only for cause until the passage of a reasonable time. *See* 3A Arthur L. Corbin, *Corbin on Contracts* § 684 (1960 & Supp. 1994); *Tuttle*, 263 N.C. at 219, 139 S.E.2d at 251; 30 C.J.S. *Employer-Employee* § 43, at 83 (1992). After the passage of a reasonable time the employment relationship can be terminated without cause.

Id. at 488-89, 470 S.E.2d at 356. This Court has recognized that additional consideration can include the removal of an employee's residence from one location to another in order to accept employment. *See Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 659, 412 S.E.2d 97, 101 (1991), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992); *Sides*, 74 N.C. App. at 345, 328 S.E.2d at 828; *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682, *disc. review denied*, 297 N.C. 298, 254 S.E.2d 918 (1979).

In this case, there was evidence that plaintiff, who had a secure position with another company, was actively recruited by AAI and eventually was persuaded to relocate from New England to North Carolina to accept the sales director position with AAI. Negotiations between plaintiff and AAI were extensive and plaintiff testified he received numerous verbal assurances of job security from top management at AAI. Plaintiff was told the job was a career position with tremendous, long-term growth potential for him and that "[a]s long as I did my job, I had a job." Other assurances included almost a dozen

statements that plaintiff would be part of a team making valuable contributions toward the future growth of AAI; it was a secure position in which plaintiff could not lose and that the long-term gains would outweigh any short-term losses. Plaintiff was told the company was prepared to pay temporary living expenses and the company contributed to the costs of selling plaintiff's Massachusetts residence. We agree with plaintiff that collectively, these statements constitute specific assurances that plaintiff would not be discharged unless his performance was inadequate.

AAI's argument that plaintiff's recovery is barred because the employment application which he signed eight days after beginning work for AAI contained language that "employment can be terminated for any reason deemed sufficient by AAI" is without merit. Plaintiff testified he never saw the employment application prior to beginning work for AAI and that when he was asked to sign the form eight days after he became employed, he did not consider the language applicable to him because of the numerous assurances he had already received from top management at AAI. Additionally, by the time plaintiff signed the application, he had already resigned from E.M. Separations and temporarily relocated to Wilmington while his wife was trying to sell their home in New England. Furthermore, AAI's Director of Personnel testified that during his interviews with plaintiff, he never asked him to complete a job application. He explained that management employees generally used resumes as the method of conveying their prior work experience and employment applications for these people were typically completed after employment and were kept on file for personnel record purposes.

II. Damage Award

[2] AAI contends the jury's award of $350,000.00 cannot stand because the calculation of damages was too speculative as to plaintiff's future income. We disagree.

In calculating the damages for this breach of contract claim, plaintiff was entitled to recover the difference between his salary as opposed to his total earnings during the contract period. *Thomas v. College*, 248 N.C. 609, 615, 104 S.E.2d 175, 179 (1958). Plaintiff presented solid evidence of the damages he suffered as a result of this breach of contract. He testified he was a capable employee who planned to work until retirement. He offered proof of his age and his salary at the time of his termination. Other evidence was introduced showing the efforts plaintiff made to find different employment and

the wages he was able to earn upon termination by AAI. Finally, expert testimony was offered to illustrate plaintiff's past and future losses.

As plaintiff noted in his brief, a determination of damages in this case is no more speculative than is an award for loss of future earnings in a personal injury claim. We conclude there was sufficient concrete evidence upon which the jury could calculate plaintiff's damages with a reasonable degree of certainty.

III. Prejudgment Interest

[3] In plaintiff's cross appeal, he argues the trial court erred in denying his petition for prejudgment interest from the date of AAI's breach of contract. We agree.

In *Metromont Material Corp. v. R.B.R. & S.T.*, 120 N.C. App. 616, 463 S.E.2d 305 (1995), *disc. review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996), we said:

> The legislature amended G.S. § 24-5(a) in 1985 to provide that "[i]n an action for breach of contract, . . . the amount awarded on the contract bears interest from the date of the breach." Subsequently, in *Steelcase, Incorporated v. The Lilly Company*, this Court noted that, as amended, G.S. § 24-5(a) "clearly provides for interest from the date of breach in breach of contract actions." *Steelcase, Inc. v. The Lilly Co.*, 93 N.C. App. 697, 703, 379 S.E.2d 40, 44, *disc. review denied*, 325 N.C. 276, 384 S.E.2d 530 (1989).
>
> Here, both parties tailor their arguments to the case law developed prior to the 1985 amendment and the rule quoted from *General Metals*. However, it is clear to this Court that resort to that rule, developed only to determine the date from which to apply interest, is no longer necessary. When the legislature amended the statute, and provided a time from which to apply interest, it obviated any need for the rule. In doing so, it removed the confusing questions of ascertainment and certainty that so often muddled the statute's application. Because this case falls under the amended version of the statute, plaintiff's arguments do not apply, and the trial court did not err in awarding prejudgment interest.

Id. at 618, 463 S.E.2d at 307. Our holding in *Metromont* is clearly dispositive of this case. To the extent the trial court's judgment is incon-

sistent with N.C. Gen. Stat. § 24-5(a), which states that interest shall be paid from the date of breach in breach of contract actions, we reverse and remand the matter for entry of judgment including prejudgment interest.

Affirmed in part, reversed in part and remanded.

Judges WYNN and JOHN concur.

GORDON G. KOLTIS, M.D. CAROLINA RADIATION AND CANCER TREATMENT CENTER, P.A., AND CAROLINA RADIATION MEDICINE, P.A. PETITIONERS-APPELLEES v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE, AND PITT COUNTY MEMORIAL HOSPITAL, INC., RESPONDENT-INTERVENOR-APPELLANT

No. COA96-387

(Filed 4 February 1997)

Hospitals and Medical Facilities or Institutions § 11 (NCI4th)— oncology treatment center—certificate of need—statutory amendment—exemption under grandfather clause

Petitioners were exempt from obtaining a certificate of need to open an oncology treatment center because they had entered into binding legal contracts "to develop" a health service as contemplated by the grandfather clause of the 1993 amendment to N.C.G.S. § 131E-176 which included an oncology treatment center within the definition of "new institutional health service" requiring a certificate of need where, prior to the effective date of the amendment, petitioners had entered into contracts with a CPA for a specified fee and duration under which the CPA was to provide consulting services related to development of the proposed center, and the CPA's duties under the contracts included preparation of an initial budget proposal and a financial feasibility study, handling of vendors' proposals for equipment, contacting an architect for a cost projection, investigation of sites, and correspondence with DHR regarding the necessity of obtaining a certificate of need. Although the grandfather clause required a contract to "develop and offer" a health service, the definition of

"offer" in the statute makes it impossible to have a contract to offer, and the requirements of the grandfather clause were satisfied by a showing of a binding contract "to develop" a health service.

Am Jur 2d, Hospitals and Asylums § 4.

Validity and construction of statute requiring establishment of "need" as precondition to operation of hospital or other facilities for the care of sick people. 61 ALR3d 278.

Appeal by respondent-intervenor from Final Decision entered 4 December 1995 by Director John M. Syria, Director of the North Carolina Department of Human Resources, Division of Facility Services. Heard in the Court of Appeals 6 January 1997.

Poyner & Spruill, L.L.P., by Mary Beth Johnston and Benjamin P. Dean, for respondent-intervenor-appellant.

Petree Stockton, L.L.P., by Noah H. Huffstetler, III and Gary S. Qualls, for petitioners-appellees.

Michael F. Easley, Attorney General, by Sherry C. Lindquist, Assistant Attorney General, for the State.

WYNN, Judge.

Petitioners, Dr. Gordon Koltis and two professional associations of which Dr. Koltis is the president and sole shareholder (Carolina Radiation and Cancer Treatment Center, P.A., and Carolina Radiation Medicine, P.A.), proposed to develop and operate a new oncology treatment center in Pitt County, North Carolina. To that end, petitioners notified the North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section (DHR) of their ongoing efforts to develop the center and requested DHR's confirmation that the project was exempt from obtaining the certificate of need required for a "new institutional health service" under N.C. Gen. Stat. § 131E-178. DHR responded that no certificate of need was required since the project did not meet the current statutory definition of a "new institutional health service" under N.C. Gen. Stat. § 131E-176(16) but warned that pending legislation would significantly change that definition and if enacted, the project would have to be reevaluated in light of the statutory amendment.

By ratification of Senate Bill 10 on 18 March 1993, N.C.G.S. § 131E-176 was amended so that an oncology treatment center fell within the definition of a "new institutional health service" requiring a certificate of need under N.C.G.S. § 131E-178. However, Senate Bill 10 contained a grandfather clause which excepted from application of the amended statute "any person . . . [or] corporation . . . who has lawfully entered into a binding legal contract to develop and offer any service that was not a new institutional health service requiring a certificate of need prior to the ratification of this act." 1993 N.C. Sess. Laws ch. 7, sec. 12. DHR notified petitioners that they did not fall within the exception and were thus required to obtain a certificate of need. Petitioners challenged DHR's decision via a contested case hearing in the Office of Administrative Hearings. Pitt County Memorial Hospital, Inc. (PCMH) intervened as a proper party and as an "affected person" within the meaning of N.C. Gen. Stat. § 131E-188 (1994).

All parties moved for summary judgment and the Administrative Law Judge (ALJ) entered a recommended decision granting summary judgment in petitioners' favor finding that petitioners fell within the application of the grandfather clause of Senate Bill 10 because they had entered into binding legal contracts to develop the oncology treatment center before 18 March 1993. DHR's Director of the Division of Facility Services issued a final agency decision adopting the ALJ's recommended decision granting summary judgment in petitioners' favor. Respondent-intervenor PCMH appeals.

The principal issue PCMH raises on appeal is whether the agency erred by granting summary judgment to petitioners on the grounds that they were exempt from obtaining a certificate of need because they had entered into binding legal contracts to develop and offer a health service as contemplated by the grandfather clause of Senate Bill 10. We hold that the agency properly granted summary judgment for petitioners and therefore affirm the agency's final decision.

PCMH first contends that the contracts petitioners rely upon are not legally binding contracts. PCMH argues that the terms of petitioners' contracts with Terrence Boardman are not sufficiently definite to be legally binding. In addition, PCMH argues that Mr. Boardman's consulting services could be terminated at will unilaterally by either side and therefore the agreement to provide such services was not binding.

A valid contract requires offer, acceptance, consideration and no defenses to formation. *Copy Products, Inc. v. Randolph*, 62 N.C. App. 553, 555, 303 S.E.2d 87, 88 (1983).

> In the making of a contract it is essential that the parties thereto assent to the same thing in the same sense, and their minds must meet as to all terms. To be binding the terms shall be definite and certain, or capable of being made so. *But the contract need not definitely and specifically contain in detail every fact to which the parties are agreeing.* It is sufficient if the terms can be made certain by proof.

Sides v. Tidwell, 216 N.C. 480, 483, 5 S.E.2d 316, 318 (1939) (emphasis added) (citations omitted).

The record in the subject case reveals that Mr. Boardman, a certified public accountant, provided general accounting services to Carolina Radiation Medicine, P.A. (CRM) for $200 per month. In August 1992, Dr. Koltis and CRM retained Mr. Boardman to act as their agent and provide consulting services connected with development of the proposed oncology treatment center for an additional $1,400 per month. In December 1992, Dr. Koltis and CRM entered into a second agreement with Mr. Boardman, effective in January 1993, to further provide such services for an additional $600 per month. The record contains two letters from Mr. Boardman to Dr. Koltis which outline the general terms of their agreement. In the first, Mr. Boardman agreed to provide "financial consulting services" including "accounting, payroll and special projects" for $1600 per month from 15 August 1992 through 31 December 1992. In the second, Mr. Boardman agreed to provide "general accounting and consulting services" for $800 per month from 1 January 1993 through 31 December 1993. The record also contains the affidavits of both Mr. Boardman and Dr. Koltis which confirm the general terms and provide further details of the agreement between the parties. We find that the uncontroverted evidence in the record establishes two legally binding contracts for a specific duration between Mr. Boardman and Dr. Koltis.

PCMH next contends that even if the contracts with Mr. Boardman are valid, legally binding contracts, they are not contracts to "develop and offer" the proposed center as required for exemption under the grandfather clause of Senate Bill 10.

Under the grandfather clause of Senate Bill 10, a person or corporation "who has lawfully entered into a binding legal contract to

develop and offer any service that was not a new institutional health service requiring a certificate of need prior to the ratification of this act" is exempt from the certificate of need requirement. 1993 N.C. Sess. Laws ch. 7, sec. 12. N.C.G.S. § 131E-176 provides the definition of the terms "develop" and "offer":

> (7) To "develop" when used in connection with health services, means to undertake those activities which will result in the offering of institutional health service or the incurring of a financial obligation in relation to the offering of such a service.
>
> . . . .
>
> (18) To "offer," when used in connection with health services, means that the person holds himself out as capable of providing, or as having the means for the provision of, specified health services.

PCMH argues that petitioners had neither entered into any contract to "develop" nor entered into any contract to "offer" the proposed oncology treatment center. However, the record reveals that petitioners entered into two separate contracts with Mr. Boardman to provide consulting services related to development of the proposed oncology treatment center.

Mr. Boardman's performance under the contracts included preparation of an initial budget proposal and financial feasibility study for the center, request and receipt of proposals from various vendors for equipment needed in the center, contact with an architect to provide a cost projection for the proposed center, the investigation of possible sites upon which to build the center, and correspondence with DHR regarding the necessity of obtaining a certificate of need for the project. Petitioners' contracts with Mr. Boardman were clearly to "develop" the center.

PCMH further argues that to be exempt from the certificate of need requirement, the grandfather clause in Senate Bill 10 requires a contract to develop *and offer* a health service. PCMH maintains that petitioners have failed to present evidence of any contract to develop *and offer* any health service.

The agency, adopting the ALJ's recommended decision, concluded that "[p]etitioners' contracts 'to develop' are sufficient to satisfy the Grandfather Clause. Under the Department's own interpretation, no separate 'contract to offer' is necessary." In arriving at that

conclusion, the agency relied upon *Hunter v. N.C. Dept. of Human Resources*, 93 DHR 0746 (Final Decision, July 14, 1994).

In *Hunter*, the agency considered whether a contract for the purchase of heart-lung bypass equipment entered into prior to the ratification of Senate Bill 10 qualified petitioners for an exemption from the application of the amended statute under the grandfather clause. The agency concluded:

> The definition of "offer" makes it impossible to have a "contract" to offer. "Offer" as it is used in the New Act involves only one party because, quite simply, one cannot contract to "hold oneself out" as being capable of providing or having the means of providing a health service; therefore, a contract for the offering or use of the equipment prior to March 18, 1993, was not necessary.

While we recognize that the agency's interpretation of the grandfather clause of Senate Bill 10 is not binding on this Court, "the construction adopted by those who execute and administer the law in question is relevant and may be considered. Such construction is entitled to 'great consideration,' or to 'due consideration.' It is said to be 'strongly persuasive, or even 'prima facie correct.' " *MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973) (citations omitted). We find the agency's interpretation persuasive and therefore hold that to satisfy the requirements of the grandfather clause of Senate Bill 10 one need only show a binding legal contract *to develop* any service that was not a new institutional health service requiring a certificate of need prior to 18 March 1993.

We find that petitioners fall within the exemption provided by the grandfather clause of Senate Bill 10 because they entered into contracts with Mr. Boardman to provide services to develop the proposed oncology treatment center prior to 18 March 1993. Accordingly, we hold that the agency properly granted summary judgment for petitioners and affirm the agency's final decision.

Affirmed.

Chief Judge ARNOLD and Judge SMITH concur.

HELEN C. BAYNOR, ADMINISTRATRIX OF THE ESTATE OF EARL J. BAYNOR, SR., PLAINTIFF v. ELISABETH COOK, M.D., BEAUFORT EMERGENCY MEDICAL ASSOCIATES, ROBERT E. SANDY, M.D., AND SEABOARD RADIOLOGY ASSOCIATES, P.A., DEFENDANTS

No. COA96-326

(Filed 4 February 1997)

Physicians, Surgeons, and Other Health Care Professionals § 149— medical malpractice—instructions—national standard of care—community standard

The trial court did not err by refusing to instruct the jury in a medical malpractice action on a national standard of care for the treatment of thoracic aortic rupture and by giving the jury the "same or similar communities" instruction pursuant to N.C.G.S. § 90-21.12. Although plaintiff's experts testified that there is a national standard of care for the treatment of such ruptures, they also testified that the community standard in Beaufort County was the same as that across the country, and the jury could not have failed to understand the relationship between a national standard of care and a similar community standard of care.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 218, 219, 363.

Modern status of "locality rule" in malpractice action against physician who is not a specialist. 99 ALR3d 1133.

Standard of care owed to patient by medical specialist as determined by local, "like community," state, national, or other standards. 18 ALR4th 603.

Appeal by plaintiff from judgment entered 14 October 1994 by Judge Cy A. Grant in Beaufort County Superior Court. Heard in the Court of Appeals 3 December 1996.

Faison & Fletcher, by C. William Faison, for plaintiff-appellant.

Herrin & Morano, by Mickey A. Herrin and J. Nathan Duggins III, for defendants-appellees Elisabeth Cook, M.D. and Beaufort Emergency Medical Associates.

Walker, Barwick, Clark & Allen, L.L.P., by Robert D. Walker, Jr. and O. Drew Grice, Jr., for defendants-appellees Robert E. Sandy, M.D. and Seaboard Radiology Associates, P.A.

WALKER, Judge.

Plaintiff's decedent, Earl J. Baynor, was involved in an automobile accident on 27 April 1992. Defendant, Dr. Elisabeth Cook, a board certified specialist in emergency medicine, treated Mr. Baynor following his admittance to the hospital. After reviewing the chest x-rays she ordered and observing Mr. Baynor for several hours, she released him with discharge instructions. The next day, defendant, Dr. Robert Sandy, a board certified specialist in radiology, reviewed the x-rays ordered by Dr. Cook and suggested that Mr. Baynor had a possible hilar mass. Dr. Sandy called the emergency room to determine Mr. Baynor's admission status and after learning he had been discharged, Dr. Sandy took no further action other than to suggest in his report that Mr. Baynor undergo a CT scan for further evaluation. On 1 May 1992, Mr. Baynor died of a thoracic aortic rupture.

At trial, both parties presented expert witnesses that testified about the applicable standard of care. Plaintiff's experts both testified that there was a national standard of care for the diagnosis and treatment of a thoracic aortic rupture (TAR). Plaintiff presented the testimony of Dr. George Podgorny concerning defendant Cook's treatment of Mr. Baynor. Dr. Podgorny testified that he was familiar with the national standard of care for the diagnosis and treatment of a TAR. He also testified that he was familiar with the standard of care of an emergency room physician in Beaufort County and that in his opinion defendant Cook deviated from the applicable standard of care. Dr. Jerome Shapiro similarly testified he was familiar with the national standard of care and that he would not expect the standard of care in Washington, North Carolina to differ from this standard. Further, he stated that the applicable standard of care would be the same regardless of the community.

Defendants Cook and Beaufort Emergency Medical Associates presented expert witnesses who testified that they were familiar with the standard of care of an emergency room physician in Beaufort County, North Carolina and that Dr. Cook did not deviate from that standard of care in her treatment of Mr. Baynor. Defendants Dr. Sandy and Seaboard Radiology Associates presented expert witnesses who testified that they were familiar with the standard of care of a radiologist in Beaufort County, North Carolina and that Dr.

Sandy did not deviate from that standard in his treatment of Mr. Baynor.

Plaintiff requested the trial court to instruct the jury as follows:

> You are instructed that although the North Carolina General Statutes established a method for ascertaining the standard of care which is to be determined in accord with the standard of practice among members of the same health care profession, similar training and experience situated in the same or similar community where an expert has or have testified, that the national standard of care exists, the diagnosis and treatment of thoracic aortic injuries following blunt chest trauma, such as an automobile collision, and it has testified as to the national standard of care, and that, the national standard of care has become the local standard of care, then you may find that the national standard of care applies, and may apply such national standard of care to determine whether Defendants Cook and Sandy have met the standard of care in their treatment of Earl Baynor[.]

This request was denied and the trial court instead instructed on the standard of care as mandated by N.C. Gen. Stat. § 90-21.12 and set forth in the Pattern Jury Instructions, Civil 809.00. N.C. Gen. Stat. § 90-21.12 states:

> In any action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental or other health care, the defendant shall not be liable . . . unless the trier of the facts is satisfied . . . that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities. . . .

The trial court instructed the jury in accordance with Pattern Jury Instruction, Civil 809.00 as follows:

> If the physician holds herself out as having special knowledge and skill in the type of health care service rendered by her, and if the patient employs her as a specialist, the physician must perform her duty to the patient in accordance with the standards of practice that may differ from those of a general practitioner. She must render the health care service in accordance with the stand-

> ards of practice exercised by like specialists with similar training and experience who are situated in the same or similar communities at the time the health care service is rendered.

This instruction was given concerning Dr. Cook's negligence and a similar instruction was given regarding Dr. Sandy.

Plaintiff's only assignment of error is that the trial court committed reversible error by denying her request for an instruction on the national standard of care.

Plaintiff argues that the requested instruction on the national standard of care was warranted by the evidence and in accordance with North Carolina law. Plaintiff also contends that since her evidence was limited to the national standard of care, an instruction on the national standard was warranted.

Plaintiff relies on *Rucker v. Hospital*, 285 N.C. 519, 206 S.E.2d 196 (1974) in support of her argument. In *Rucker*, the plaintiff's expert testified that he was not familiar with the defendant hospital but he was familiar with standards and practices in duly accredited hospitals throughout the United States and that the treatment of gunshot wounds was uniform throughout the country. The trial court excluded this testimony but the Supreme Court reversed stating that because the defendant hospital was a fully accredited hospital, this witness should have been allowed to testify as to the applicable standard of care for gunshot wounds since the standards were the same in accredited hospitals throughout the nation. *Id.* at 526, 206 S.E.2d at 201.

Plaintiff asserts that the holdings in *Rucker* and later cases establish that our law allows a doctor's conduct to be judged against a national standard of care when the standard of care is the same across the country. We do not read *Rucker* to stand for plaintiff's proposition. Instead, *Rucker* allowed an expert to testify because he was familiar with accredited hospitals across the country and that the treatment of gunshot wounds was the same at all such hospitals, not because North Carolina had adopted a national standard of care. In *Page v. Hospital*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980), this Court stated:

> By adopting the "similar community" rule in G.S. 90-21.12 it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers and not

> to exclude testimony such as that offered in this case where it was shown that the witness was familiar with the standards of hospitals in adjoining and nearby communities.

The Court noted that the statute was designed to overcome the strict "locality" rule that had previously existed in this State. *Id.* Therefore, it is apparent that the "similar community" requirement in the statute is not confined to North Carolina but would apply to communities within and without our State.

Plaintiff also argues that her requested instruction on a national standard of care should have been given to bring into the jury's view the relationship between the evidence presented and the legal issues involved. Plaintiff claims that the trial court's failure to instruct the jury on the national standard of care left the jury to wonder how it was to consider the evidence on the national standard of care. Therefore, the jury must have focused on the local standard of care. We find plaintiff's arguments unpersuasive.

Dr. Podgorny testified that he was familiar with the standard of care for an emergency room physician in Beaufort County and Dr. Shapiro testified he would not expect the standard of care in Washington, North Carolina to differ from the national standard of care with which he was familiar. Thus, the jury heard testimony that the community standard in Beaufort County for the treatment of TARs is the same across the country. The trial court properly allowed plaintiff's experts to testify that based on their familiarity with the national standard of care as related to a common medical issue (TARs), this standard of care did not vary depending on the community. Plaintiff's arguments assume that the jury failed to understand the relationship between a national standard of care and a similar community standard of care. We find nothing in the record to support this assertion.

No error.

Judges LEWIS and SMITH concur.

STATE OF NORTH CAROLINA v. BRAD LEE CRAWFORD

No. COA95-1359

(Filed 4 February 1997)

Automobiles and Other Vehicles § 834 (NCI4th)— DWI out of officer's presence—authority to arrest without warrant

A deputy sheriff had probable cause to believe (1) that defendant had committed the misdemeanor offense of driving while impaired outside his presence and (2) that defendant might cause injury to himself or others if not immediately arrested, and the deputy thus had authority to arrest defendant without a warrant pursuant to N.C.G.S. § 15A-401(b)(2), where the deputy found defendant alone in a car parked on the shoulder of a rural side road around 3:30 a.m.; defendant was in the driver's seat, his pants were undone, and he had been drooling; defendant had a strong odor of alcohol about him, had difficulty speaking, and admitted he had been drinking; the hood of the car was warm although the outside temperature was 26 degrees; a box of tapes and a car cover occupied the passenger seats; defendant had possession of the ignition key; the officer was alone at the scene; there was no evidence that defendant's car was inoperable; and defendant attempted to put the key in the ignition in order to drive away from the scene. Therefore, the trial court erred in suppressing evidence seized after defendant's arrest.

Am Jur 2d, Arrest §§ 64, 66, 67; Automobiles and Highway Traffic §§ 304-308.

What amounts to violation of drunken-driving statute in officer's "presence" or "view" so as to permit warrantless arrest. 74 ALR3d 1138.

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statute or ordinance. 93 ALR3d 7.

Appeal by the State from order filed 21 November 1995 by Judge W. Steven Allen, Sr. in Guilford County Superior Court. Heard in the Court of Appeals 22 August 1996.

Defendant Brad Lee Crawford was arrested on 24 November 1994 and charged with driving while impaired, resisting, obstructing, and

delaying a law enforcement officer, and simple possession of marijuana. After a trial, defendant was found guilty of all three charges in Guilford County District Court. Defendant appealed to Superior Court, and on 23 August 1995 filed a motion to suppress.

The trial court held a hearing on defendant's motion 13 September 1995. The uncontroverted evidence presented at the hearing showed the following. At approximately 3:24 a.m. on 24 November 1994, a deputy of the Guilford County Sheriff's Department received a call from the dispatcher to check on a suspicious vehicle sitting on the side of the road in a rural area of Guilford County. Approximately ten to fifteen minutes later, the deputy arrived at the indicated area and observed a black Nissan 300ZX parked on the side of the road with the engine off. The driver's door was open and defendant was sitting in the driver's seat with one leg hanging out of the car. The deputy described defendant as being in a semiconscious state. Defendant's knee and shirt were wet from drool and his pants were undone. There was no one else in the car.

The deputy became concerned that the defendant might be sick and asked defendant if he was all right. Defendant was initially unresponsive and appeared to have trouble speaking. The deputy began looking for a medical alert bracelet and considered calling for an ambulance. However, as he looked for the medical alert bracelet, the deputy detected a strong odor of alcohol on defendant's breath. He then felt the hood of defendant's car and, although it was 26 degrees outside, the hood was warm to the touch. The deputy observed a cardboard box of audio tapes sitting in the front seat and a yellow nylon car cover in the back seat, but saw no beer or liquor bottles or cans in the vehicle.

The deputy asked defendant if he was alright numerous times before getting a response. When defendant finally spoke, the deputy detected a slight slur in his speech. The deputy asked defendant if he had been drinking, to which defendant responded "yes." When asked how much he had to drink, defendant replied "some." The deputy then asked defendant several times to step out of the car. Defendant failed to respond to the deputy's first request to get out of the car and answered "no" when the deputy asked him the second time. The third time he was asked, defendant replied "I'm not going anywhere with you." Defendant then started to put a key, which he was holding in his right hand, into the ignition. Before defendant could insert the key in the ignition, the deputy removed defendant from the car, handcuffed

him, and told him he was under arrest for driving while impaired. During his search of the car, the deputy found a small bag of what appeared to be marijuana.

After the motion hearing, the trial court ruled there was insufficient evidence to arrest defendant and allowed defendant's motion to suppress in an order filed 21 November 1995. From this order, the State appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Joseph P. Dugdale, for the State.

Mark B. Campbell for defendant-appellee.

McGEE, Judge.

On appeal, the State argues the deputy had probable cause to arrest the defendant and that exigent circumstances justified defendant's warrantless arrest. We agree and reverse the order of the trial court.

To be guilty of driving while impaired, a person must drive a vehicle upon a highway, street, or public vehicular area within this State while under the influence of an impairing substance or after having consumed sufficient alcohol to have a blood alcohol concentration of .08 or more at any relevant time after driving. N.C. Gen. Stat. § 20-138.1(a) (1993). The determinative question in this case is whether, under the facts and circumstances, the deputy had probable cause to arrest defendant for driving while impaired. We hold that he did.

To be constitutionally valid, an arrest must be based upon probable cause. *State v. Eubanks*, 283 N.C. 556, 559, 196 S.E.2d 706, 708 (1973).

> "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. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. . . ." "The existence of 'probable cause,' justifying an arrest without a warrant is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic

question to be determined in each case in the light of the particular circumstances and the particular offense involved."

State v. Harris, 279 N.C. 307, 311, 182 S.E.2d 364 (1971) (quoting 5 Am. Jur. 2d *Arrests* §§ 44 & 48 (1962)). Therefore, the degree of certainty necessary for probable cause is a "fair probability," an amount of proof greater than "reasonable suspicion" but less than "preponderance of the evidence," "clear and convincing," or "beyond a reasonable doubt." *See, e.g., Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983) (probable cause does not deal with hard certainties, but with probabilities); *Illinois v. Gates*, 462 U.S. 213, 235, 76 L. Ed. 2d 527, 546 (1983) (probable cause requires only the probability of criminal activity, not a *prima facie* showing); *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984) (probable cause "does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required."). "In order to justify an officer in making an arrest without a warrant, it is not essential that the offense be shown to have been actually committed. It is only necessary that the officer have reasonable ground to believe such offense has been committed." *State v. Jeffries*, 17 N.C. App. 195, 198, 193 S.E.2d 388, 391 (1972), *cert. denied*, 282 N.C. 673, 194 S.E.2d 153 (1973).

In this case, the deputy found defendant alone in a car parked on the shoulder of a rural side road. Defendant was in the driver's seat in a semiconscious state, his pants were undone, and he had been drooling. Defendant had a strong odor of alcohol about him, had difficulty speaking, and admitted to the deputy he had been drinking. However, there was no evidence of alcohol in the car. On a night when the temperature was 26 degrees, the hood felt warm, indicating the car had been recently driven. There were no other passengers in the car and the deputy observed a box of tapes and a car cover occupying the passenger seats. Defendant had possession and control of the ignition key. We do not, nor do we need to, reach the issue of whether there was sufficient evidence that the defendant "drove" the vehicle as defined by N.C. Gen. Stat. § 20-4.01(7) & (25). In light of the particular circumstances and the offense involved, the facts are sufficient to warrant a reasonable and prudent person, acting in good faith, to have a reasonable ground to believe the defendant had committed the misdemeanor offense of driving while impaired, or that there was a fair probability the defendant had committed the offense. Therefore, the deputy had probable cause to arrest defendant.

We also hold the deputy had authority to arrest defendant without a warrant. Under N.C. Gen. Stat. § 15A-401(b)(2) (1996 Cumm. Supp.), an officer may make an arrest without a warrant for an offense committed out of the officer's presence where the officer has probable cause to believe the person committed a misdemeanor and may cause physical injury to themselves or others, or damage to property unless immediately arrested. This Court has held that where an officer is alone at the scene and there is no evidence the intoxicated driver's car is inoperable, the officer has probable cause to believe the driver may cause injury to himself or others. *In re Pinyatello*, 36 N.C. App. 542, 545, 245 S.E.2d 185, 187 (1978). This is so because, if the officer left the scene to obtain a warrant, there would be no one to prevent the driver from operating his car or to protect the driver from traffic hazards on a public street. *Id.* Because of "the well known propensity of intoxicated persons to engage in irrational and erratic behavior," an officer has probable cause to believe a drunk driver will return to his vehicle, drive upon the highway, and possibly cause physical injury to himself or others unless immediately arrested. *In re Gardner*, 39 N.C. App. 567, 572, 251 S.E.2d 723, 726 (1979). This is especially so when, as in this case, the intoxicated person makes an attempt to drive away from the scene.

Because we hold the deputy had probable cause to believe defendant had committed the offense of driving while impaired and would present a danger to himself and others if not immediately arrested, the order of the trial court granting defendant's motion to suppress evidence obtained after defendant's arrest is reversed.

Reversed.

Judges EAGLES and WALKER concur.

BRENDA L. SHOOK, PLAINTIFF/APPELLANT v. COUNTY OF BUNCOMBE, NORTH CAROLINA; STEVE METCALF, IN HIS OFFICIAL CAPACITY AS FORMER BUNCOMBE COUNTY MANAGER; WILLIAM E. McELRATH, IN HIS OFFICIAL CAPACITY AS (FORMER) ASSISTANT BUNCOMBE COUNTY MANAGER AND NOW BUNCOMBE COUNTY MANAGER; MIKE HYATT, IN HIS OFFICIAL CAPACITY AS VETERANS SERVICE SUPERVISOR; CATHY COOMER, IN HER OFFICIAL CAPACITY AS BUNCOMBE COUNTY SAFETY OFFICER; AND RAY REDMON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF BUNCOMBE COUNTY PHYSICAL FACILITIES, DEFENDANTS/APPELLEES

No. COA96-109

(Filed 4 February 1997)

Appeal and Error §§ 340, 418 (NCI4th)— violations of appellate rules—dismissal of appeal

Plaintiff's appeal is dismissed for failure to comply with the Rules of Appellate Procedure where plaintiff failed to assign any error in the record on appeal as required by N.C. R. App. P. 10(a) (1997) and 10(c)(1) (1997) and where the arguments in plaintiff's brief do not contain "reference[s] to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal" as required by N.C. R. App. P. 28(b)(5) (1997).

Am Jur 2d, Appellate Review §§ 547, 550.

Judge MARTIN, John C., concurring in the result.

Judge EAGLES concurs and also joins in the separate concurring opinion.

Appeal by plaintiff from summary judgment entered 15 September 1995 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 21 October 1996.

Howard C. McGlohon for plaintiff appellant.

Russell & King, P.A., by J. William Russell and Jill S. Stricklin, for defendant appellees.

SMITH, Judge.

Plaintiff failed to comply with the appellate rules of this Court, and for this reason, we dismiss. Our rules require appellant to present a record in final form and complete. N.C.R. App. P. 9(a)(1)(e) and (j) (1997); *Pharr v. Worley*, 125 N.C. App. 136, 139, 479 S.E.2d 32, 34

(1997). In the instant appeal, plaintiff has failed to assign any error whatsoever in the record on appeal as required by N.C.R. App. P. 10(a) (1997) and 10(c)(1) (1997). *See Muse v. Charter Hosp. of Winston-Salem, Inc.*, 117 N.C. App. 468, 481, 452 S.E.2d 589, 598, *disc. review denied*, 340 N.C. 114, 455 S.E.2d 663 (1995). This omission is fatal to the appeal, as "[a] party may not present for the first time in an appellate brief a question raising issues of law not set out in the assignments of error contained in the record on appeal." *Branch Banking and Trust Co. v. Staples*, 120 N.C. App. 227, 231, 461 S.E.2d 921, 925, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 233 (1995).

Defendant appellees have, in their brief, cited *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 480 (1987), as their primary authority on the issue of plaintiff appellant's omission of assignments of error. The *Ellis* Court, interpreting the then-existing N.C.R. App. P. 10(a), held that assignments of error are unnecessary in an appeal from summary judgment, since "review of summary judgment is necessarily limited to whether the trial court's conclusions as to [] questions of law were correct ones." *Id.* at 415, 355 S.E.2d at 481.

In our view, *Ellis* is no longer the law. At the time of the *Ellis* decision, N.C.R. App. P. 10(a) read as follows:

> "Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2), and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, **by properly raising them in his brief**, the questions *whether the judgment is supported by the verdict or by the findings of fact and conclusions of law*, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, *notwithstanding the absence of exceptions or assignments in the record on appeal.*

Ellis, 319 N.C. at 414-15, 355 S.E.2d at 480-81 (boldface emphasis ours) (italicized emphasis in original) (quoting N.C.R. App. P. 10(a)).

N.C.R. App. P. 10 was amended by our Supreme Court on 8 December 1988, with the amendments becoming effective for all judgments entered on or after 1 July 1989. *See* Amendments to the Rules of Appellate Procedure, 324 N.C. 613, 638-41 (1989). The amended version of Rule 10 is materially and substantially different from the version of Rule 10 in effect at the time of the *Ellis* decision—1987. The amended (and current) version of Rule 10(a) is as follows:

> (a) **Function in Limiting Scope of Review**. Except as otherwise provided herein, *the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10.* Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, *by properly making them the basis of assignments of error*, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

N.C.R. App. P. 10(a) (1997) (emphasis added). Additionally, N.C.R. App. P. 10(c)(1) (1997) states unequivocally that "[a] listing of the assignments of error upon which an appeal is predicated *shall* be stated at the conclusion of the record on appeal . . . ." (emphasis added).

The appellate rules are promulgated by our Supreme Court pursuant to the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. Given the substance of the Supreme Court's changes to Rule 10 since its *Ellis* decision, assignments of error are now mandatory to perfect an appeal. *See, e.g., Staples*, 120 N.C. App. at 231, 461 S.E.2d at 925; *Muse*, 117 N.C. App. at 481, 435 S.E.2d at 598.

Plaintiff's appeal purports to present a number of interwoven and complicated issues, amidst a record on appeal of three volumes and seven hundred and sixty-seven (767) pages. These circumstances highlight why our appellate rules are a necessity. When we are presented with an appeal such as the instant one, the rules are not merely ritualistic formalisms, but are essential to our ability to ascertain the merits of an appeal. Furthermore, the appellate rules promote fairness by alerting both the Court and appellee to the specific errors appellant ascribes to the court below. *See Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994).

Plaintiff's brief also violates other essential appellate rules. For instance, and for reasons made obvious by the discussion above, plaintiff's briefed arguments do not contain "reference[s] to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C.R. App. P. 28(b)(5) (1997); *Bustle*, 116 N.C. App. at 659, 449 S.E.2d at 11. Therefore, "[a]ssignments of error not set out in the appellant's brief . . . will be taken as abandoned." *Id.*

As we stated in *Bustle*, "[a]n appellate court will not review matters not properly before it." *Bustle*, 116 N.C. App. at 659, 449 S.E.2d at 11. Our rules are mandatory, and in fairness to all who come before this Court, they must be enforced uniformly. *Id.* Accordingly, plaintiff's appeal is dismissed.

Dismissed.

Judge MARTIN, John C., concurs in the result by separate opinion.

Judge EAGLES concurs and also joins in the separate concurring opinion.

Judge MARTIN, John C., concurring in the result.

I would affirm the trial court's order granting summary judgment in favor of defendants. In my view, the evidence forecast by plaintiff falls short of the showing required to impose liability upon defendant pursuant to the exception to the exclusivity provisions of the Workers' Compensation Act, G.S. § 97-1 *et seq.*, created by our Supreme Court's decision in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). Thus, plaintiff's exclusive remedy is under the Workers' Compensation Act.

I agree, however, that plaintiff's multiple violations of the Rules of Appellate Procedure so frustrate the review process in this case as to warrant dismissal of the appeal and I, therefore, concur in the result reached by the majority.

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS AND WILLIAM E. PEELE, JR., CO-ADMINISTRATORS OF THE ESTATE OF ROSE GIBSON PEELE; JIMMIE BROADY, ADMINISTRATOR OF THE ESTATE OF MINNIE THOMPSON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, ADMINISTRATOR OF THE ESTATE OF PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, ADMINISTRATOR OF THE ESTATE OF DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. AND NELSON BARRINGTON, CO-ADMINISTRATORS OF THE ESTATE OF JOSEPHINE BARRINGTON; PEARLIE GAGNON, ADMINISTRATRIX OF THE ESTATE OF JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, ADMINISTRATOR OF THE ESTATE OF ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON AND LINDA OWENS, CO-ADMINISTRATORS OF THE ESTATE OF FRED BARRINGTON; JR.; ADA BLANCHARD; AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA MCRAE; SANDRA MCPHAUL; EVANDER LYNCH, ADMINISTRATOR OF THE ESTATE OF JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, ADMINISTRATRIX OF THE ESTATE OF ROSIE ANN CHAMBERS; BERNARD CAMPBELL; ROSE CHAPPELL; MARTHA NELSON, ADMINISTRATRIX OF THE ESTATE OF MARTHA RATLIFF; DEBORAH PITTMAN; ANNETTE PIERCE; ZELDA ROBERTS; RICHARD ROBERTS; CLEO REDDICK; DELORES POUNCY; BOBBY QUICK; DELORES QUICK; LULA SMITH, ADMINISTRATRIX OF THE ESTATE OF CYNTHIA RATLIFF; WILLIE QUICK; MARY BRYANT; DONNA BRANCH DAVIS; DORIS BOSTIC; RACHEL INGRAM; RICHARD M. LIPFORD; ALICE S. WEBB, ADMINISTRATRIX OF THE ESTATE OF JEFFREY A. WEBB; BARBARA SHAW; FLORA C. BANKS, ADMINISTRATRIX OF THE ESTATE OF MARGARET TERESA BANKS; JAMES THOMAS BANKS; LINDA CAROL ELLISON; PAUL SAUNDERS, ADMINISTRATOR OF THE ESTATE OF MARY LILLIAN WALL; JOANNE PAGE, ADMINISTRATRIX OF THE ESTATE OF GAIL VIVIAN CAMPBELL; VELMA BUTLER; ROY FUNDERBURK; MARY SUE RICH, ADMINISTRATRIX OF THE ESTATE OF DONALD BRUCE RICH; PEGGY BROWN, ADMINISTRATRIX OF THE ESTATE OF MARY ALICE QUICK; CAROLYN M. RAINWATER; MARGIE MORRISON, ADMINISTRATRIX OF THE ESTATE OF MICHAEL A. MORRISON; SHERMAN MCDONALD; WILLIAM G. HAMILTON AND MARIE A. HAMILTON; BRENDA F. BAILEY; ELTON RAY CAFFERATA; PAMELA S. COOPER; WILLIAM KELLY, JR., ADMINISTRATOR OF THE ESTATE OF BRENDA GAIL KELLY; CATHERINE DAWKINS, ADMINISTRATRIX OF THE ESTATE OF PHILIP R. DAWKINS; JEANETTE L. SMITH; RUBY BULLARD SELLERS; REGGIE SMITH; CYNTHIA FAYE GRAHAM; WILLIAM WINSTON SMITH, SR.; WILLIAM NOCONDA SMITH, JR.; BETTY EUBANKS, ADMINISTRATRIX OF THE ESTATE OF CYNTHIA S. WALL; BETTY B. WHITE; DARRELL LEONARD WILKINS, ADMINISTRATOR OF THE ESTATE OF ROSE LYNETTE JACOBS WILKINS; ANGELA LYNN COULTER, ADMINISTRATRIX OF THE ESTATE OF JOSIE MAE COULTER; FELTON ALBERT HATCHER; PATRICIA W. HATCHER; MILDRED LASSITER MOATES; OLIN DELLANO MOATES; GLADYS FAYE NOLAN; RONNIE CARROL NOLAN; HOMER F. JARRELL, ADMINISTRATOR OF THE ESTATE OF BERTHA JARRELL; LORETTA SCOTT; LORETTA GOODWIN; BENITA INGRAM; MATTIE P. NICHOLSON; MARY ANN DAIREN; MONICA MCDOUGALD; ALISON GRIFFIN; BRENDA MCDOUGALD; AND ROY S. MORRISON, JR., PLAINTIFFS V. NORTH

CAROLINA DEPARTMENT OF LABOR AND NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION, DEFENDANTS

No. COA96-207

(Filed 4 February 1997)

1. Appeal and Error § 112 (NCI4th)— denial of motion to dismiss—sovereign immunity—immediate appeal

The denial of a motion to dismiss based on sovereign immunity is immediately appealable.

Am Jur 2d, Appellate Review § 164.

2. State § 31 (NCI4th)— Tort Claims Act—public duty doctrine inapplicable

The public duty doctrine does not apply in actions brought against State agencies under the Tort Claims Act.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 114; States, Territories, and Dependencies § 104.

3. Labor and Employment § 31 (NCI4th)— Department of Labor—violation of inspection duties—negligence action

One purpose of N.C.G.S. § 95-4, which imposes specific duties upon the Commissioner of Labor to enforce inspection laws, to inspect workplaces, and to prosecute violations, is to provide for the safety of the people who work in commercial establishments and to protect them from injuries in the workplace arising from unsafe conditions. Therefore, a violation of these duties to inspect and enforce can give rise to an action for negligence.

Am Jur 2d, Labor and Labor Relations § 3174; Plant and Job Safety—OSHA and State Laws §§ 62, 137.

Municipal liability for negligent performance of building inspector's duties. 69 ALR4th 739.

4. Labor and Employment § 31 (NCI4th); State § 46 (NCI4th)— workplace fire—failure to inspect—statement of claim against Department of Labor

Plaintiffs stated a claim against the Department of Labor under the Tort Claims Act for deaths and injuries suffered in a

fire at a food processing plant where they alleged that defendant had never inspected the plant for workplace safety violations despite the occurrence of two previous fires at the plant; the employer was issued eighty-three citations for violations of the Occupational Safety and Health Act when defendant inspected the plant after the last fire; and plaintiffs suffered injuries as a result of defendant's breach of its duty to inspect.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 221-223.

Municipal liability for negligent performance of building inspector's duties. 69 ALR4th 739.

Appeal by defendants from order entered 19 December 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 October 1996.

Fuller Becton Billings & Slifkin, P.A., by Charles L. Becton, Russell & King, P.A., by Edward L. Bleynat, Jr., Law Offices of Woodrow Gunter, by Woodrow W. Gunter, II, Adams Kleemeier Hagan Hannah & Fouts, by J. Alexander S. Barrett, and Kitchin, Neal, Webb & Futrell, by Henry L. Kitchin, for plaintiffs-appellees.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Reginald L. Watkins, Special Deputy Attorney General David Roy Blackwell, Special Deputy Attorney General Elisha H. Bunting, Jr., and Special Deputy Attorney General Ralf F. Haskell, for the State.

LEWIS, Judge.

Plaintiffs commenced this action under the Tort Claims Act, N.C. Gen. Stat. section 143-291 et. seq., for damages incurred as a result of a 3 September 1991 fire at the Imperial Food Products plant ("the plant") in Hamlet. Plaintiffs allege that defendants negligently failed to inspect the plant for workplace safety violations and failed to enforce workplace safety laws. Defendants moved to dismiss the claims under N.C.R. Civ. P. 12(b)(6) for failure to state a claim and under N.C.R. Civ. P. 12(b)(1) and (2) on the basis of sovereign immunity. Deputy Commissioner D. Bernard Alston denied defendants' motions. The full Commission affirmed and adopted the Deputy Commissioner's decision. Defendants appeal.

Since we are reviewing a ruling on a motion to dismiss, we treat plaintiffs' allegations as true. *See Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Plaintiffs allege that on 3 September 1991, a hydraulic fuel line near a deep fat fryer in the processing section of the plant ruptured, igniting hydraulic fuel from a natural gas fume cooker. The fire spread rapidly through the plant, killing twenty-five (25) people and injuring fifty-six (56). Defendants had never inspected the plant, despite the occurrence of two other fires at the plant, one in 1980 and another in 1983. When it was inspected subsequent to the fire in September 1991, the plant was issued eighty-three (83) citations for various violations of the Occupational Safety and Health Act of North Carolina. Plaintiffs allege, inter alia, that defendants' failure to inspect the plant was negligent.

[1] As a preliminary matter, we note that ordinarily, the denial of a motion to dismiss is not immediately appealable. *E.g. Godwin v. Walls*, 118 N.C. App. 341, 344, 455 S.E.2d 473, 477 (1995). However, since defendants' motion is based on sovereign immunity, its denial is properly before us. *See Hawkins v. State of North Carolina*, 117 N.C. App. 615, 622, 453 S.E.2d 233, 237 (1995).

[2] Defendants argue that because they owed no duty to plaintiffs, they cannot be held liable to them under the Tort Claims Act. The first reason they cite for lack of duty is the public duty doctrine. However, in an opinion filed contemporaneously herewith, *Hunt v. North Carolina Department of Labor*, 96COA-312, we reject this argument and hold that the public duty doctrine does not apply in actions brought against State agencies under the Tort Claims Act. Accordingly, this argument has no merit.

Defendants next argue that no duty is imposed by Chapter 95 of the North Carolina General Statutes, entitled "Department of Labor and Labor Regulations." They argue that if Chapter 95 establishes a duty, it is a duty owed by the employer not the government. We disagree.

Plaintiffs allege that a duty is imposed by N.C. Gen. Stat. section 95-4. This statute states that the Commissioner of Labor is "*charged with the duty*":

> (4) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State. . . .

(5) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.

(6) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating houses, and commercial institutions in this State before any court of competent jurisdiction. . . .

N.C. Gen. Stat. § 95-4 (1993) (emphasis added).

[3] This statute clearly imposes specific duties upon the Commissioner of Labor to enforce inspection laws, to inspect the workplaces of North Carolina and to prosecute violations. One obvious purpose of this statute is to provide for the safety of the people who work in commercial establishments and to protect them from injuries in the workplace arising from unsafe conditions. Therefore, we hold that a violation of these duties to inspect and enforce can give rise to an action for negligence. *See Hunt v. North Carolina Department of Labor*, 96COA-312; *see also Coleman v. Cooper*, 89 N.C. App. 188, 195-97, 366 S.E.2d 2, 7-8 (1988).

[4] In the present case, plaintiffs have alleged that defendants have never inspected the plant. They further allege that, as a result of this breach of defendants' duty to inspect, they suffered injury. We hold that these allegations are sufficient to enable plaintiffs' negligence claim to withstand a motion to dismiss. Accordingly, the Industrial Commission did not err in denying defendants' motions.

Affirmed.

Judges WALKER and MARTIN, MARK D. concur.

JASON LAMONT HUNT, BY AND THROUGH HIS GUARDIAN AD LITEM, DAVID H. HASTY, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF LABOR, DEFENDANT

No. COA96-312

(Filed 4 February 1997)

1. Appeal and Error § 423 (NCI4th)— brief—failure to designate assignments of error

Defendant's appeal is subject to dismissal for failure to designate an assignment of error supporting each argument in the brief. N.C. R. App. P. 28(b)(5).

Am Jur 2d, Appellate Review § 547.

2. Appeal and Error § 112 (NCI4th)— denial of motion to dismiss—sovereign immunity—immediate appeal

The denial of a motion to dismiss on the basis of sovereign immunity constitutes an exception to the general rule that the denial of a motion to dismiss is not immediately appealable.

Am Jur 2d, Appellate Review § 164.

3. State § 31 (NCI4th)— Tort Claims Act—public duty doctrine inapplicable

The public duty doctrine is inapplicable in suits brought against State agencies under the Tort Claims Act.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 137.

4. Games, Amusements, and Exhibitions § 6 (NCI4th)— amusement devices—inspection by Department of Labor—breach of duty—negligence action against Department

A rule promulgated by the Commissioner of Labor pursuant to the Amusement Device Safety Act imposes a duty upon the Department of Labor to inspect amusement devices, including go-carts, to ensure that they comply with its rules and therefore establishes a standard of conduct in protecting people who ride amusement devices. A breach of the duty owed under this rule may give rise to an action for negligence against the Department of Labor. N.C.G.S. § 95-111.4(3), (4) and (7).

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 138-146.

5. Games, Amusements, and Exhibitions § 6 (NCI4th)—amusement devices—go-cart—negligent inspection—claim against Department of Labor

Plaintiff go-cart rider stated a claim against the Department of Labor under the Tort Claims Act where he alleged that he received severe injuries when the seat belt on a go-cart malfunctioned, and that the go-cart had been inspected and approved for operation by an employee of the Department even though the seat belt did not comply with the rules and regulations established by the Department.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 138-146.

Appeal by defendant from order entered 19 December 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 October 1996.

MacRae, Perry, Pechmann, Williford & MacRae, by James C. MacRae, Jr., for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General William H. Borden, for defendant-appellant.

LEWIS, Judge.

The issue in this case is whether the North Carolina Industrial Commission ("Industrial Commission") erred in denying defendant's motion to dismiss.

On 12 August 1994, plaintiff brought this action in the Industrial Commission under the Tort Claims Act, N.C. Gen. Stat. section 143-291 et. seq. Plaintiff alleged that he suffered severe injuries to his abdominal area when the seat belt on a go-cart, previously inspected by an employee of defendant, malfunctioned. Plaintiff further alleged that defendant's employee approved the seat belt for operation, despite the fact that it did not comply with rules and regulations established by defendant.

Defendant moved to dismiss based on lack of subject matter jurisdiction, personal jurisdiction and failure to state a claim. By order filed 22 November 1995, Deputy Commissioner John A. Hedrick denied defendant's motion. The full Commission affirmed and adopted the Deputy Commissioner's order. Defendant appeals.

[1] We first note that defendant has failed to designate an assignment of error after each argument. This violation of N.C.R. App. P. 28(b)(5) subjects defendant's appeal to dismissal. *See Hines v. Arnold*, 103 N.C. App. 31, 37-38, 404 S.E.2d 179, 183 (1991). However, in our discretion under N.C.R. App. P. 2, we will consider defendant's appeal. Additionally, we conclude that defendant has only preserved Assignments of Error 3 and 4; the rest are deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (1997).

[2] Initially, we must also recognize the general rule that a denial of a motion to dismiss is not immediately appealable. *Hawkins v. State of North Carolina*, 117 N.C. App. 615, 622, 453 S.E.2d 233, 237 (1995). However, since defendant's motion is rooted in sovereign immunity, it constitutes an exception to this rule. *See id.*

Defendant argues that the Industrial Commission erred in denying its motion to dismiss because plaintiff's claim is barred by sovereign immunity. Defendant maintains that since the Tort Claims Act only waives sovereign immunity if a State employee is negligent, a duty must be present before liability is imposed. Since there is no duty to plaintiff in this case, defendant argues, sovereign immunity has not been waived.

[3] Defendant maintains that the public duty doctrine bars the imposition of a duty in this instance. Plaintiff, however, argues that the public duty doctrine does not apply to State agencies because the Tort Claims Act nullifies this defense as applied to them.

Under the public duty doctrine, municipalities and their agents owe a duty to the general public, not to individuals. *See Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991). North Carolina has recognized two narrowly construed exceptions to this doctrine. *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). The Tort Claims Act empowers the Industrial Commission to "hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. State Ports Authority*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983). However, the Act imposes a ceiling of $150,000 in damages for injury to any one person. N.C. Gen. Stat. § 143-291(a) (1996). Under the terms of the Act, "negligence is determined by the same rules as those applicable to private parties." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

Since the public duty doctrine does not apply in actions between private parties, it necessarily follows that it cannot apply to actions brought under the Tort Claims Act. Accordingly, we hold that the public duty doctrine is inapplicable in suits brought under the Tort Claims Act.

Defendant next argues that there was no duty owed to plaintiff because the applicable statutes and implementing regulations do not impose such a duty. We disagree.

In *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), this Court recognized that "a standard of conduct may be determined by reference to a statute which imposes upon a person a specific duty for the protection of others so that a violation of the statute is negligence *per se*." *Coleman*, 89 N.C. App. at 195, 366 S.E.2d at 7. The *Coleman* court then described when such a standard of conduct could be found:

> "The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results."

Id. at 195-96, 366 S.E.2d at 7 (quoting The Restatement (Second) of Torts, Sec. 286). In *Coleman*, this Court held that N.C. Gen. Stat. section 7A-544 established a "standard of conduct to be exercised by DSS in protecting an abused juvenile" and that a violation of that statute could give rise to a negligence action. *Id.* at 196-97, 366 S.E.2d at 7-8.

In the present matter, both parties agree that the provisions of Article 14B of the North Carolina General Statutes, entitled Amusement Device Safety Act of North Carolina, apply. The intent behind this Article, as stated, is to insure that "amusement devices shall be designed, constructed, assembled or disassembled, maintained, and operated so as to prevent injuries." N.C. Gen. Stat. § 95-111.1(c) (1993). N.C. Gen. Stat. section 95-111.4 empowers the Commissioner of Labor to adopt and enforce rules and regulations

and to make periodic inspections of devices subject to the Article. N.C. Gen. Stat. § 95-111.4(3), (4) and (7) (1993). Rules promulgated by defendant provide that "[a]n inspector *shall* inspect each amusement device" for soundness and compliance with the applicable rules and regulations. N.C. Admin. Code tit. 13, r. 15.0405 (August 1987) (emphasis added). The rules also specify the minimum standards for "go karts," including seat belt requirements. N.C. Admin. Code tit. 13, r. 15.0429 (May 1992).

[4] We hold that Rule 15.0405 imposes a duty upon defendant to inspect amusement devices to ensure that they comply with its rules and therefore establishes a standard of conduct in protecting people who ride amusement devices, such as go-carts. This duty to inspect is specific and is unquestionably imposed for the protection of others. The purpose of this rule, which is likewise true for Article 14B and all of the rules passed under its authority, is to protect people who ride amusement devices, like plaintiff, from injuries received while riding unsafe equipment, such as those allegedly sustained by plaintiff. We therefore hold that a breach of the duty owed under this rule may give rise to an action for negligence.

[5] Plaintiff alleges that defendant was negligent in its inspection of the seat belt on the go-cart which he was operating while injured. He alleges that the go-cart was approved for operation even though the seat belt did not comply with the rules and regulations contained in Title 13 of the Administrative Code as promulgated by defendant. Since plaintiff alleges a breach of duty by defendant, he has stated a claim upon which relief can be granted.

Accordingly, the Industrial Commission has jurisdiction over this claim and defendant under the State Tort Claims Act and defendant's motions were properly denied.

Affirmed.

Judges WALKER and MARTIN, MARK D. concur.

RONALD McGEE, EMPLOYEE, PLAINTIFF v. ESTES EXPRESS LINES, EMPLOYER, AND PROGRESSIVE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA96-401

(Filed 4 February 1997)

1. **Workers' Compensation § 230 (NCI4th)— earning capacity—ownership of business—involvement in management—marketable skills**

An employee's earning capacity is based on his ability to command a regular income in the labor market. Thus employee ownership of a business can support a finding of earning capacity only to the extent the employee is actively involved in the personal management of the business and only to the extent that those management skills are marketable in the labor market.

Am Jur 2d, Workers' Compensation §§ 395-397.

2. **Workers' Compensation § 230 (NCI4th)— temporary total disability—Form 21 agreement—denial of modification—wages earned improper basis**

The Industrial Commission erred by denying defendant employer's request to modify disability payments required by a Form 21 agreement on the basis that defendant had not shown that plaintiff employee had earned any wages in a tax preparation business that he owned because plaintiff's continued entitlement to compensation benefits must be based on his post-injury earning capacity rather than on his post-injury wages.

Am Jur 2d, Workers' Compensation §§ 379, 395, 397.

3. **Workers' Compensation § 254 (NCI4th)— temporary total disability—Form 21 agreement—presumption of continuing disability—burden of rebuttal**

The employee has the benefit of a presumption of continuing total disability arising because of a Form 21 agreement, and the burden is on the employer to rebut that presumption. If it is determined that the employee has post-injury wages, a presumption arises that he has earning capacity consistent with those wages, which presumption is rebuttable by either party.

Am Jur 2d, Workers' Compensation §§ 397, 431.

Appeal by defendants from Opinion and Award for the Full Commission entered 27 November 1995. Heard in the Court of Appeals 7 January 1997.

Samuel H. Long, III, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Thomas W. Page and Jennifer Ingram Mitchell, for defendant-appellants.

GREENE, Judge.

Estes Express Lines (the employer) and Progressive Insurance Company (carrier) (collectively defendants), appeal from Opinion and Award for the North Carolina Industrial Commission (the Commission) denying the defendants' request to terminate payment of temporary total disability benefits to Ronald McGee (employee) previously agreed to by the defendants and the employee in a Form 21 Agreement and approved by the Commission on 30 June 1992.

It is undisputed that on 3 January 1990 the employee sustained an injury to his right knee arising out of and in the course of his employment with employer. Prior to his injury the employee operated a tax-filing service out of his home as part-time secondary employment. After his injury the employee expanded his tax-filing service and rented an office space outside the home and employed others to work in the business. The employee works up to four to five hours a day in the business but has not received any wages from the business and minimal distribution of profits.

Upon the request of the defendants, the Commission conducted a hearing to determine whether the employee's disability was continuing. The defendants argued that the employee was no longer disabled because he was engaged in gainful employment as the owner of a tax preparation business. The Commission concluded that the defendants "did not meet their burden of proof in establishing that [the employee] is actually earning wages and is gainfully employed" and ordered that the defendants continue to pay temporary total disability benefits to the employee "until further order of the Commission, or [the employee] returns to work earning the same or greater wages."

The dispositive issue is whether an employee continues to be disabled, within the meaning of N.C. Gen. Stat. § 97-2(9), if he actively engages in a business owned by him.

When any of the parties to a Form 21 Agreement "disagree as to the continuance of any weekly payment under such agreement, either party may make application to the . . . Commission for a hearing." N.C.G.S. § 97-83 (1991); *see Worker's Compensation Rules of the Industrial Commission* Rule 404. If the disagreement relates to the continued disability of the employee, the Commission must resolve that issue based on the evidence presented and determine if the employee is capable of earning the same wages he had earned before his injury in the same or other employment. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982); N.C.G.S. § 97-2(9) (1991) (defining disability). It is an employee's "post-injury earning capacity" rather than an employee's *actual wages* which are relevant in assessing the disability. *Saums v. Raleigh Community Hosp.*, 124 N.C. App. 219, 221, 476 S.E.2d 372, 374 (1996). If the employee has the capacity to earn some wages, but less than he was earning at the time of the injury, he is entitled to partial disability benefits under section 97-30. *Gupton v. Builders Transp.*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987). If the employee's earning capacity has been "totally obliterated," he is entitled to benefits under section 97-29. *Id.*

[1] An employee's earning capacity must be measured "by the employee's own ability to compete in the labor market." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986). In other words, an employee's earning capacity is based on his ability to command a regular income in the labor market. *See Larson's Workmen's Compensation Law* § 57.51(e) (1996). Thus employee ownership of a business can support a finding of earning capacity only to the extent the employee is actively involved in the personal management of that business and only to the extent that those management skills are marketable in the labor market. *Id.* (income received from business owned by employee cannot be used to reduce a previously established disability unless the income is the "direct result of the [employee's] personal management and endeavor"); *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806 (emphasizing importance of employee's ability "to earn wages competitively").

[2] In this case, the Commission denied the defendants' section 97-83 request to modify the disability payments on the basis that the defendants had not shown that the employee had earned any wages from his business. Because the employee's continued entitlement to benefits must be based on his post-injury earning capacity, not his post-injury wages, the Commission erred. Accordingly, this case must

be remanded to the Commission for reconsideration. On remand the Commission must determine the employee's earning capacity based on the principles stated in this opinion.

[3] On remand the Commission shall receive new evidence, if tendered by either party. We note that because the employee has the benefit of a presumption of total disability arising because of the Form 21 Agreement, *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386 (1996), the burden on remand must rest with the defendants to rebut that presumption. In the event it is determined that the employee has post-injury wages, a presumption shall arise that he has earning capacity consistent with those wages, *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), which presumption is rebuttable by either party. *Id.*

Reversed and remanded.

Judges EAGLES and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. THOMAS EVANS, DEFENDANT

No. COA96-282

(Filed 4 February 1997)

1. Constitutional Law § 199 (NCI4th); Criminal Law § 1096 (NCI4th Rev.)— use of firearm—enhancement of kidnapping sentence—consecutive sentence for armed robbery—not double jeopardy

The trial court's enhancement of defendant's sentence for kidnapping under N.C.G.S. § 15A-1340.16A for use of a firearm and imposition of a consecutive sentence for armed robbery did not impose multiple punishments for the same conduct in violation of defendant's right against double jeopardy.

Am Jur 2d, Criminal Law §§ 279, 551, 552.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping. 39 ALR5th 283.

2. Appeal and Error § 155 (NCI4th)— failure to object—failure to argue plain error or preservation by rule or law—waiver of appellate review

Defendant waived appellate review of an issue as to whether the trial court abused its discretion by finding certain mitigating factors in one judgment but failing to do so in other judgments where defendant made no objection to the trial court's failure to make such findings, and defendant presented no argument as to how the alleged error amounted to plain error or is preserved by rule or law.

Am Jur 2d, Trial §§ 707, 1999.

Appeal by defendant from judgment entered 23 October 1995 by Judge Abraham P. Jones in Wake County Superior Court. Heard in the Court of Appeals 6 January 1997.

Michael F. Easley, Attorney General, by Neil Dalton, Assistant Attorney General, for the State.

John F. Oates, Jr. for defendant-appellant.

WYNN, Judge.

At about 2:00 a.m. on 9 September 1995, defendant entered the Raleigh restaurant where he worked just as the dining room manager closed out the day's business and locked the money in the safe. Dressed in black, wearing a ski mask over his face and wielding a gun, defendant threatened the manager at gunpoint, tied her up, bound her mouth, nose and eyes with duct tape and then pistol-whipped her. He then took the money out of the safe and hid it in a bag along with his disguise and several other incriminating items in a stairwell just outside the entrance of the restaurant.

Police officers discovered the hidden evidence during their investigation on the night of the robbery and apprehended the defendant when he attempted to retrieve the items from the stairwell. Defendant confessed to the crime and gave police a written statement explaining that he was under the influence of drugs on the night of the crime and blaming his drug problem for his actions.

At trial, defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious bodily injury, first degree kidnapping, possession of cocaine and armed robbery. After a sentencing hearing, the trial court made findings of mitigating and aggravating

factors for each charge. The trial court, after determining that the factors in aggravation outweighed the factors in mitigation, imposed aggravated sentences for assault with a deadly weapon with intent to kill inflicting serious bodily injury and armed robbery. As to kidnapping and possession of cocaine, the trial court found that the mitigating factors outweighed the aggravating factors, but under N.C. Gen. Stat. § 15A-1340.16A (Cum. Supp. 1996) enhanced the sentence for kidnapping by sixty months for use of a firearm. Defendant appeals from the sentences imposed.

On appeal, the defendant raises two issues: (I) Whether the trial court imposed double punishment for the same conduct in violation of both the state and federal constitutions by enhancing the sentence for kidnapping under N.C.G.S. § 15A-1340.16A and then imposing a consecutive sentence for armed robbery, and (II) Whether the trial court abused its discretion by finding certain mitigating factors in one judgment but failing to do so in the other judgments. We find no merit to defendant's appeal.

I.

[1] Defendant first assigns as error the trial court's enhancement under N.C.G.S. § 15A-1340.16A of his sentence for kidnapping followed by the imposition of a consecutive sentence for armed robbery. He argues that the trial court's actions violated the constitutional prohibition on double jeopardy by imposing multiple punishments for the same offense. We find no merit to this argument.

Our Supreme Court has held that "where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical." *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988).

"[K]idnapping is an unlawful, nonconsensual confinement, restraint or removal from one place to another [of a person] for the purpose of committing specified acts." *State v. Claypoole*, 118 N.C. App. 714, 717, 457 S.E.2d 322, 324 (1995). Under N.C. Gen. Stat. § 14-39 (Cum. Supp. 1996), the offense is kidnapping in the first degree and is a Class C felony "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted."

N.C.G.S. § 15A-1340.16A provides:

> If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months.

This firearm enhancement does not apply, however, if "evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying . . . felony." N.C.G.S. § 15A-1340.16A. Clearly, in the subject case defendant's sentence for first degree kidnapping was appropriately enhanced under this statute and did not subject defendant to multiple punishments for the same offense.

Moreover, armed robbery and kidnapping are two distinct criminal statutes which require proof of different elements. Therefore, the punishment of each of these separate offenses by consecutive sentences does not violate the constitutional prohibition against double jeopardy. *See State v. Morgan*, 118 N.C. App. 461, 455 S.E.2d 490 (1995).

II.

[2] Defendant lastly contends that the trial court abused its discretion by finding certain mitigating factors in one judgment but failing to do so in the other judgments. However, a party must present to the trial court a timely request, objection or motion in order to preserve a question for appellate review. N.C.R. App. P. 10(b)(1). Barring such an objection, the defendant bears the burden of "establish[ing] his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court." *State v. Oliver*, 309 N.C. 326, 335, 307 S.E.2d 304, 312 (1983).

The record in the subject case indicates that defendant made no objection to the trial court's failure to make the findings at issue. Moreover, defendant presents no argument as to how the alleged errors amount to plain error or are preserved by rule or law. Thus, defendant has waived appellate review of this issue. *State v. Robbins*, 319 N.C. 465, 525, 356 S.E.2d 279, 314, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

For the foregoing reasons, we affirm the sentence imposed by the trial judge.

Affirmed.

Chief Judge ARNOLD and Judge SMITH concur.

DORIS E. HOLT v. LINDA J. WILLIAMSON, M.D., D/B/A ALBEMARLE PEDIATRICS

ROBERT B. HOLT v. LINDA J. WILLIAMSON, M.D., D/B/A ALBEMARLE PEDIATRICS

No. COA95-902

(Filed 18 February 1997)

1. Negotiable Instruments and Other Commercial Paper § 23 (NCI4th); Evidence and Witnesses § 573 (NCI4th)— relationships with former girlfriends—relevance to show forgeries, breach of fiduciary duties

In an action against a doctor by her purported common law husband and his mother to enforce promissory notes, testimony by three former girlfriends of the purported husband concerning the husband's use of a stamp of the doctor's signature, his improper payment of employees from the doctor's pediatric practice account, his use of an alias, the secrecy with which he conducted his business affairs, his treatment of the doctor as his wife, and his intimate relationships and discussions of marriage with each of the three girlfriends at the time he held himself out as the doctor's husband was relevant and admissible to support defendant doctor's defense that the promissory notes were forged and her counterclaims against the purported husband for conversion and breach of fiduciary duty.

Am Jur 2d, Evidence §§ 380, 417, 441, 502.

2. Evidence and Witnesses § 3156 (NCI4th)— character for truthfulness—opinion testimony

Opinion testimony by three former girlfriends of the male plaintiff regarding such plaintiff's lack of truthfulness was admissible under N.C.G.S. § 8C-1, Rule 608(a), as the veracity of any

witness may be attacked by opinion testimony as to the character of that witness for truthfulness.

Am Jur 2d, Evidence §§ 705, 1437; Witnesses §§ 816, 1028.

3. Evidence and Witnesses § 2950 (NCI4th)— cross-examination—reward offer—crimes by defendant—bias of plaintiff

Cross-examination of plaintiff regarding a "reward offer" seeking information about various crimes allegedly committed by defendant, which plaintiff mailed to defendant's acquaintances and caused to be published in newspapers and on the radio about the time plaintiff instituted this action against defendant for breach of contract and enforcement of promissory notes, was admissible to demonstrate that plaintiff's motivation in instituting suit against defendant derived in significant part from his bias against her and that his credibility as a witness was in question.

Am Jur 2d, Evidence §§ 495, 1437; Witnesses §§ 816, 1039.

4. Evidence and Witnesses § 2950 (NCI4th)— cross-examination—letter drafted by defendant—admissibility to show bias

Cross-examination of the male plaintiff regarding a letter drafted by him and signed by the female plaintiff and others indicating their desire to "get [defendant] put away" and warning the male plaintiff's former girlfriend that "the best way to avoid further involvement" was to assist in putting defendant away was admissible to demonstrate the male plaintiff's bias against defendant and thereby impeach his credibility as a witness.

Am Jur 2d, Evidence §§ 495, 1437; Witnesses §§ 816, 1039.

5. Evidence and Witnesses § 575 (NCI4th)— attempted procurement of signature stamp—relevancy to show fraud and conversion

Testimony by a stamp company's owner that his company received orders for a signature stamp bearing defendant doctor's name, shortly after defendant discovered a fraudulent scheme by her purported common law husband and retrieved her signature stamp from the purported husband's residence, was relevant to defendant's counterclaims against the purported husband for

conversion and breach of fiduciary duty where sufficient circumstantial evidence existed to raise an inference that the purported husband was the party seeking to procure the signature stamp.

Am Jur 2d, Conversion § 32; Fraud and Deceit § 429.

6. Appeal and Error § 147 (NCI4th)— objection on discovery grounds—relevancy issue not presented

The appellate court will not consider plaintiffs' contention that certain testimony was irrelevant where plaintiffs' objection at trial was based on discovery matters and plaintiffs' counsel informed the trial court that no relevancy question existed. N.C. R. App. P. 10(b)(1).

Am Jur 2d, Appellate Review § 614.

7. Negotiable Instruments and Other Commercial Paper § 30 (NCI4th)— promissory notes—business plan—lack of consideration

A business school professor's testimony that a business plan created by defendant doctor's purported common law husband to outline his proposed services to defendant in setting up her practice was not a real business plan of any value was relevant to the issue of lack of consideration for consulting agreements and corresponding promissory notes which the purported husband sought to enforce.

Am Jur 2d, Bills and Notes § 689; Contracts § 18.

8. Damages § 134 (NCI4th)— punitive damages—supporting evidence—award not excessive

The jury's award of punitive damages on defendant doctor's counterclaim against her purported common law husband was supported by the evidence and the jury's verdict finding that a fiduciary relationship existed between the purported husband and defendant and that the purported husband had breached his fiduciary duty to defendant. Furthermore, the jury's award of $1,600,000 in punitive damages when it awarded compensatory damages of only $31,834 was not so excessive as to have been awarded under the influence of passion or prejudice, although the purported husband contends the award approximated the amount of the promissory notes sued upon by him and his mother, where the evidence showed an elaborate fraudulent scheme perpetrated by the purported husband against defendant.

Am Jur 2d, Damages §§ 754, 844, 906; Fraud and Deceit § 347.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available. 2 ALR5th 449.

9. Conspiracy § 12 (NCI4th)— conspiracy to convert funds—sufficient evidence—JNOV improper

The trial court erred by entering a JNOV in favor of the mother of defendant doctor's purported common law husband which relieved the mother from joint and several liability for compensatory damages awarded to defendant doctor where the record shows that the judgment against the mother was rendered upon defendant's counterclaim that she conspired to convert defendant's funds, not that she actually converted them; it was thus not necessary that she have control over the funds; an agreement between the mother and her son to convert defendant's funds unlawfully was shown by evidence that she discussed with her son the drawing of an employment contract with defendant which was found by the jury to be fraudulent, she signed or witnessed numerous fraudulent consulting agreements and promissory notes, and checks were written to her by her son from defendant's pediatric practice account; the jury rejected the mother's testimony that she personally saw defendant stamp her signature on the documents at issue; and there was direct evidence of overt acts by the son which furthered the agreement to convert defendant's funds.

Am Jur 2d, Conspiracy §§ 15, 26, 40; Evidence § 848.

Appeal by plaintiffs and defendant from judgment and order entered 12 December 1994 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 29 March 1996.

Smith, Follin & James, L.L.P., by Norman B. Smith and Margaret Rowlett, for plaintiffs.

Morton, Grigg and Phillips, L.L.P., by Ernest H. Morton, Jr., David L. Grigg, and David L. Grigg, Jr., for defendant.

JOHN, Judge.

Plaintiff Robert B. Holt (Holt) and his mother, plaintiff Doris E. Holt (Mrs. Holt), appeal judgment in favor of defendant entered upon jury verdict as well as the trial court's contemporaneous order allow-

ing in part and denying in part plaintiffs' motion for judgment notwithstanding the verdict (JNOV). Defendant Dr. Linda Williamson (Dr. Williamson) likewise appeals the partial grant of plaintiffs' JNOV motion. While rejecting plaintiffs' contentions, we find defendant's arguments persuasive and reverse the trial court's entry of JNOV in favor of Mrs. Holt.

Pertinent facts and procedural information are as follows: Holt and Dr. Williamson met in 1983 while the latter was a student at Bowman Gray School of Medicine, and the two began an intimate relationship. Following defendant's graduation and upon commencement of her residency at Cone Memorial Hospital in Greensboro, defendant moved into the house shared by Holt and his mother in that city (the Holt residence). Dr. Williamson testified that she and Holt discussed marriage many times during the next several years, but that Holt assured defendant they were already married under common law by virtue of living together. Dr. Williamson related that Holt gave her engagement and wedding rings, and Holt admitted the couple held themselves out as husband and wife. For example, they told Dr. Williamson's parents they were married, and Dr. Williamson introduced Mrs. Holt, with whom she had become very close, as her mother-in-law.

Upon completion of defendant's residency, she and Mrs. Holt moved to Albemarle, where defendant began a pediatrics practice, "Albemarle Pediatrics." Defendant testified that Holt told her he would also move to Stanly County upon sale of the Greensboro residence.

Dr. Williamson and Holt agreed the latter would manage all financial aspects of defendant's medical practice. He did so from an office located within the Holt residence in Greensboro at which he received and stored checks and accounting documents associated with Albemarle Pediatrics.

Holt had in his possession a signature stamp bearing Dr. Williamson's name and was also an authorized signatory on the bank account of Albemarle Pediatrics. From November 1988 until the end of 1992, Holt wrote numerous checks payable to himself, his business ventures, and Mrs. Holt, affixing Dr. Williamson's stamp to some and personally signing others.

In addition, Holt drafted agreements obligating Dr. Williamson to pay Mrs. Holt $90,000 per year for ten years for housekeeping and secretarial services, and to pay himself $150,000 per year for ten

years for consulting and management services. The agreement with Mrs. Holt was to be automatically renewable for ten-year periods; upon termination of the agreement, Mrs. Holt was to receive $90,000 for ten years, and thereafter $85,000 per year until she reached age 114. The contract with Holt was similarly renewable, and if terminated he was to receive $100,000 for five years, $75,000 for the next five years, and $52,000 annually thereafter until he reached age 80.

The agreement with Mrs. Holt mandated that any disputes arising out of the contract be settled by a panel of three arbitrators: Holt and one individual each appointed by Mrs. Holt and by Dr. Williamson. Holt's contract similarly provided for a panel of arbitrators to consist of his mother and one person each appointed by himself and Dr. Williamson respectively. Arbitration decisions were to be by majority vote with no appeal. The agreements also declared, *inter alia*, that Mrs. Holt would hold herself out as defendant's mother-in-law, and that Holt likewise would hold himself out as defendant's husband in all aspects, "except sexually on [Holt's] own discretion."

Although Dr. Williamson testified she never signed her name with a signature stamp, her stamped signature appeared on the foregoing contracts and twenty corresponding promissory notes totalling approximately $1,600,000.00. In addition, her stamped signature appeared on agreements obligating her to indemnify Mrs. Holt from tax liabilities and to guarantee any defaults of Holt up to $2,225,000.00 in two of his other business ventures. Further, Dr. Williamson testified she unknowingly personally signed a tax indemnity agreement between Holt and herself. Holt acknowledged drafting each of the above documents, and Mrs. Holt either signed as a party or attested as a witness all of the documents except one.

Ultimately, in January 1993, Dr. Williamson terminated the business and personal relationship between herself and the Holts after obtaining legal advice and retrieving her business records from the Holt residence.

On 30 July 1993 and 4 August 1993, respectively, Mrs. Holt and Holt initiated the instant actions against defendant, seeking damages resulting from the alleged breach of the contracts described above and enforcement of the corresponding promissory notes. Defendant answered 14 October 1993, alleging the contracts and promissory notes to be "fictitious and false." She counterclaimed against Holt, seeking compensatory and punitive damages resulting from

mismanagement of Albemarle Pediatrics and improper dispersal of its funds, breach of fiduciary duty, and conspiracy with Mrs. Holt to misappropriate funds and fabricate the contracts and promissory notes. Dr. Williamson also counterclaimed against Mrs. Holt for compensatory and punitive damages arising out of the alleged conspiracy with Holt.

The actions were consolidated pursuant to defendant's motion, and plaintiffs voluntarily dismissed their breach of contract claims prior to trial. On 10 November 1994, the jury returned a verdict finding that none of Dr. Williamson's purported signatures on the promissory notes were genuine, thereby rejecting plaintiffs' claims based upon the notes. The jury also determined plaintiffs had conspired to convert Dr. Williamson's funds, that Holt had converted said funds in breach of a fiduciary duty, and that his "breach of fiduciary duty and/or conversion [had been] accompanied by outrageous or aggravated conduct," thereby entitling Dr. Williamson to $31,834.00 compensatory and $1,600,000.00 punitive damages. On 12 December 1994, the trial court entered judgment consistent with the verdict, holding Holt and his mother jointly and severally responsible for payment of compensatory damages and Holt solely liable for the punitive award. However, on that same day the court granted Mrs. Holt's motion for judgment notwithstanding the verdict "as to defendant's counterclaim for civil conspiracy and conversion against her."

Plaintiffs attack the trial court's judgment primarily on grounds the court erroneously admitted certain evidence and let stand the award of punitive damages, while defendant contends the trial court erroneously granted Mrs. Holt's motion for judgment notwithstanding the verdict.

I.

Plaintiffs claim the trial court's permitting into evidence of two documents and the testimony of seven different witnesses constituted sufficient grounds for allowance of their motion for mistrial, and now entitles them to a new trial, because such evidence was irrelevant or, alternatively, had a prejudicial effect that outweighed its probative value. We disagree.

"Relevant evidence," as defined by N.C.R. Evid. 401 (Rule 401), is

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

See In re Dennis v. Duke Power Co., 114 N.C. App. 272, 295, 442 S.E.2d 104, 117 (1994), *aff'd in part and rev'd in part*, 341 N.C. 91, 459 S.E.2d 707 (1995) ("evidence is relevant if it has any logical tendency, *however slight*, to prove a fact in issue in the case" (citation omitted)). The trial court's ruling on whether proffered evidence is relevant is not discretionary; however, it is to be given "great deference" on appeal. *Hales v. Thompson*, 111 N.C. App. 350, 357, 432 S.E.2d 388, 393 (1993).

Evidence deemed relevant is admissible unless specifically prohibited either constitutionally or statutorily, N.C.R. Evid. 402, but may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.R. Evid. 403 (Rule 403). The decision whether or not to exclude evidence under Rule 403 is within the sound discretion of the trial court, as is the determination of the necessity for a mistrial. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

[1] Plaintiffs focus upon testimony by three of Holt's former girlfriends, Clarissa Ann Keller (Keller), Krystal Powers (Powers), and Joanna Lane (Lane). They contend that notwithstanding the trial court's *in limine* orders substantially limiting the testimony of these witnesses before the jury, the women were allowed to relate their personal relationships with Holt, thereby "sidetrack[ing]" the trial and producing the "unfair implication . . . that he mistreated defendant." We are persuaded otherwise.

Keller testified she had been involved with Holt from 1986 through 1990, and that they had discussed marriage. She knew Dr. Williamson resided at the Holt residence during a part of that time, but Holt would not allow Keller to visit when defendant was present. Keller reported an incident during which she attempted to spy on Holt out of jealousy, and saw him in his bedroom wearing a bathrobe and laying on his bed with Dr. Williamson. When Dr. Williamson moved to Albemarle, Keller came to the Holt residence more often, and Holt paid her for performing such tasks as cleaning the house and washing his automobiles. On one occasion she retrieved mail from the mailbox and discovered a piece of correspondence listing the addressee as "Doug West," the name under which, according to another witness, an individual had attempted to order a signature stamp in the name of Dr. Williamson.

Powers related that she dated Holt for one year beginning in March 1992. She lived in the Holt residence with him from the begin-

ning of their relationship until November 1992, eventually moving out because she "got tired of his lies, and [his] locking me out of the house, and mistreating me, and so, I decided to leave, and was afraid to leave." Powers further stated that Holt had several people working for him in the home-based office, with at least one doing various chores around the Holt residence, including feeding the horses and washing his automobiles. According to Powers, these individuals were paid by Holt out of the Albemarle Pediatrics account. Further, Holt kept the office locked and attempted to conceal its contents from Powers; nonetheless, she had seen him use a signature stamp bearing Dr. Williamson's name when he wrote checks out of the Albemarle Pediatrics account to pay the employees.

Finally, Lane testified she had been employed by Holt in 1991 to work for Med Tech, a subdivision of Albemarle Pediatrics. Over the three-week tenure of her employment she had been required to perform no "real" work and instead spent her time participating in recreational activities with Holt and caring for and riding his horses. She said other employees at the house ran personal errands for Holt, mowed the lawn, and washed dishes. Lane also related that she and Holt quickly became engaged, but that she broke off the relationship after he took her on a trip to Atlanta and "left [her] there."

In addition, the three women expressed their opinion as to Holt's character for truthfulness or untruthfulness, stating respectively: (1) "I think he is dishonest. I think he is a pathological liar. He cannot tell the truth;" (2) "He cannot distinguish between truth and a lie;" and (3) "[H]e is extremely dishonest."

Examination of the record reveals the testimony of the foregoing witnesses to be relevant to Dr. Williamson's defense that the promissory notes upon which plaintiffs sued were forged, and also to her counterclaims against Holt for conversion and breach of fiduciary duty. Particularly pertinent was evidence regarding Holt's use of the signature stamp, his improper payment of employees from the Albemarle Pediatrics account, his use of an alias, and the secrecy with which he conducted business affairs. Evidence Holt was laying on a bed with defendant in his bedroom while wearing a robe, and that Keller was not allowed at the Holt residence when Dr. Williamson was home, was relevant in that Holt denied he had ever acted in a husbandly manner towards defendant or that they had ever shared a bedroom in the Holt residence; his treatment of Dr. Williamson as his wife was germane to the existence of a fiduciary

duty between the two. Evidence Holt had intimate relationships and discussed marriage with each of the three witnesses during the period of 1986 to 1993, a time during which Holt held himself out to Dr. Williamson as her husband, was relevant to the scheme of deceit perpetrated by Holt against defendant. In addition, brief details concerning the relationship of each with Holt were properly admitted to establish a foundation as to their knowledge of Holt and their respective opportunities for observing and hearing the matters about which they testified.

The trial court limited with precision and particularity those details of Holt's relationships with the women which were allowed before the jury. While an isolated improper statement on the part of a witness, such as that of Powers concerning why she moved out of the Holt residence, may have escaped the court's careful scrutiny during the lengthy trial below, the testimony of each was proper nearly *in toto*. The record indicates that any fleeting irrelevant comment which may have come before the jury constituted mere harmless error and in no way prejudiced plaintiffs to the extent a new trial is required. *See* N.C.R. Civ. P. 61 (no error in admission of evidence is grounds for new trial unless refusal to grant one would amount to denial of a substantial right). Moreover, the trial court did not abuse its discretion under Rule 403 in determining the testimony of Holt's girlfriends not to be unduly prejudicial.

[2] In addition, the statements of the three women regarding Holt's lack of truthfulness was without question permissible under N.C.R. Evid. 608(a), as the veracity of any witness may be attacked by opinion testimony as to the character of that witness for truthfulness. While Keller's statement that Holt was a "pathological" liar arguably qualified as testimony only appropriate from an expert witness, *see* N.C.R. Evid. 701 & 702, it may equally be fairly characterized as simple hyperbole on the part of Keller. In any event, if admission of Keller's comment was indeed error, we conclude it likewise was harmless error. *See* N.C.R. Civ. P. 61.

[3] Plaintiffs further contend the trial court erred by permitting other allegedly irrelevant and unduly prejudicial evidence, including that of a "reward offer" drafted by Holt in 1993 at or about the time the instant action was initiated, and which purported to seek information about various crimes allegedly committed by defendant. Holt mailed this pronouncement to numerous acquaintances of defendant, including potential witnesses, and caused it to be published in newspapers and on the radio. The document stated, *inter alia*, that "depositions

are currently underway," and warned, "if you are about to be deposed, remember, perjury is a criminal act under RICO," and that "anyone with knowledge of racketeering activities can be brought into the suit and . . . can be arrested for all the crimes committed by the overall organization." The trial court allowed cross-examination of Holt regarding this "reward offer" for the purpose of demonstrating his bias against defendant.

"It is well-established that '[a] party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause . . . .' " *State ex. rel. Everett v. Hardy*, 65 N.C. App. 350, 352, 309 S.E.2d 280, 282 (1983) (citation omitted). Particularly in light of other testimony indicating Holt's bitterness against defendant for terminating their relationship, the challenged evidence was properly admitted as reflecting that Holt's motivation in instituting suit against defendant derived in significant part from his bias against her and that therefore his credibility on the witness stand was in question. His apparent attempt to intimidate potential witnesses was also admissible to impeach his credibility. *See* 81 Am. Jur. 2d *Witnesses* § 893 (1992); David B. Harrison, Annotation, *Admissibility and Effect, on Issue of Party's Credibility or Merits of his Case, of Evidence of Attempts to Intimidate or Influence Witness in Civil Action*, 4 A.L.R.4th 829 (1981).

[4] Plaintiffs also contest cross-examination of Holt regarding a December 1993 letter drafted by him, signed by Mrs. Holt and others, and sent to Keller, indicating their desire to "get [Dr. Williamson] put away" and warning Keller that "the best way to avoid further involvement is by assisting us in putting [her] away." As with the "reward offer," this cross-examination was admissible to demonstrate Holt's bias against Dr. Williamson and thereby impeach his credibility as a witness. Further, the court did not abuse its discretion in ruling that the probative value of the evidence was not outweighed by any prejudicial effect. *See* Rule 403.

[5] In addition, plaintiffs attack testimony by J. E. McCarter (McCarter), owner of Greensboro Rubber Stamp Company, that his business received orders for a signature stamp bearing Dr. Williamson's name in late January and early February 1993, shortly after defendant discovered Holt's scheme and retrieved her signature stamp from the Holt residence. Purchase of the first stamp was

sought in the name of "ABLE PEDIATRICS," using a false Greensboro address and telephone number. The second was ordered in the name of "Doug West." Testimony by Keller and Nanette Best linked use of the name Doug West to Holt and one of his employees, Dan Moore. Sufficient circumstantial evidence thus existed to raise an inference that Holt was the party seeking to procure the stamps, thereby supporting defendant's claim that Holt had been utilizing her signature stamp to defraud her. Plaintiffs' assertions notwithstanding, McCarter's testimony was relevant to defendants' counterclaims of conversion and breach of fiduciary duty.

[6] Plaintiffs also label as irrelevant testimony by First Union employee Cindy Compton [Compton] that Holt unsuccessfully attempted to withdraw money from defendant's IRA account in May of 1994. However, plaintiffs' objection at trial to this evidence was based solely on matters surrounding discovery; indeed, plaintiffs' counsel stated to the trial court regarding the challenged testimony that "[t]here's no relevancy question." We therefore do not address further plaintiffs' current assertion on appeal that Compton's testimony was irrelevant. *See* N.C.R. App. P. 10(b)(1) (to preserve question for appellate review, party must have presented timely motion to trial court, "stating the specific grounds for the ruling the party desired," if not apparent from the context).

[7] Finally, we reject plaintiffs' objection on relevancy grounds to testimony by business school professor Rollie Tillman that the "Tri-Party Partnership Business Plan" created by Holt to outline his proposed services to Dr. Williamson in setting up her practice was not a real business plan of any value. This evidence was relevant to the issue of lack of consideration for the consulting agreements and promissory notes.

In sum, plaintiffs' argument they were entitled to a mistrial and that a new trial is required based upon the introduction of irrelevant and prejudicial evidence is completely unfounded.

II.

[8] Holt next argues the trial court erred by failing to grant his JNOV motion and motion to strike on the issue of punitive damages, contending such award violated his federal and state constitutional rights to due process and access to the judicial system, was not supported by sufficient evidence, and was so excessive and oppressive as to have been awarded under the influence of passion or prejudice.

We first observe that no constitutional arguments were presented at the trial level in support of Holt's motions regarding the punitive damages award. Accordingly, we will not consider such arguments on appeal. *See* N.C.R. App. P. 10(b)(1).

Regarding Holt's insistence that there was insufficient evidence to support an award of punitive damages, we disagree. Punitive damages are available for fraud, and fraud exists where there has been a breach of fiduciary duty. *Stone v. Martin*, 85 N.C. App. 410, 418, 355 S.E.2d 255, 259-60, *appeal dismissed and disc. review denied*, 320 N.C. 638, 360 S.E.2d 105 (1987). The jury by its verdict determined that a fiduciary relationship existed between Holt and Dr. Williamson, and that the former had breached his fiduciary duty to the latter. Suffice it to observe that *plenary* evidence, notably as recited above in the facts of this case, supported the jury's findings in this regard.

Finally, Holt's contention that the jury's award was so excessive as to have been awarded under the influence of passion or prejudice cannot be sustained. Holt complains that the award of $1,600,000 approximated the amount of the promissory notes sued upon by Holt and his mother. Holt's concern is directly addressed by the United States Supreme Court in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 125 L. Ed. 2d 366 (1993), a case in which an award of $10 million dollars in punitive damages was upheld even though it accompanied a compensatory award of only $19,000. The Court, in a plurality opinion, stated a jury may appropriately

> consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.
>
> . . . .
>
> While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents . . . had petitioner succeeded in its illicit scheme.

Id. at 460 & 462, 125 L. Ed. 2d at 381-82.

When the elaborate nature of the fraud perpetrated by Holt against Dr. Williamson, a woman who considered him her husband, is

contemplated in its entirety, the jury 's award cannot be said to have been in violation of the standards enunciated by the Supreme Court. We also note evidence was introduced at trial that Holt was possessed of substantial wealth. *See Arnold v. Sharpe*, 37 N.C. App. 506, 513, 246 S.E.2d 556, 561 (1978), *rev'd on other grounds*, 296 N.C. 533, 251 S.E.2d 452 (1979) (evidence of defendant's financial condition relevant in case involving punitive damages).

Consideration of plaintiffs' remaining arguments reveals them to be without merit, and we decline to discuss them further.

III.

[9] Turning to defendant's appeal, we address her primary contention that the trial court erred by granting the JNOV motion of Mrs. Holt, thereby relieving her from joint and several liability as to the $31,834.00 compensatory award.

A motion for judgment notwithstanding the verdict should be "cautiously and sparingly granted," *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985), and only upon the trial court's determination that no more than a scintilla of evidence supports the essential elements of the non-movant claimant's case, when viewing the evidence in the light most favorable to the non-movant, *Clark v. Moore*, 65 N.C. App. 609, 610, 309 S.E.2d 579, 580-81 (1983).

In the case *sub judice*, the trial court granted Mrs. Holt's JNOV motion "as to defendant's counterclaim for civil conspiracy *and* conversion" (emphasis added). This ruling appears to have been based upon the court's perception, articulated when earlier considering motions for directed verdict, that "I don't find anything in here to suggest that Doris Holt had ever a smidgen of financial say-so or control about how that Albemarle Pediatrics' money was flowing." However, close examination of the pleadings and questions presented to the jury reveals judgment against Mrs. Holt was rendered upon defendant's counterclaim that Mrs. Holt *conspired* to convert defendant's funds as opposed to a claim of actual conversion.

Although there is no cause of action for civil conspiracy *per se*, an action exists for wrongful acts committed by persons pursuant to a conspiracy; such a claim requires showing of an agreement between two or more persons to do an unlawful act which results in damages to the claimant. *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d

325, 337 (1981); *Henderson v. LeBauer*, 101 N.C. App. 255, 260, 399 S.E.2d 142, 145, *disc. review denied*, 328 N.C. 731, 404 S.E.2d 868 (1991). Because the action is for damages caused by acts pursuant to the agreement, rather than for the agreement itself, the claimant must present evidence of an "overt act" committed by at least one conspirator in furtherance of the "common objective." *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337. Although an action for civil conspiracy may be established by circumstantial evidence, sufficient evidence of the agreement must exist "to create more than a suspicion or conjecture in order to justify submission of the issue to a jury." *Id.*

A thorough review of the record, considered in the light most favorable to Dr. Williamson, reflects circumstantial evidence sufficient to raise more than a "suspicion or conjecture" that an agreement existed between the two plaintiffs to convert defendant's funds unlawfully, as well as direct evidence of overt acts by Holt which furthered that agreement, thereby causing damage to defendant. In particular, we find compelling the testimony of Mrs. Holt that she discussed with Holt the drawing of an employment contract with defendant, ultimately resulting in the totally one-sided contracts initially sued upon. In addition, Mrs. Holt signed or initialed as a witness numerous consulting agreements, promissory notes, and other contracts at issue in the instant litigation, and testified she personally saw defendant stamp her signature on these documents, although the jury specifically rejected this evidence in finding none of the purported signatures on the notes were genuine. Additional persuasive evidence of conspiracy was the existence of checks written to Mrs. Holt by her son from the Albemarle Pediatrics account. In conclusion, Mrs. Holt's unusual relationship with defendant over many years as her "mother-in-law," including residing with defendant in Albemarle while defendant's "husband" remained in Greensboro, coupled with Mrs. Holt's personal interest in, and actions regarding, the fraudulent contracts and promissory notes, constituted more than a scintilla of circumstantial evidence, *see Clark*, 65 N.C. App. at 610, 309 S.E.2d at 581, in support of the allegations of conspiracy against Mrs. Holt.

The suggestion of the able and experienced trial judge that Mrs. Holt appears to have been less culpable than her son in the scheme against Dr. Williamson is without doubt well taken. Nonetheless, we are compelled to reverse the order granting JNOV in favor of Mrs. Holt, and to remand for reinstatement of the judgment rendered on the verdict against her. As we have resolved this argument in favor of

Dr. Williamson, it is unnecessary to discuss her remaining assignments of error.

Affirmed in part; reversed and remanded in part.

Judges GREENE and MARTIN, Mark D. concur.

MICHAEL COBO AND VIRGINIA COBO v. ERNEST A. RABA, M.D.

No. COA95-170

(Filed 18 February 1997)

1. Physicians, Surgeons, and Other Health Care Professionals § 120 (NCI4th)— medical malpractice—psychiatrist—contributory negligence

The trial court erred in a negligence action against a psychiatrist by not instructing the jury on the issue of plaintiff Michael Cobo's contributory negligence where the action claimed misdiagnosis and negligent treatment and there was evidence that Michael Cobo's conduct during the time he was being treated by the defendant joined simultaneously with the negligent treatment of the defendant to cause Cobo's injuries. Contributory negligence must be submitted to the jury when the trial court submits only one issue with respect to multiple claims of negligence and defendant's contentions concerning contributory negligence would be inappropriate as to one claim but may not be inappropriate as to another. Further, there was evidence that Cobo had refused to pursue a suggested course of treatment involving medicine and requested that defendant take no notes during the sessions.

Am Jur 2d, Negligence §§ 846, 853, 1108.

2. Limitations, Repose, and Laches § 24 (NCI4th)— psychiatric malpractice—statute of limitations—continued course of treatment

The continuing course of treatment doctrine was applicable to a malpractice claim against a psychiatrist where plaintiff began his treatment in 1980, the sessions after 1986 primarily

dealt with plaintiff's newly diagnosed HIV status, the doctor-patient relationship terminated in 1988, and defendant contended that the three-year statute of limitations of N.C.G.S. § 1-15(c) barred any actions arising out of treatment rendered before 1986. Defendant continued to treat plaintiff after 1986 for conditions that plaintiff alleged were caused by defendant's negligence before 1986 and the treatment did not change in that plaintiff continued to meet with defendant four times a week to discuss his problems and to learn how to control and manage those problems.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 320.

Judge McGEE dissenting in part and concurring in part.

Appeal by defendant from judgment entered 15 June 1994 in Durham County Superior Court by Judge Henry W. Hight, Jr. Heard in the Court of Appeals 14 November 1995.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for plaintiff-appellees.

Anderson, Broadfoot, Johnson, Pittman & Lawrence, by Lee B. Johnson, and Ragsdale, Liggett & Foley, by George R. Ragsdale and Kristin K. Eldridge, for defendant-appellant.

GREENE, Judge.

Ernest Raba (defendant) appeals a judgment entered against him in the amount of $850,000 after a jury found that Michael Cobo (Cobo) was injured by defendant's negligence.

Defendant is a psychiatrist practicing in the Durham, North Carolina area. Cobo began to see defendant as a patient when Cobo moved to Durham to accept a job at Duke Medical School. Cobo had previously been diagnosed and treated for depression during medical school and during his residency in Miami. During treatment for depression in Miami, Cobo had been treated with an antidepressant drug which produced adverse side effects. In late 1980 Cobo began a course of treatment with defendant who diagnosed Cobo as suffering from chronic depression. The treatment consisted of psychoanalysis four times a week which continued until December 1986, when Cobo tested positive for HIV.

Cobo told defendant that he did not wish to be treated with medication because his previous treatment with medication had "affected him badly" and had been unhelpful. Further, during the initial sessions defendant did not take notes pursuant to Cobo's request. Cobo was worried about protecting his identity and keeping the treatment a secret.

During his time in psychoanalysis with defendant, Cobo's depression became worse, which negatively affected his marriage, relationships with co-workers, and his job to the point that he was eventually removed from Duke's tenure track. Beginning in 1982 or 1983, he increased his abuse of alcohol and his use of marijuana, which he had begun using before seeking treatment from defendant. In 1981 Cobo began having sex with males "on a monthly basis," including sex with male prostitutes. Cobo had sex with other men before he began seeing defendant, but only infrequently. Defendant advised Cobo that he "was making some very dangerous choices [about sexual partners and homosexual activity] and recommended that they stop," and talked to Cobo about the risk of sexually transmitted diseases.

After Cobo was diagnosed with HIV, defendant began to treat him in a more supportive manner, offering more practical feedback and suggestions on ways to deal with his HIV status, including getting medical care, his substance abuse and how to tell his wife. After being diagnosed with HIV, defendant prescribed a medication for Cobo to treat his anxiety as well as depression and continued to see defendant four times a week. In December 1988 the doctor-patient relationship between Cobo and defendant was terminated and Cobo began seeing another psychiatrist who prescribed an antidepressant medication. Once the medication took effect, Cobo's depression improved.

Dr. John Monroe, Jr., an expert in the field of psychiatry, testified that "major depression," from which Cobo was suffering, was a "biologic disregulation" that has to do with "chemical imbalances."

Cobo and his wife Virginia Cobo (collectively plaintiffs) filed a complaint against defendant seeking damages and alleging misdiagnosis and negligent treatment. Plaintiffs' complaint also alleged that "early on in the treatment" defendant "discouraged the use of any medications" and "failed to prescribe appropriate medications," continued to treat Cobo with psychotherapy when he knew or should have known that it was less effective than other methods, including prescribing medications, and defendant "failed to keep notes on his

sessions with [Cobo] in order to follow the course and effect, or lack thereof, of his therapy."

Defendant claimed as affirmative defenses that Cobo was contributorily negligent and that the claims for acts occurring prior to December 1986 were barred by the statute of limitations.

Defendant's request that the trial court instruct the jury on contributory negligence was denied. Defendant also requested that the trial court instruct the jury on the statute of limitations, contending that all claims arising from conduct occurring before December 1986 were barred because after plaintiff was diagnosed as HIV positive, defendant's treatment of plaintiff was "completely different." The trial court denied this request as well. The trial court submitted a single issue of negligence to the jury ("Was the plaintiff . . . injured by the negligence of the defendant") and instructed them to answer the issue "yes" if they determined that Cobo had met his burden of proving either negligent diagnosis or negligent treatment.

The issues are whether (I) an instruction on contributory negligence should have been submitted to the jury; and (II) all claims relating to conduct occurring before December 1986 are barred by the statute of limitations.

I

[1] The trial court must instruct the jury on a claim or defense if there is substantial evidence, when viewed in the light most favorable to the proponent, of the claim or defense. *Dixon v. Taylor*, 111 N.C. App. 97, 103, 431 S.E.2d 778, 781 (1993); *see Holtman v. Reese*, 119 N.C. App. 747, 750, 460 S.E.2d 338, 341 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Wheeler*, 122 N.C. App. 653, 656, 471 S.E.2d 636, 638 (1996).

Contributory negligence is "negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains." *Watson v. Storie*, 60 N.C. App. 736, 738, 300 S.E.2d 55, 57 (1983).

> [T]o . . . constitute contributory negligence in a medical malpractice action, a patient's negligence must have been an active and efficient contributing cause of the injury, must have cooperated with the negligence of the malpractitioner, must have entered

into proximate causation of the injury, and must have been an element in the transaction on which the malpractice is based.

Jensen v. Archbishop Bergan Mercy Hosp., 459 N.W.2d 178, 186 (Neb. 1990); *see* David M. Harney, *Medical Malpractice* § 24.1, at 563-64 (3d ed. 1993) (hereinafter *Harney*). Failure to follow a physician's instructions may also give rise to contributory negligence. *McGill v. French*, 333 N.C. 209, 220-21, 424 S.E.2d 108, 114-15 (1993); *see Harney* § 24.1(A), at 564-65. When a patient's negligent conduct occurs subsequent to the physician's negligent treatment instead of concurrently or simultaneously, recovery by the patient should be mitigated and not completely defeated pursuant to a contributory negligence theory. *Harney* § 24.5, at 571; *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968) (contrasting contributory negligence with the "doctrine of avoidable consequences"). Expert testimony is not necessary to establish proximate cause when the jury, using its "common knowledge and experience, is able to understand and judge the action of [plaintiff]." *McGill*, 333 N.C. at 218, 424 S.E.2d at 113 (quoting *Powell v. Shull*, 58 N.C. App. 68, 71, 293 S.E.2d 259, 261, *disc. rev. denied*, 306 N.C. 743, 295 S.E.2d 479 (1982)).

Contributory negligence as a defense is inapplicable "where a patient's conduct provides the occasion for care or treatment that, later, is the subject of a malpractice claim, or where the patient's conduct contributes to an illness or condition for which the patient seeks the care or treatment on which a subsequent medical malpractice [claim] is based." *Harney* § 24.1, at 564. In other words, a person's use of alcohol cannot constitute contributory negligence in a malpractice action against a physician treating him for alcohol abuse. *See Cowan v. Doering*, 522 A.2d 444, 450 (N.J. Super. 1987) (patient under physician's care for taking an overdose of sleeping pills who jumped out of window and brought malpractice action against physician for failure to take precautionary steps to prevent her attempt at suicide was not contributorily negligent because the suicidal conduct was the very symptom for which patient was being treated), *aff'd*, 545 A.2d 159 (N.J. 1988). On the other hand, a person's use of alcohol could constitute contributory negligence in a malpractice action against a physician treating that person for a broken back, provided the use of alcohol simultaneously joined with the physician's negligence in contributing to the injuries.

In this case Cobo sought care and treatment for his depression. On the face of this record there is evidence that a reasonable mind

might accept as adequate to support the conclusion that Cobo's sexual activities with other men did not contribute to the depression for which he sought treatment from defendant. Although there is evidence that Cobo was having intermittent sex with other men prior to his treatment by the defendant, there is no evidence that his sexual activities (prior to or during his treatment by the defendant) was the cause of his depression. Indeed, there is evidence that Cobo's depression was the result of a biological condition. Accordingly, because there is substantial evidence that Cobo's conduct during the time he was being treated by the defendant joined simultaneously with the negligent treatment[1] of the defendant to cause Cobo's injuries, the trial court erred in not submitting the issue of contributory negligence to the jury on this basis.[2]

There are also other grounds that support submission of the issue of contributory negligence. Defendant produced substantial evidence that he was hindered in his diagnosis and treatment due to several conditions Cobo imposed on him. Cobo initially refused to pursue a course of treatment involving medication due to the effects that a previous medication had upon him. Further, to ensure that his confidentiality was protected, Cobo requested that defendant take no notes during the sessions. Thus there is substantial evidence that these actions by Cobo occurred simultaneously with defendant's negligent treatment and diagnosis to cause Cobo's injuries.

II

[2] Defendant contends that the three year statute of limitations is a bar to any action arising out of treatment rendered before December 1986. Defendant argues that the treatment rendered after December 1986 was distinctly different from that rendered before

1. We acknowledge that Cobo's sexual activities during the period of his treatment by the defendant cannot constitute contributory negligence with respect to the negligent diagnosis claim. This is so because that conduct occurred subsequent to the diagnosis. When, however, the trial court submits only one issue to the jury with respect to multiple claims of negligence by the plaintiff and defendant's contentions concerning plaintiff's contributory negligence would be inappropriate as to one of plaintiff's claims, i.e., negligent diagnosis, the contributory negligence issue must be submitted to the jury if the actions by plaintiff may constitute contributory negligence as to another of plaintiff's claims, i.e., negligent treatment. See *McGill*, 333 N.C. at 216, 424 S.E.2d at 112.

2. Of course, on retrial whether the issue of contributory negligence is to be submitted to the jury must be determined on the basis of the evidence presented at the new trial, not on the basis of the evidence in this record, and on the basis of the law as set forth in this opinion.

December 1986, and therefore the continuing course of treatment doctrine is inapplicable.

Section 1-15(c) provides that a cause of action for malpractice accrues "at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c) (1996). Pursuant to section 1-15(c), a cause of action for malpractice has a statute of limitations of three years. Pursuant to the continued course of treatment doctrine, however, a cause of action does not accrue until the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action. *Stallings v. Gunter*, 99 N.C. App. 710, 714, 394 S.E.2d 212, 215, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990). It is not necessary that the treatment rendered subsequent to the negligent act be negligent if the physician continued to treat the patient for the disease or condition created by the original act of negligence. *Id.* at 714-15, 394 S.E.2d at 215.

At the same time that Cobo tested positive for HIV, defendant began a "more supportive" form of analysis and prescribed medication for Cobo's anxiety. Cobo's treatment, however, did not change in that Cobo continued to meet with defendant four times a week to discuss his problems and to learn how to control and manage those problems, although after 1986 the sessions primarily dealt with Cobo's HIV status. We determine that despite any change in treatment, because defendant continued to treat Cobo after 1986 for conditions that Cobo has alleged were caused by defendant's negligence before 1986, the continuing course of treatment doctrine is applicable and plaintiffs' action was timely filed.

We have addressed and reject without discussion the defendant's argument that the trial court erred in denying his motions for directed verdict and post trial motions. Because we are ordering a new trial, it is not necessary to address the other issues raised on appeal.

New trial.

Judge MARTIN, Mark D., concurs.

Judge McGEE dissents in part and concurs in part.

Judge McGEE dissenting in part, and concurring in part.

I respectfully dissent as to the part of the majority opinion which finds the trial court erred in not submitting the issue of contributory negligence to the jury, but concur as to the majority's decision that the continuing course of treatment doctrine is applicable in this case and plaintiffs' action was timely filed.

In this case, Dr. Cobo sought treatment for depression and participated in psychoanalysis sessions conducted by defendant four times a week for approximately eight years. Dr. Cobo and his insurance provider were charged approximately $100,000 for defendant's services. During this time, Dr. Cobo's depression grew progressively worse, to the point of jeopardizing his marriage and career. As the depression deepened, he had crying spells, began to abuse alcohol and drugs, and increased the frequency of his homosexual encounters. Despite Dr. Cobo's contention that he was going "through Hell," defendant never suggested or volunteered as a possibility that Dr. Cobo see another psychiatrist, nor did he offer an alternative in the treatment. Any suggestion by Dr. Cobo that someone else or some other treatment might be helpful "was met with the same either analytic silence or pushing it off to the side." Later in the treatment, when Dr. Cobo suggested the possibility of medication, defendant told him it "might distance [him] from [his] feelings and make it difficult to participate in the analysis."

Dr. Cobo ended his treatment with defendant in December 1988. He began treatment with another psychiatrist who prescribed antidepressant drugs, including Prozac and a tricyclic drug widely available in 1980. Upon taking the antidepressant medication, Dr. Cobo testified his life improved dramatically, that there "was a sense of happiness that I was connected to my kids, to my wife, and that there was . . . that there was a reason to live other than just to suffer."

Dr. Monroe, plaintiffs' expert witness in psychiatry, testified that, in his opinion, Dr. Cobo suffered from major depression which had gone untreated by defendant. Dr. Monroe testified defendant incorrectly diagnosed Dr. Cobo as suffering from chronic depression, which usually results from an event or occurrence in a person's life. He testified major depression represents a biological disregulation which is highly treatable and responds well to medication. He also testified analytic therapy does not work well with major depression because the patient is too depressed to adequately participate in it. Dr. Monroe testified it was his opinion that defendant had not con-

formed to the standard of care for physicians similarly trained and situated in Durham in his treatment of Dr. Cobo from 1980 to 1988. Dr. Monroe testified that, in his opinion, Dr. Cobo's psychiatric condition would have been improved from 1980 to 1988 if defendant rendered appropriate psychiatric treatment and care, and that the continuation of Dr. Cobo's major depression contributed to his engaging in at-risk behavior.

The majority holds the evidence showing Dr. Cobo continued to engage in self-destructive behavior while in therapy with defendant constitutes evidence of contributory negligence, entitling defendant to a jury instruction on that issue. However, I believe the evidence of Dr. Cobo's conduct during therapy properly bore on the issue of minimizing of damages.

> The rule in North Carolina is that an injured plaintiff, whether his case be in tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had. This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable. It has its source in the same motives of conservation of human and economic resources as the doctrine of contributory negligence, but "comes into play at a later stage."
>
> "The doctrine of avoidable consequences is to be distinguished from the doctrine of contributory negligence. Generally, they occur—if at all—at different times. Contributory negligence occurs *either before or at the time of* the wrongful act or omission of the defendant. On the other hand, the avoidable consequences generally arise after the wrongful act of the defendant. That is, damages may flow from the wrongful act or omission of the defendant, and if some of these damages could reasonably have been avoided by the plaintiff, then the doctrine of avoidable consequences prevents the avoidable damages from being added to the amount of damages recoverable."

Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968) (citations omitted, emphasis added). Here, plaintiffs' complaint alleged three theories of negligence: 1) defendant "failed to exercise reasonable care and diligence in the application of his knowledge, skill and ability in the care and treatment of . . . Cobo beginning approximately

September 20, 1980 and continuing through March, 1989"; 2) defendant "failed to exercise his best medical judgment in the treatment and care" of Dr. Cobo; and 3) defendant "failed to exercise that degree of care and skill in diagnosing Michael Cobo's condition and in treating that condition as would be in accordance with the standards of practice among members of the same medical profession, and particularly among physicians with similar training and experience to the Defendant Ernest A. Raba, who were situated in the same or similar communities as him at the time period set forth in the Complaint." Plaintiffs' negligence claims and the evidence presented at trial show plaintiffs proceeded on a theory that defendant misdiagnosed Dr. Cobo's condition and began an improper treatment based on the misdiagnosis. Further, defendant continued that negligent treatment after it became, or should have become, apparent the treatment was not working and Dr. Cobo's condition was worsening. Therefore, under plaintiffs' theory of defendant's negligence, Dr. Cobo's conduct and behavior during therapy, alleged by defendant to be contributory negligence, did not arise "before or at the time" of defendant's wrongful act or omission. *See Miller, supra.*

As the majority correctly points out, Dr. Cobo's conduct during treatment could not constitute contributory negligence regarding his claim of an improper diagnosis. However, I believe the majority incorrectly separates when the claim for improper diagnosis arose from when plaintiffs' claim for improper treatment arose. Because the improper treatment was based upon the incorrect diagnosis, and defendant began the improper treatment at the start of the doctor/patient relationship, defendant's negligence occurred at the very beginning of Dr. Cobo's treatment. From the start of the relationship, defendant treated Dr. Cobo through psychoanalysis, a course of treatment that plaintiffs' expert witness testified does not work adequately for people suffering from major depression. Because defendant's negligence based on improper treatment arose at the start of the relationship, Dr. Cobo's conduct months and years after the beginning of treatment could not constitute contributory negligence under either a theory of improper diagnosis or improper treatment. Therefore, *McGill v. French*, 333 N.C. 209, 424 S.E.2d 108 (1993), cited by the majority, is inapplicable.

Further, the majority states there is no evidence Dr. Cobo's sexual activities were the cause of his depression. While this statement is correct, the evidence actually indicated that Dr. Cobo, although a "fundamentally homosexual" man, engaged in at-risk sexual activity

in reaction to his depression. In fact, his concern over his homosexual tendencies was a factor in seeking treatment. Because he sought treatment for his homosexual activity as a symptom of his depression, Dr. Cobo's position is similar to the alcoholic seeking treatment for alcoholism in the example provided by the majority.

Nor do I agree with the majority that there are other grounds upon which to find contributory negligence. Dr. Cobo initially told defendant he did not wish to take medication because, as a surgeon, he could not afford to be sedated. However, because defendant improperly diagnosed Dr. Cobo, Dr. Cobo was never told his condition was biological in nature. Because Dr. Cobo was never told that his condition would not respond to psychotherapy, but would respond favorably to medication, Dr. Cobo could not make an informed decision about the medication and his initial reluctance to being treated with medication cannot be held to be negligent. Nor does Dr. Cobo's request that defendant keep no notes amount to contributory negligence. Regardless of whether defendant kept notes, he would still have been treating Dr. Cobo with psychoanalysis, which the evidence showed was an improper and ineffective method of treatment.

I find no merit to defendant's remaining arguments and would therefore allow the jury's verdict to stand. Accordingly, I would vote No Error.

JANNETT J. MARTIN AND RICHARD W. MARTIN, PLAINTIFFS V. JOHN MICHAEL BENSON AND INDUSTRIAL ELECTRIC, INC., DEFENDANTS

No. COA95-1417

(Filed 18 February 1997)

Evidence and Witnesses § 2279 (NCI4th)— automobile accident—medical causation of injuries—testimony of neuropsychiatrist

Plaintiffs were entitled to a new trial in a negligence action arising from an automobile accident where the trial court erred by allowing an expert neuropsychologist to testify that plaintiff Jannett Martin had not suffered a closed head injury. There is no statute specifically defining the practice of neuropsychology in North Carolina, but it is evident from N.C.G.S. § 90-270.2(8) and

N.C.G.S. § 90-270.3 that the practice of psychology does not include the diagnosis of medical causation.

Am Jur 2d, Expert and Opinion Evidence §§ 56-58, 180.

Judge LEWIS dissenting.

Appeal by plaintiffs from judgment entered 13 June 1995 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 24 September 1996.

Mary K. Nicholson; and Joseph A. Williams; for plaintiff-appellants.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendant-appellees.

WALKER, Judge.

On 28 November 1990, plaintiff, Jannett Martin, was operating a motor vehicle when the truck operated by defendant, John Benson, crossed the median and collided with plaintiff. The truck was owned by defendant, Industrial Electric, Inc. Defendant's negligence was stipulated and the jury awarded plaintiff damages in the amount of $50,000.00.

Plaintiff's evidence established that prior to the accident she was a very active and social person, but after the accident she became quiet and depressed. The evidence also showed that she was treated for headaches, depression, chronic pain, not sleeping or eating, anxiety, crying spells and memory difficulty and that she was employed before the accident, but became disabled and unable to work afterward. She incurred medical expenses in the amount of $100,041.22.

Plaintiff presented medical evidence of her course of treatment after the injury. This evidence included the testimony of Dr. James Adelman, a neurologist who specialized in treating patients with headaches. Dr. Adelman first saw plaintiff on 18 January 1991 and diagnosed her with musculoskeletal pain, post traumatic and post-concussion headaches. He stated that even though plaintiff did not report losing consciousness from the accident, the fact that plaintiff reported feeling dazed at the time of the accident was sufficient to show an alteration in the functioning of the brain, which is symptomatic of a closed head injury. Dr. Adelman's testimony included the following:

Q: Okay. All right. So, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether or not the original diagnosis you made was directly related to or could or might have been related to the accident of November 28, 1990?

. . .

A: Yes, I do.

Q: What is that opinion?

A: I believe that the headaches were a result of the accident.

Q: Okay. You then undertook to treat her; is that right?

A: That's correct.

Q: Okay. Initially you were treating her for headaches; is that correct?

A: Yes, it is.

Q: Okay. And did you have any—did you at some point have any further diagnosis with regard to her condition?

A: Well, I had the diagnoses that I quoted. And the musculoskeletal pain, post traumatic. The second one was the headaches, post-concussion. And the third diagnosis was that of depression.

Q: Okay. At some point did you diagnose a closed head injury?

A: Yes. And I think that the closed head injury, the fact that she had a concussion implies closed head injury.

Q: Okay. Tell the members of the jury whether or not if a person has to actually lose consciousness in order to have a concussion?

A: Well, a concussion is made if there is alteration in the functioning of the brain. And she [had] alteration in the functioning of her brain because she was dazed after the accident. She was disoriented. She didn't know where she was and was unable to function. So, there was no question about the fact that she had a trauma to the brain itself and a head injury.

On 27 March 1995, defendants moved to have plaintiff examined by a neuropsychologist for the purpose of updating information on plaintiff's medical condition. Thereafter, a week before the trial

began on 17 April 1995, plaintiff submitted to an evaluation by a neuropsychologist, Dr. Elizabeth Gamboa, who was retained by the defendants. Dr. Gamboa examined plaintiff for approximately three hours and reviewed plaintiff's medical records. At trial Dr. Gamboa was permitted to testify as follows:

> Q: Now, you had an occasion to perform—well, not only perform but review certain tests of Mrs. Martin, and I won't go through all of that again, but as a result of your review of the records, both psychiatric and medical, and as a result of your independent testing did you form certain conclusions concerning a neurological state?
>
> A: Yes.
>
> Q: And what were those conclusions?
>
> A: My conclusions were that the records and her presentation and her test results on all of the times she was tested are consistent with a diagnosis of cognitive impairments due to depression and the effects of medications and not to a closed head injury. I do not believe that a closed head injury is present. I do believe that she has memory problems. I think those memory problems are very real. I think they are reversible because they are due to depression and to medication effects. So, if she is taken off the medications which are causing the memory problems and is treated for her depression, the memory problems will clear up.
>
> Q: Do you have an opinion, Dr. Gamboa, based on your review of all the records and of your seeing Mrs. Martin and the tests you administered to whether or not she suffered a closed head injury in this accident?
>
> A: Yes.
>
> Q: What is your opinion?
>
> A: That she did not.
>
> Q: Do you have an opinion, Dr. Gamboa, as a result of reviewing all the records surrounding the accident as to whether or not she has been disabled from work because of this accident?
>
> A: Yes.
>
> Q: What is your opinion?
>
> A: That she is not disabled from work.

Plaintiff argues that Dr. Gamboa was allowed to testify as to her own medical diagnosis and opinion of disability based on that diagnosis when, by statutory definition of her profession, she had no expertise. According to Dr. Gamboa, she received a bachelor's degree in psychology, obtained a doctorate degree in psychology and completed a post-doctoral year of training in neuropsychology. At the time, she was working as a neuropsychologist in a brain injury unit at a rehab hospital. Defendant contends it was within the trial court's discretion whether to allow Dr. Gamboa's testimony under N.C. Gen. Stat. § 8C-1, Rule 702 and absent an abuse of discretion, there was no error in the trial court's admitting this evidence.

The issue presented in this case, whether a neuropsychologist is qualified to testify that the plaintiff did not suffer a closed head injury in this accident, appears to be one of first impression in this State. In other jurisdictions which have considered similar issues, the courts have split. The jurisdictions allowing the neuropsychologist to testify regarding the medical causation of a plaintiff's condition base their arguments on an interpretation of the state's rule of evidence patterned after the Federal Rule of Evidence 702, dealing with the expert witness testimony. *See Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882 (Iowa Sup. Ct. 1994); *Cunningham v. Montgomery, D.M.D.*, 921 P.2d 1355 (Or. Ct. App. 1996).

In *Hutchison*, the Iowa Supreme Court observed that while the practice of medicine was statutorily excluded from the practice of psychology in its state, nevertheless, the Court would follow a liberal interpretation of Rule 702 and allow such testimony if the criteria for qualification under Rule 702 were met. *Hutchison*, at 887-88.

The Oregon Court of Appeals, in its recent decision of *Cunningham*, supra, follows the holding of the Iowa court. Again, the Oregon court noted that its Rule 702 reflected the view that an expert witness on a medical subject need not be a person licensed to practice medicine. The Court reversed the trial court, which had limited the neuropsychologist's testimony to identifying mental impairments of the plaintiff, holding that the neuropsychologist could testify to the medical causation of plaintiff's condition. *Cunningham*, at 1360.

However, in a well reasoned dissent, the minority pointed out that the neuropsychologist testified that she was a specialist who focused on the mental and behavioral characteristics of individuals who have brain impairment due to dementia, other brain disease or

head injury. Therefore, the neuropsychologist was qualified to test plaintiff's mental abilities and express an opinion about whether plaintiff's abilities were impaired and it did not necessarily follow that the neuropsychologist was qualified to determine the cause of the impairment. The minority then concluded that, "[a] medical doctor must be able to distinguish between organic and nonorganic causes of a condition in order to do the doctor's job. It does not follow, however, that a psychologist must have an equivalent capacity." *Id.* at 1363-64.[1]

Further, the State of Georgia does not allow neuropsychologists to testify as to medical causation based on its stautory definition of the practice of psychology. In *Chandler Exterminators, Inc. v. Morris et al.*, 416 S.E.2d 277 (Ga. Sup. Ct. 1992), the Supreme Court of Georgia reversed its Court of Appeals, holding that the trial court did not abuse its discretion in refusing to permit a neuropsychologist to testify that the plaintiffs had organic brain damage from exposure to chemicals. The Court upheld the trial court's determination that "[the neuropsychologist], though qualified to state which mental dysfunctions [p]laintiffs may be suffering, is not competent to testify as to causation to a reasonable degree of medical certainty." The Court, in finding the statute defining and limiting the practice of psychology to be controlling authority, observed that medical causation is not a subject within the scope of a psychologist's expertise. *Id.* at 278.

In this case, the trial court, in allowing the testimony of Dr. Gamboa, relied upon N.C. Gen. Stat. § 8C-1, Rule 702 (1992). The rule provides:

> Testimony by experts.
>
> > If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

A reading of this statute alone arguably would support the admission of Dr. Gamboa's testimony. Patients were referred to her from neurologists when they were not sure whether a closed head injury existed or if there was some mental or emotional problem causing the symptom the patient was reporting. Dr. Gamboa's training and

1. There is no reference in the decision to any statute which defines the practice of psychology or neuropsychology in Oregon.

experience would further suggest that she could ". . . assist the trier of fact to understand the evidence or determine a fact in issue . . ." as required by Rule 702. However, we must consider Rule 702 in light of this State's statutes defining the practice of "psychology."

There is no statute specifically defining the practice of "neuropsychology" in our State. Only the practice of psychology is defined in N.C. Gen. Stat. § 90-270.2(8) (1993) as follows:

> Practice of psychology.—The observation, description, evaluation, interpretation, or modification of human behavior by the application of psychological principles, methods, and procedures for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior or of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, or mental health. The practice of psychology includes, but is not limited to: psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavioral analysis and therapy; diagnosis and treatment of mental and emotional disorder or disability, alcoholism and substance abuse, disorders of habit or conduct, as well as of the psychological aspects of physical illness, accident, injury, or disability; and psychoeducational evaluation, therapy, remediation, and consultation. Psychological services may be rendered to individuals, families, groups, and the public. The practice of psychology shall be construed within the meaning of this definition without regard to whether payment is received for services rendered.

Further, N.C. Gen. Stat. § 90-270.3 (1993) places additional restrictions on the practice of psychology. This section states:

> **Practice of medicine and optometry not permitted.**
>
> Nothing in this Article shall be construed as permitting licensed psychologists or licensed psychological associates to engage in any manner in all or any parts of the practice of medicine or optometry licensed under Articles 1 and 6 of Chapter 90 of the General Statutes, including, among others, the diagnosis and correction of visual and muscular anomalies of the human eyes and visual apparatus, eye exercises, orthoptics, vision training, visual training and developmental vision. A licensed psychologist or licensed psychological associate shall assist his or her

> client or patient in obtaining professional help for all aspects of the client's or patient's problems that fall outside the boundaries of the psychologist's own competence, including provision for the diagnosis and treatment of relevant medical or optometric problems.

Where these statutes use language as ". . . diagnosis and treatment of mental and emotional disorder or disability . . .," it is evident that the practice of psychology does not include the diagnosis of medical causation.

Defendant urges us to interpret our case of *Horne v. Marvin L. Goodson Logging Co.*, 83 N.C. App. 96, 349 S.E.2d 293 (1986), as holding that the testimony of a neuropsychologist was competent in a workers' compensation claim even though the neuropsychologist's opinion was contrary to the testimony of the neurosurgeon and that if this testimony was competent, it was admissible for the purposes of determining whether the injured worker had received a brain injury. However, a close reading of *Horne* reveals that our Court limited its holding to finding that the Industrial Commission erred in concluding that the neuropsychologist's testimony was "incompetent." *Id.* Certainly a properly qualified neuropsychologist is competent to testify as an expert about psychological and emotional conditions of a patient without expressing an opinion as to the organic causes of those conditions. Likewise, the neuropsychologist would be competent to testify as an expert that the psychological and emotional conditions of a patient are not consistent with other patients who have been medically diagnosed with brain injuries.

We conclude that Dr. Gamboa, in expressing an opinion that the plaintiff did not suffer a closed head injury in this accident, testified as to medical causation. This testimony invades the field reserved for the practice of medicine in this State. The privileges and limits of the psychology profession are primarily matters to be determined by our legislature. Any extension of such privileges and limits must be made by legislative enactment, not court decision. Thus, the trial court erred in allowing this portion of Dr. Gamboa's testimony, entitling plaintiff to a new trial and we need not consider plaintiff's other assignment of error.

New trial.

Judge LEWIS dissents.

Judge MARTIN, Mark D. concurs.

Judge LEWIS dissenting.

Because I feel that the Rules of Evidence control in this case and should not be diluted by other statutes, I respectfully dissent.

In *State v. Parks*, 96 N.C. App. 589, 386 S.E.2d 748 (1989), this Court acknowledged our standard of review of a trial court's ruling under Rule 702:

> A trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion. Moreover, the determination whether the witness has the requisite level of skill to qualify as an expert witness is ordinarily within the exclusive province of the trial judge, and "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it."

Parks, 96 N.C. App. at 592, 386 S.E.2d at 750 (quoting *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984)). Furthermore, our cases demonstrate that "[i]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." *State v. Evangelista*, 319 N.C. 152, 163-64, 353 S.E.2d 375, 383 (1987). It is enough that the expert witness "because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). Additionally, "[i]t is the function of cross-examination to expose any weaknesses in [expert opinion] testimony." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984).

The majority states that Dr. Gamboa's testimony "invades the field reserved for the practice of medicine in this State." However, in *Maloney v. Hospital Systems*, 45 N.C. App. 172, 262 S.E.2d 680, *disc. review denied*, 300 N.C. 375, 267 S.E.2d 676 (1980), this Court held that nurses are qualified to render expert opinions as to medical causation, even though they are not medical doctors. *Maloney*, 45 N.C. App. at 177-79, 267 S.E.2d at 683-84. The Court reached this decision after noting that "the giving of expert testimony should not be limited to those witnesses who are licensed in some particular field of endeavor" and finding "no basis or justification for treating medical experts differently—for establishing a preferred or exclusive class among medical expert witnesses." *Id.* at 178, 267 S.E.2d at 684. This holding was subsequently adopted by the Supreme Court in *State v. White*, 340 N.C. 264, 294, 457 S.E.2d 841, 858, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 436 (1995).

I find the reasoning and holding of the Court in *Maloney* controlling in the present case. I believe we are bound to follow the majority of states which permit a psychologist to testify as to medical causation as long as she or he possesses the requisite knowledge to be found an expert under Rule 702 by the trial judge. *See Hutchinson v. American Family Mut. Ins.*, 514 N.W.2d 882, 886 (Iowa 1994). Defendants have indisputably provided more than ample evidence that Dr. Gamboa is an expert by training and experience. Her testimony would assist the trier of fact, if they found it credible, after cross-examination. Her testimony is admissible as the trial judge found.

Dr. Gamboa testified that she is a psychologist who specializes in brain injuries, has both a bachelor's degree and a doctorate degree in psychology, is currently on a brain injury team at a rehabilitation hospital, and is on a list of neuropsychologists established by the Department of Public Instruction who are qualified to diagnose brain injuries. These educational and professional accomplishments are more than sufficient to enable Dr. Gamboa to testify that in her expert opinion, plaintiff did not have a closed head injury as a result of this accident. The jury, if it so chooses, may then take the fact that she is not a medical doctor into account when determining how much weight to give her testimony.

Because I find no abuse of the trial court's discretion in allowing the testimony in this case, I would affirm its ruling.

JAMES B. MULLINS, PETITIONER v. N.C. CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT

No. COA96-388

(Filed 18 February 1997)

1. Administrative Law and Procedure § 10 (NCI4th)— law enforcement officer certification—Commission rules—not in excess of statutory authority

The adoption and implementation by the Criminal Justice Education and Training Standards Commission of rules used in this case to revoke petitioner's law enforcement officer certifica-

tion were not in excess of the statutory authority granted to the Commission. The intent of the Legislature was to enhance the criminal justice profession through mandated education, training and standards regarding character and moral fitness and the provisions of Chapter 17C evidence an intent by the Legislature for the Commission to have the authority to ensure professionalism and integrity of criminal justice officers. To effectuate the legislative mandate, the Commission considered what conduct it deemed unacceptable and enacted rules providing that a person may not be certified as an officer if that person has committed or been convicted of a felony, giving the Commission the power to revoke certification of officers who have committed or been convicted of a felony, and defining the commission of an offense as a finding by the Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified criminal offense.

Am Jur 2d, Administrative Law §§ 225 et seq.

2. Sheriffs, Police, and Other Law Enforcement Officers § 2 (NCI4th)— law enforcement officer certification—Commission rules—commission of felony—interpretation of criminal statutes

Rules of the Criminal Justice Education and Training Standards Commission used in this case to revoke petitioner's law enforcement officer certification were not in violation of N.C.G.S. § 150B-19(1) in that the Commission had to interpret and implement the sections of the General Statutes which establish felony offenses in concluding that there was sufficient evidence that petitioner had committed acts necessary to satisfy the elements of felonious larceny and felonious breaking or entering. The adoption of the "commission of an offense" rule does not constitute an "interpretation" of criminal statutes, but is merely an approach used to establish minimum standards regarding the moral character of criminal justice officers. The reference to criminal statutes is solely for the purpose of providing guidance to officers and applicants. Here, the petitioner committed the acts necessary to satisfy the elements of N.C.G.S. § 14-54(a) and N.C.G.S. § 14-72(b) in that he entered the police station with a stolen key with the intent to take the money seized in an arrest without consent and with the intent to deprive the police of the money.

Am Jur 2d, Sheriffs, Police & Constables §§ 26-36.

3. Constitutional Law § 34 (NCI4th)— law enforcement certification—commission of felony—power of Commission to conduct hearings—no constitutional violation

The trial court properly determined that neither the Criminal Justice Education and Training Standards Commission nor its rules violated petitioner's constitutional rights pursuant to Article IV, Section 3 of the North Carolina Constitution, which provides in part that the General Assembly may vest such judicial powers in administrative agencies as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. The disputed judicial power vested in the Commission is the power to conduct hearings and take administrative action involving revocation of a certification issued by the Commission. The ability to hold hearings is a power that is reasonably necessary for the Commission to accomplish the purposes for which it was created. It is necessary for the Commission to have a means by which to gather evidence and investigate to determine if individuals are complying with statutory provisions.

Am Jur 2d, Constitutional Law § 339.

Appeal by petitioner from order entered 19 December 1995 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 6 January 1997.

John C. Hunter for petitioner appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robin P. Pendergraft, for respondent appellee.

SMITH, Judge.

On 12 January 1988 respondent, the North Carolina Criminal Justice Education and Training Standards Commission, (the Commission) issued a probationary law enforcement officer certification to petitioner James B. Mullins (petitioner) to enable him to work with the Mount Holly Police Department. Respondent issued a general certification on 12 January 1989. In 1989 Mullins left Mount Holly and continued his law enforcement career with the Belmont Police Department. On or about 1 December 1991, while a law enforcement officer with Belmont, petitioner and other Belmont officers arrested Mark Anthony Bowen. Upon arrest, various items to be used as evidence in the case were seized from Bowen including

approximately $831.00 in United States currency. The money was counted and inventory taken by Officer Gene Thompson, Sergeant Don Johnson, and petitioner. The money was placed in an evidence locker shared by petitioner and Officer Thompson. Thereafter, petitioner experienced financial difficulties and was subsequently dismissed from the Belmont Police Department in April of 1991.

Sometime in April of 1991, after Mullins was no longer employed by the Belmont Police Department, he returned to the department after a shift change, when few officers would be in the building. He entered the building through the back door and went into the Sergeant's office and removed the evidence room key from a desk. Using the key, he opened the evidence room and unlocked his former evidence locker with a duplicate key. He removed an envelope from the locker that contained the money seized in the Bowen criminal case. He locked the evidence locker and room and returned home with the money.

On 6 July 1992, petitioner was indicted for feloniously breaking or entering a building occupied by the Belmont Police Department with the intent to commit the felony of larceny, and for feloniously stealing $831.00 in U.S. currency, such property in the custody and control of the Belmont Police Department. On 3 November 1992, petitioner pled guilty to the misdemeanor offenses of breaking or entering, a violation of N.C. Gen. Stat. § 14-54(a) (1993) and to misdemeanor larceny, a violation of N.C. Gen. Stat. § 14-72(b) (1993). He was sentenced to a term of imprisonment of not less than nor more than two years, which was suspended upon the following conditions: He was to be placed on supervised probation for three years; pay a $60.00 monthly probation supervision fee, $85.00 in costs and $831.00 as restitution; serve sixty days electronic house arrest; and not go on or about the premises of the Belmont Police Department.

By notice dated 30 November 1993, the Commission notified petitioner that the Standards Committee of the Commission had found that "probable cause exist[ed] to believe [petitioner's] certification as a law enforcement officer should be permanently revoked." Petitioner requested an administrative hearing to challenge the Commission's proposed permanent revocation of his certification.

An administrative hearing was held on 8 November 1994 by Administrative Law Judge, Beecher R. Gray. He rendered a proposal for decision, and on 2 June 1995 the Commission adopted the proposed decision permanently revoking petitioner's certification. On 27

July 1995 petitioner filed a petition for judicial review of the final agency decision. On 19 December 1995 the trial court issued an order upholding the final agency decision. From this order petitioner appeals.

Appellate review of a final agency decision is governed by N.C. Gen. Stat. § 150B-51(b) (1995), which provides that the reviewing court may affirm the decision of the agency or remand the case for further proceedings.

> It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b).

> The proper manner of review by this Court depends upon the particular issues presented on appeal. If it is alleged that the agency's decision was based on an error of law then *de novo* review is required. If, however, it is alleged that the agency's decision was not supported by the evidence or that the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.

In re Appeal of Ramseur, 120 N.C. App. 521, 524, 463 S.E.2d 254, 256 (1995) (citations omitted).

[1] Petitioner first argues that the adoption and implementation of the Commission rules at issue are in excess of the statutory authority granted to the Commission. We disagree. Petitioner argues that by adopting and implementing N.C. Admin. Code tit. 12, r. 9A.0103(4) (January 1995) and N.C. Admin. Code tit. 12, r. 9A.0204(a) (August

1995), the Commission exceeded its statutory authority. N.C. Admin. Code tit. 12, r. 9A.0103(4) (January 1995) provides:

> "Commission of an offense" means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified criminal offense.

N.C. Admin. Code tit. 12, r. 9A.0204(a) (August 1995) provides:

> The Commission shall revoke the certification of a criminal justice officer when the Commission finds that the officer has committed or been convicted of:
>
> (1) a felony offense: or
>
> (2) a criminal offense for which the authorized punishment included imprisonment for more than two years.

This Court in *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985), held that administrative agencies have powers expressly vested by statute and implied powers reasonably necessary for the agency to function properly. "In addition to the powers expressly vested in an agency by statute, those powers reasonably necessary for the agency to function properly are implied from the legislature's general grant of authority." *Id.* at 530, 338 S.E.2d at 121 (*citing In re Community Association*, 300 N.C. 267, 280, 266 S.E.2d 645, 654-55 (1980); *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 384, 192 S.E.2d 57, 58 (1972)). "An issue as to the existence of power or authority in a particular administrative agency is one primarily of statutory construction." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (*citing Joseph Burstyn, Inc. v. Wilson*, 303 N.Y. 242, 101 N.E.2d 665 (1951), *rev'd on other grounds*, 343 U.S. 495, 96 L.Ed. 1098 (1952)), *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980).

> In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished. The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish."

Comr. of Insurance v. Rate Bureau, 300 N.C. at 399, 269 S.E.2d at 561 (citations omitted).

The intent of the Legislature in enacting Chapter 17C was to enhance the criminal justice profession through mandated education, training and standards regarding character and moral fitness. Chapter 17C of the North Carolina General Statutes governs the education and training of criminal justice officers. N.C. Gen. Stat. § 17C-1 (1995) provides:

> The General Assembly finds that the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature. It is in the public interest that such education and training be made available to persons who seek to become criminal justice officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service.

Further, certain powers have been delegated to the Commission by the Legislature in N.C. Gen. Stat. § 17C-6(a) (1995):

> In addition to powers conferred upon the Commission elsewhere in this Chapter, the Commission shall have the following powers, which shall be enforceable through its rules and regulations, certification procedures or the provisions of G.S. 17C-10:
>
> (1) Promulgate rules and regulations for the administration of this Chapter . . . .
>
> * * * *
>
> (3) Certify, pursuant to the standards that it has established for the purpose, persons as qualified under the provisions of this Chapter to be employed at entry level and retained as criminal justice officers;
>
> * * * *
>
> (8) Investigate and make such evaluations as may be necessary to determine if criminal justice agencies, schools, and individuals are complying with the provisions of this Chapter; . . .

Also, in N.C. Gen. Stat. § 17C-10(c) (1995) the Legislature addresses the standards for criminal justice officers. In pertinent part the statute provides:

> In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment, training, and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officers, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

These provisions of Chapter 17C evidence an intent by the Legislature for the Commission to have the authority to ensure professionalism and integrity of criminal justice officers. The Legislature specifically authorized the Commission to prescribe the means for presenting evidence of fulfillment of the required minimum standards including citizenship, good moral character, experience, and other matters as relate to competence and reliability. To effectuate the legislative mandate of establishing qualifications for citizenship, good moral character, competence and reliability the Commission considered what conduct it deemed unacceptable for criminal justice officers and those aspiring to join the criminal justice profession and incorporated the conduct deemed egregious by society by referencing the criminal laws in the administrative rules. As a minimum standard the Commission enacted N.C. Admin. Code tit. 12, r. 9B.0111(a) (December 1987) which provides that a person may not be certified as a law enforcement officer if that person has "committed or been convicted of . . . a felony . . . ." To enforce this standard the Commission adopted N.C. Admin. Code tit. 12, r. 9A.0204(a) (August 1995), which gives the Commission the power to revoke certification of a criminal justice officer if they have committed or have been convicted of a felony. In N.C. Admin. Code tit. 12, r. 9A.0103(4) (January 1995) "the commission of an offense" is defined as a finding by the Commission or an administrative body that "a person performed the acts necessary to satisfy the elements of a specified criminal offense." This method of establishing a standard for certification purposes is within the authority granted to the Commission by the Legislature to ensure the quality and professionalism of law enforcement officers.

[2] Petitioner's second assignment of error is that the Commission rules at issue are in violation of N.C. Gen. Stat. § 150B-19(1) (1995). N.C. Gen. Stat. § 150B-19(1) states, "[a]n agency may not adopt a rule

that does one or more of the following: (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so." Petitioner argues that pursuant to N.C. Admin. Code tit. 12, r. 9A.0103(4) (January 1995), the Commission had to interpret and implement sections of the North Carolina General Statutes that establish felony offenses in North Carolina. Conclusions of Law Nos. 4 and 6 in the Commission's Final Decision state that there is sufficient evidence to conclude that petitioner committed the acts necessary to satisfy the elements of N.C. Gen. Stat. §§ 14-54(a) and 14-72(b).

Interpret means, "to explain or tell the meaning of . . . ." Webster's Third New International Dictionary 1182 (1971). Implement means, "to carry out . . . to give practical effect to and ensure of actual fulfillment by concrete measures . . . ." *Id.* at 1134. In the present case the Commission is not "implementing" the criminal code. Further, the adoption of the "commission of an offense" rule does not constitute an "interpretation" of criminal statutes. The imposition of the rule is merely an approach used to establish minimum standards regarding the moral character of criminal justice officers. The Commission's reference to the criminal statutes is solely for the purpose of providing guidance to officers and applicants. It is not an attempt to interpret the criminal code, but to use pre-established elements of behavior which together constitute an offensive act. The Commission relies on the elements of each offense, as specified by the Legislature and the courts. The Commission then uses a specified criminal offense as a guide for unacceptable conduct regarding behavioral standards. In the present case petitioner committed the acts necessary to satisfy the elements of N.C. Gen. Stat. § 14-54(a) and N.C. Gen. Stat. § 14-72(b). N.C. Gen. Stat. § 14-54(a) provides: "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-72(b) provides, "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is: . . . (2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57 . . . ." "The essential elements of felonious breaking or entering are (1) breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986). Larceny requires that defendant (1) take the property of another, (2) carry it away, (3) without the owner's consent, and (4) with the intent to deprive the owner of his property. *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983).

In the present case, petitioner entered the police station with a stolen key with the intent to take the money seized in the arrest without consent and with the intent to deprive the police of the money. Petitioner committed the actions necessary to constitute the felony of felonious breaking or entering and larceny pursuant to N.C. Gen. Stat. §§ 14-54(a) and 14-72(b).

[3] Petitioner's final assignment of error is that the trial court improperly determined that neither the Commission nor its rules violated petitioner's constitutional rights pursuant to Article IV, Section 3 of the North Carolina Constitution. We disagree.

Article IV, Section 3 of the North Carolina Constitution provides in part, "[t]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice." "Whether a judicial power is 'reasonably necessary as an incident to the accomplishment of a purpose for which' an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred." *State ex rel. Lanier v. Vines*, 274 N.C. 486, 497, 164 S.E.2d 161, 168 (1968).

> The application of Article IV, Section 3 thus requires three questions be answered: (1) For what purposes was the agency created? (2) Which peculiarly "judicial" power has the General Assembly attempted to vest in the agency? and (3) Is the Legislature's grant of such judicial power reasonably necessary as an incident to the accomplishment of the purposes for which the agency was created?

In the Matter of Appeal from Civil Penalty, 92 N.C. App. 1, 11, 373 S.E.2d 572, 578, *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989).

"The purpose of the [North Carolina Criminal Justice Education and Training Standards] commission is to raise the level of competence within the criminal justice community by: (1) Establishing minimum standards for employment and retention of criminal justice personnel; (2) Establishing minimum standards for the training and education of criminal justice personnel . . . ." N.C. Admin. Code Tit.

12, r. 9A.0102 (January 1981). Further, N.C. Gen. Stat. §§ 17C-1, 17C-6 and 17C-10 establish the purposes for which the Commission was created. Second, the disputed judicial power vested in the Commission is the power of the Commission to conduct hearings and to take administrative action involving revocation of a certification issued by the Commission. We hold that the ability to hold hearings is a power that is reasonably necessary for the Commission to accomplish the purposes for which it was created. It is necessary for the Commission to have a means by which to gather evidence and investigate to determine if individuals are complying with the provisions of Chapter 17C.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

H. SCOTT HARRIS, JR., EMPLOYEE, PLAINTIFF-APPELLEE v. NORTH AMERICAN PRODUCTS, EMPLOYER; AND TRAVELERS INSURANCE CO., CARRIER, DEFENDANT-APPELLANTS

No. COA96-409

(Filed 18 February 1997)

1. Workers' Compensation § 191 (NCI4th)— hard metal restrictive lung disease—occupational disease—simultaneous employment

The Industrial Commission applied the correct legal standard in determining that defendants were liable for compensation for plaintiff's occupational disease where the plaintiff suffered from pneumoconiosis, or hard metal restrictive lung disease, and the Commission found that defendant suffered from a compensable occupational disease caused by his employment as a brazier and machine operator by defendant North American Products. The evidence presented at the hearing was insufficient to show that plaintiff's restrictive lung disease was augmented by his subsequent employment at a chicken house so as to constitute a last injurious exposure.

Am Jur 2d, Workers' Compensation § 328.

2. Workers' Compensation § 259 (NCI4th)— pneumoconiosis—temporary partial disability—wage rate—more hours

The Industrial Commission did not err in awarding plaintiff temporary partial disability benefits from the time he became unable to continue his employment with North American due to his lung disease until he obtained employment at wages equal to or greater than those which he was earning at the time of his injury, even though his weekly income was approximately the same during the interval due to his working more hours. N.C.G.S. § 97-2(9).

Am Jur 2d, Workers' Compensation § 381.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission entered 9 November 1995. Heard in the Court of Appeals 7 January 1997.

Pressly, Thomas & Conley, P.A., by Gary W. Thomas, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by William J. Garrity, for defendant-appellants.

MARTIN, John C., Judge.

Defendants North American Products, the employer, and Travelers Insurance Company, the carrier, appeal from an opinion and award of the Industrial Commission awarding plaintiff benefits for temporary partial disability due to an occupational disease. Plaintiff sought benefits for pneumoconiosis, or hard metal restrictive lung disease allegedly caused by his employment at North American Products. Defendants denied liability.

Evidence before the deputy commissioner tended to show that plaintiff had begun working at the Showell chicken house in late 1977 or early 1978 and worked there seven days per week. After finishing school, plaintiff also began working at the Perdue chicken house and worked at both chicken houses seven days per week for ten to twelve hours per day. In October 1984, plaintiff began working for defendant North American Products and, sometime thereafter, stopped working at the Showell chicken house. He continued, however, working at the Perdue chicken house seven days per week from 7:00 a.m. until 2:00 p.m.

When plaintiff began working at North American Products he was a healthy two hundred pound man with no respiratory problems. In April 1985 he became a brazier and machine operator at North American Products. His job involved welding carbide onto a saw blade and then grinding the carbide down. The grinding process used a diamond wheel which had water and coolant running over it. The grinding process created a greenish-black mist, some of which was airborne and some of which would go down into the machine. Typically, after plaintiff operated the grinding machine, his clothes would be black from the residue. Additionally, any time he would blow his nose the product would be black. The ventilation systems did not work and no masks were worn.

Plaintiff testified that in mid-1989 he began to notice shortness of breath and weight loss. His breathing did not worsen while he was working at the chicken house; it remained the same. The chicken houses were well ventilated and had an air conditioning system which sucked up most of the dust and feathers. Plaintiff stopped working at North American in January 1990, and thereafter his breathing improved and he regained his lost weight.

Plaintiff's physician, Dr. Haponik, a specialist in pulmonary medicine, testified that plaintiff suffered from a restrictive ventilatory defect. His lungs were restricted and his lung capacity was diminished to about 50 or 60 percent of normal. In Dr. Haponik's opinion, plaintiff's exposure to the metals in connection with his work at North American placed him at an increased risk of contracting the condition and was the major factor in causing the condition, although exposure to airborne irritants in the chicken houses could be potentially injurious. Dr. Haponik felt, however, that the poultry exposures would manifest themselves as obstructive, rather than restrictive.

While plaintiff worked at North American Products his average weekly wage was $361.60, and he worked a forty hour work week. After leaving his employment at North American, plaintiff was employed by Jantzen, Inc., as a mechanic on knitting machines, where his hourly wage was less than he had made at North American, but his average weekly wage was approximately the same because he worked fifty hours per week. In April 1991, plaintiff became employed by Hibco Plastics, as a band saw operator, also at an hourly rate less than he had made at North American. In October 1991, plaintiff's wage at Hibco was reduced due to a layoff. In July 1993, he secured employment at ASMO as a molding machine op-

erator at a pay rate of $9.30 per hour, more than he had made at North American.

The deputy commissioner found that plaintiff suffered from a compensable occupational disease and awarded him benefits for temporary partial disability for the period from January 1990, when he left his employment with North American, through July 1993, when he secured the higher paying job with ASMO, and medical expenses. Defendants appealed to the Full Commission. By an opinion and award filed 9 November 1995, the Full Commission found that defendant had not shown good cause to reconsider the evidence, to receive further evidence, or to amend the deputy commissioner's award. The Full Commission adopted the deputy commissioner's findings of fact and concluded that plaintiff suffered from a compensable occupational disease as a result of which he was entitled to compensation for temporary partial disability at the rate of "sixty-six and two-thirds percent of the difference between his average weekly wages [at North American] and the average weekly wages while employed at Jantzen and Hibco." Defendants appeal to this Court.

By the assignments of error brought forward in their brief, defendants present two questions: (1) whether the Commission should have determined that plaintiff's employment at the chicken houses after he had terminated his employment at North American Products was a last injurious exposure to the hazards of his lung disease, and (2) whether the Commission erred in finding that plaintiff had diminished earning capacity as a result of his lung disease so as to be entitled to benefits for temporary partial disability. For the following reasons, we affirm the opinion and award of the Full Commission.

[1] The standard of appellate review of an opinion and award of the Industrial Commission is limited to whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify the Commission's legal conclusions and decision. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 129, 468 S.E.2d 283, 285-86, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996) (citations omitted). The Commission's findings "will not be disturbed on appeal if supported by any competent evidence even if there is evidence in the record which would support a contrary finding." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986). The Commission, and not this Court, is "the sole judge of the credibility of witnesses" and the weight given to

their testimony. *Pittman*, at 129, 468 S.E.2d at 286, quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

The Commission found "[t]here is insufficient evidence of record to prove by its greater weight that the level of airway irritants to which plaintiff was exposed in his work in the chicken houses caused or augmented his lung disease." Defendants assign error, contending the Commission should have found that plaintiff's continued employment at the chicken houses after he had terminated his employment at North American Products was a last injurious exposure to the hazards of hard metal restrictive lung disease. Under our workers' compensation scheme, where compensation is payable for an occupational disease, liability falls upon the employer in whose employment the employee was last injuriously exposed to the hazard of the disease, and its insurer at the time of the exposure. N.C. Gen. Stat. § 97-57 (1991). It is not necessary that the exposure to the hazard either caused or significantly contributed to the development of the occupational disease; it is enough if the exposure augmented the disease process. *Neal v. Leslie Fay, Inc.*, 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Dr. Haponik diagnosed plaintiff with a restrictive ventilatory defect, specifically pneumoconiosis, or hard metal disease, and testified that plaintiff was at an increased risk for developing this disease over members of the general public due to the work environment at North American Products. However, he distinguished plaintiff's exposure to airway irritants at the chicken house as being potentially causative of an obstructive ventilatory defect, such as asthma, which could affect plaintiff's flare-ups and symptoms, but would not be causative of a restrictive ventilatory defect. Dr. Haponik was not asked for, and did not offer, his opinion as to whether the exposure to antigens in the chicken houses could aggravate or accelerate the restrictive lung condition. Moreover, plaintiff testified that he worked in chicken houses for seven years with no problems and then developed breathing problems and sudden weight loss after becoming employed at North American Products. His condition improved after he stopped work at North American, even though he continued to work at the chicken houses. We agree with the Commission that the evidence is insufficient to show that plaintiff's restrictive lung disease was augmented by his employment at the chicken houses so as to constitute a "last injurious exposure," and we conclude that the Commission applied the correct legal standard in determining that

defendants are liable for compensation for plaintiff's occupational disease.

[2] Defendant's second contention is that the Commission erred in awarding plaintiff benefits for temporary partial disability pursuant to G.S. § 97-30 for the period from January 1990 through July 1993. Specifically, defendant argues that there is no competent evidence to support a finding that plaintiff had a diminished wage earning capacity as the result of his lung disease.

The term "disability" means "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. Gen. Stat. § 97-2(9). "To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury." *Daughtry v. Metric Construction Co.*, 115 N.C. App. 354, 357, 446 S.E.2d 590, 593, *disc. review denied*, 338 N.C. 515, 452 S.E.2d 808 (1994), quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986). If the Commission makes these findings, and they are supported by competent evidence, they are conclusive on appeal even though there is evidence to support a contrary finding. *Donnell v. Cone Mills Corp.*, 60 N.C. App. 338, 299 S.E.2d 436, *disc. review denied*, 308 N.C. 190, 302 S.E.2d 243 (1983). A claimant who is able to work and earn some wages, but less than the wages earned at the time of injury, is partially disabled. *Calloway v. Shuford Mills*, 78 N.C. App. 702, 338 S.E.2d 548 (1986). Disability is a legal conclusion and will be binding on the reviewing court if supported by proper findings. *Id.*

G.S. § 97-30 provides that during the period of such partial disability the employer shall pay to the injured employee a weekly compensation equal to 66 2/3 percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter. The burden is on the employee to prove his incapacity to earn, as a result of the compensable injury, the same wages he was earning at the time of the injury. *Hill v. DuBose*, 234 N.C. 446, 67 S.E.2d 371 (1951).

In this case, the evidence showed that plaintiff's hourly wage after he terminated his employment at North American due to his

lung impairment was less than he had earned at North American; however, his weekly income was approximately the same as pre-injury due to his working more hours post-injury. The evidence presents the issue of whether factors other than actual post-injury earnings may be considered in determining an injured employee's post-injury earning capacity.

It is uniformly held that while an injured employee's post-injury wages may create a presumption of post-injury earning capacity, the presumption may be rebutted by either party upon a showing that such wages are an unreliable basis for determining the employee's actual earning capacity. 1C A. Larson, Workmen's Compensation Law, § 57.21(d) (1996). North Carolina follows this rule. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 436, 342 S.E.2d 798, 805 (1986) ("Also to be taken into consideration is whether the post-injury earnings are a proper index of the employee's earning capacity or whether the amount of such earnings truly reflects other considerations which may exaggerate such capacity and be only of a temporary nature"); *Saums v. Raleigh Community Hospital*, 124 N.C. App. 219, 476 S.E.2d 372 (1996) (employee's post-injury earnings create presumption of commensurate earning capacity which may be rebutted by evidence of other factors); *Daughtry v. Metric Construction Co., supra* (court found evidence of one temporary job insufficient to show plaintiff was capable of earning $12 per hour post-injury); *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 403 S.E.2d 548, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991) (either party may show that post-injury earnings are an unreliable basis for determination of post-injury earning capacity).

Other jurisdictions have likewise considered the issue and have held that factors other than actual post-injury earnings may be considered in determining whether an injured employee's post-injury earning capacity has been diminished due to the injury. *Sjoberg's Case*, 394 Mass. 458, 476 N.E.2d 196 (1985) arose upon facts very similar to those before us in the present case. The employee's average weekly wage at the time of his injury was $302.31. He obtained various jobs after his resignation and at one point, working over 50 hours per week, his average weekly wage was $317.48, although he earned less per hour than at the time of injury. The Massachusetts Legislature had not specified a method for computing post-injury average weekly wage. Citing Larson and cases from other jurisdictions, the Massachusetts Supreme Court held that it was not error for the board to conclude that overtime

payments should not be included in the employee's post-injury average weekly wage.

> It is uniformly held . . . without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those received before the accident. The position may be best summarized by saying that actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things; increase in general wage levels since the time of the accident; claimant's own greater maturity or training; *longer hours worked by claimant after the accident*; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings.

394 Mass. at 462, 476 N.E.2d at 198-99 (citations omitted) (emphasis added). *See* 1C A. Larson, Workmen's Compensation Law, § 57.33(c) (1996). The court also reasoned that a holding to the contrary would "reward the idle and punish the ambitious." *Sjoberg's Case* at 463, 476 N.E.2d at 199.

In this case, evidence before the Commission showed that plaintiff worked for a number of employers after developing his lung disease and earned a lower hourly wage than with defendant, and that, due to his restrictive ventilatory defect, he was no longer able to work at his previous employment with defendant or at any other employment where he was exposed to metals or airway irritants. During this period plaintiff was unable to produce, by working the same number of hours as he was working at the time of his injury, the same average weekly earnings as at the time of his injury. Had the Commission considered plaintiff's post-injury earnings alone, without regard to the number of hours he was required to work to produce those earnings, plaintiff's capacity to earn would have been exaggerated. Therefore the evidence showed that plaintiff's actual post-injury earnings were not a reliable indicator of his post-injury earning capacity and the Commission properly determined that, during such period, plaintiff was partially disabled. Accordingly, we affirm the decision of the Commission awarding plaintiff temporary partial disability benefits from January 1990, when he became unable

to continue his employment with North American due to his lung disease, until July 1993, when he obtained employment at wages equal to or greater than those which he was earning at the time of his injury.

Affirmed.

Judges EAGLES and GREENE concur.

GEORGE S. WALL, BY VIRGINIA WALL, SURVIVING SPOUSE, PLAINTIFF/CLAIMANT v. NORTH HILLS PROPERTIES, INC., DEFENDANT/EMPLOYER AND AETNA LIFE & CASUALTY COMPANY, DEFENDANT/CARRIER AND/OR THEODORE BUNN, UNINSURED, DEFENDANT/EMPLOYER

No. COA96-397

(Filed 18 February 1997)

Workers' Compensation § 180 (NCI4th)— heart attack and death—operation of bulldozer—arising in scope of employment

The Industrial Commission correctly concluded that decedent's heart attack and death resulted from an injury by accident arising out of and in the course of his employment and that his widow was entitled to compensation where decedent's brother-in-law contracted to clear land; decedent occasionally assisted with transporting and burning wood; decedent took home oak which he burned, sold, or gave to friends; he was 67 years old at the time of his death and had a lengthy history of heart disease; decedent agreed to watch fires at night for his brother-in law on a project in Cary; he cut and loaded blocks of wood into his truck at night and he loaded logs onto his trailer in the morning with the help of his employer by wrapping a chain around the logs before the employer used the bulldozer to load the trailer; and one morning the employer found him slumped over the controls of the bulldozer with the bulldozer running, two logs loaded onto the trailer, and another chained in front of the bulldozer. Decedent was acting in the course and scope of his employment because he was removing wood from the land to the mutual benefit of his employer and himself; the employer knew that he was taking the wood and helped him load his trailer every morning; his heart attack followed a period of unusually high exertion, which occurred when he placed chains around the logs and then

operated the bulldozer; and operating the bulldozer was unusual and not a normal part of his work routine.

Am Jur 2d, Workers' Compensation § 332.

Appeal by defendants North Hills Properties, Inc., and Aetna Life & Casualty Company from opinion and award of the North Carolina Industrial Commission filed 30 January 1996. Heard in the Court of Appeals 6 January 1997.

Leon A. Lucas, P.A., by Leon A. Lucas, for plaintiff appellee.

Yates, McLamb & Weyher, L.L.P., by Bruce W. Berger, for defendant appellants North Hills Properties, Inc., and Aetna Life & Casualty Company.

No brief filed by Theodore Bunn, pro se, defendant employer.

SMITH, Judge.

For approximately nine years, North Hills Properties, Inc., subcontracted with Theodore Bunn, a self-employed individual, to clear land. In September and October of 1993 Mr. Bunn was clearing land for North Hills. Mr. Bunn used a bulldozer to push down and pile up trees and debris which were then burned or transported off the tracts of land. Mr. Bunn's brother-in-law, George Wall, occasionally assisted with both the transporting and burning of wood. When oak trees were being cleared from the land, Mr. Wall cut the trees and took some of the oak home which he burned, sold, or gave to friends. On 28 October 1993, Mr. Wall died on the job site where he helped Mr. Bunn clear land.

Mr. Wall was 67 years old at the time of his death and had a lengthy history of heart disease. His wife testified that he had had "three heart attacks, four bypasses since 1979." Medical records showed that, in 1981, Mr. Wall underwent quadruple bypass surgery and from the date of that surgery until the time of his death, he received ongoing monitoring and treatment for various episodes of syncope and angina. Part of Mr. Wall's treatment included various medications for his heart. At the time of his death he was taking Procardia XL, Lopressor, Nitrol Ointment and aspirin, all for his heart condition.

Even after his bypass surgery, Mr. Wall continued to have problems and on a number of occasions he had to be taken to the emergency room. In July of 1986 he collapsed while walking in his yard. In

August of 1991, Mr. Wall had to be taken to the emergency room when he got out of bed too quickly to answer the door and felt dizzy, was wet with sweat and lost his balance. In January of 1993 he experienced epigastric discomfort associated with sweatiness while he was deer hunting and had to be taken to the emergency room. He developed substernal chest discomfort that went into his jaw which was relieved by lying him down on the examination table. Mr. Wall's cardiologist, Dr. J. A. Whitaker, suspected that Mr. Wall was having angina pectoris. Dr. Whitaker saw Mr. Wall in April and September of 1993 and Mr. Wall was doing well. As of 29 January 1993 Dr. Whitaker was of the opinion that Mr. Wall's angina was stable but that he remained at risk for a heart attack.

In September of 1993 Mr. Wall agreed to watch fires for Mr. Bunn on a project in Cary, North Carolina. For the first two days, Mr. Wall cut stumps out of the ground with his chain saw for eight to nine hours each day. After those two days, Mr. Wall watched fires at night, cut and loaded blocks of wood into his truck and then loaded logs onto his trailer with the help of Mr. Bunn in the morning.

Mr. Wall usually arrived at the job site in the early evening with his chain saw, pickup truck and trailer. Once there, Mr. Wall cut logs into blocks and loaded the blocks into the back of his truck. During the night Mr. Wall tended the fires. In the morning when Mr. Bunn returned to the job site, he helped Mr. Wall load logs onto Mr. Wall's trailer. Mr. Wall wrapped a chain around each log and Mr. Bunn used the bulldozer to lift the logs onto the trailer. Upon returning home, Mr. Wall's wife wrapped a chain around each log and Mr. Wall used his tractor to unload the logs.

On Wednesday evening, 28 October 1993, Mr. Bunn told Mr. Wall that he would be late arriving the next morning because he had to purchase fuel. Mr. Bunn arrived at the job site at approximately 7:15 a.m. He found Mr. Wall slumped over the controls of the bulldozer. The bulldozer was running and there were two logs loaded onto Mr. Wall's trailer and another chained log in front of the bulldozer. Mr. Wall was rushed to the emergency room in full cardiopulmonary arrest. Resuscitative efforts failed and Mr. Wall was pronounced dead. His death certificate lists "coronary artery disease" as the immediate cause of death.

The case was heard before Deputy Commissioner Bernadine S. Ballance (now Commissioner) on 31 August 1994. Deputy Commissioner Ballance made the following pertinent findings of fact:

9. Theodore Bunn's work consisted of clearing tress from the land. He would knock down trees, pile them up and burn them.

10. George S. Wall, Theodore Bunn's brother-in-law, was hired on occasions by Theodore Bunn to watch the fires. He was paid either $65.00 or $75.00 on the nights he watched the fires. Decedent had worked approximately 24 nights. George Wall was also allowed to take any wood or logs he wanted from the site for his own use and benefit. He sold some of the logs and blocks as wood to others and retained the proceeds. To transport the logs and blocks of wood from the work site, decedent would drive a pick-up [*sic*] truck with a trailer attached. He loaded the pick-up [*sic*] truck with blocks of wood and the trailer with logs. The logs would have to be loaded on the trailer with the use of heavy equipment. Theodore Bunn testified that he would help with this job. Defendant, Theodore Bunn's testimony that he did not pay decedent to watch fires and that decedent watched fires in exchange for wood is not credible in light of the substantial evidence to the contrary presented herein.

* * * *

12. Decedent's job of watching the fires did not include running the bulldozer, operating a chain saw, or any other physically demanding activities. Decedent's job was to sit in a truck and watch the burning piles of wood and other debris.

The Deputy Commissioner concluded as a matter of law that Mr. Wall's death was caused by a heart attack resulting from his pre-existing heart condition and was not due to unusual or extraordinary exertion or conditions arising out of and in the course of his employment and was not compensable under the Workers' Compensation Act. The Deputy Commissioner also concluded that Mr. Wall's death was not due to exposure to extreme conditions and was not caused by accident arising out of and in the course and scope of his employment. The Deputy Commissioner denied plaintiff's claim for death benefits.

Plaintiff gave notice of appeal to the Full Commission. The Full Commission found that Mr. Wall's heart attack and resulting death occurred following a period of unusually high exertion and that the period of overexertion was from work which was unusual and not normally part of Mr. Wall's routine. The Commission also found that Mr. Wall's death by heart attack resulted from an injury by accident

arising out of and in the course of his employment and that his widow is entitled to 400 weeks of compensation at the rate of $166.75 per week. From this opinion and award defendants North Hills Properties, Inc., and Aetna Life & Casualty Company appeal.

Defendants argue that the Full Commission committed reversible error in finding and concluding that Mr. Wall's death by heart attack was an accident within the meaning of the North Carolina Workers' Compensation Act. We disagree and affirm the opinion and award of the Full Commission.

Review on appeal from an award of the Industrial Commission "is limited to review of: (1) whether there was competent evidence before the Commission to support its findings; and (2) whether such findings support its legal conclusions." *King v. Forsyth County*, 45 N.C. App. 467, 467-68, 263 S.E.2d 283, 283, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 676 (1980). The Commission's findings of fact are conclusive and binding on appeal if supported by competent evidence in the record even though the record contains evidence which would support a contrary finding. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 504, 183 S.E.2d 827, 830 (1971).

To be compensable under the Workers' Compensation Act, an injury must result from an "accident arising out of and in the course of the employment . . . ." N.C. Gen. Stat. § 97-2(6) (1991 and Cum. Supp. 1996). "The claimant has the burden of proving each of these elements." *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988). "When an employee is conducting his work in the usual way and suffers a heart attack, the injury does not arise by accident and is not compensable." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991) (citing *Jackson v. Highway Commission*, 272 N.C. 697, 701, 158 S.E.2d 865, 868 (1968)). "However, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to *unusual or extraordinary exertion*, *Lewter v. Abercrombie Enterprises, Inc.*, 240 N.C. 399, 404, 82 S.E.2d 410, 415 (1954), or extreme conditions." *Id.* (citing *Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 503, 358 S.E.2d 380, 382, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 84 (1987)).

> " '[A]rising out of' means arising out of the work the employee is to do, or out of the service he is to perform. The risk must be incidental to the employment.
>
> * * * *

> . . . A death does not arise out of employment unless it can be traced to the employment as a proximate cause.

Bingham v. Smith's Transfer Corp., 55 N.C. App. 538, 543, 286 S.E.2d 570, 574 (1982) (citations omitted). "Whether the accident grew out of the employment is a mixed question of law and fact . . . ." *Alford v. Quality Chevrolet Co.*, 246 N.C. 214, 216, 97 S.E.2d 869, 871 (1957).

In *Lee v. F.M. Henderson & Associates*, 284 N.C. 126, 127, 200 S.E.2d 32, 35 (1973), plaintiff lost his first and second fingers while operating his employer's electric saw while working on a personal project. " 'It was not unusual for plaintiff and his co-workers to use the defendant employer's equipment for personal projects when the employees were not busy with company work. A practice or custom had been established by the employer, allowing the employees to use such equipment.' " *Id.* at 132-33, 200 S.E.2d at 37. Our Supreme Court held that

> plaintiff's use of his employer's electric saw and 'scrap' material during the Saturday morning lull was a *reasonable* activity and the risk inherent in such activity was a risk of the employment. The reasonableness of plaintiff's activity on this occasion is attested by the express approval of his superiors as well as by the established policy of his employer.

Id. at 134, 200 S.E.2d at 38. The Court also stated:

> We have not overlooked the Commission's finding or conclusion that plaintiff when injured "was performing an act personal to himself" and that "this activity in no way enhanced the business of the defendant employer." We take this as a finding that the particular piece of plywood with which plaintiff was working when injured was for his own personal use and that plaintiff's work thereon was of no value to the business of the employer. The specific findings of fact show that the employer, by its policy of permitting and encouraging such use of its equipment and "scrap" material, had determined that this course was for the mutual advantage of employer and employee in respect of employer-employee relationships as well as in development of the employees' skill in the areas of planning and construction.

Id. at 135-36, 200 S.E.2d at 39 (citation omitted). The Court further held that to deny benefits because the employee was injured while working on a article for his personal use, "narrowly and unduly"

restricted the protection of the Workers' Compensation Act. *Id.* at 136, 200 S.E.2d at 39.

In the present case the Commission made the following findings of fact:

> 22. The Full Commission finds that by the greater weight of the medical and other evidence of record, decedent's death by heart attack on 29 October 1993 resulted from his work for defendant Theodore Bunn and defendant-contractor North Hills, Inc. and was an injury by accident within the meaning of the Workers' Compensation Act.
>
> 23. The Full Commission finds that decedent's heart attack and resulting death at work on 29 October 1993 occurred following a period of unusually high exertion. The Full Commission also finds that this period of overexertion was from work which was unusual and not normally part of decedent's routine.
>
> 24. Decedent's death by heart attack resulted from an injury by accident arising out of and in the course of his employment on 29 October 1992.

We hold that Mr. Wall's death is compensable under the Workers' Compensation Act. He was engaged in an activity for the mutual benefit of himself and his employer Mr. Bunn. Mr. Bunn testified that he was hired by North Hills to "clear the land," and it did not matter how he disposed of the trees. He could "haul them off" or burn them. Mr. Bunn allowed Mr. Wall to take wood from the land because Mr. Bunn had to get the wood out of his way. The wood was a "hold-up" to Mr. Bunn. Further, every morning when Mr. Bunn arrived at the job site, Mr. Wall already had his truck loaded with wood. Mr. Wall also had a trailer, and Mr. Bunn helped load Mr. Wall's trailer with logs. Mr. Wall wrapped a chain around the logs and Mr. Bunn lifted the logs up with the bulldozer and placed them on the trailer. Mr. Wall then removed the chain. Mr. Bunn testified that running a bulldozer is "tiresome work." He also testified that, if someone who was not accustomed to running a bulldozer, actually ran a bulldozer for six or seven hours, "it would kill them" because they weren't used to it. On the morning of his death, Mr. Wall put two logs on the trailer. He apparently wrapped the chain around the logs as he usually did and then he operated the bulldozer, which he usually did not do. Mr. Wall was acting in the course and scope of his employment because he was removing wood from the land to the mutual benefit of his employer and him-

self. Moreover, Mr. Bunn knew that Mr. Wall was taking wood from the land and Mr. Bunn helped Mr. Wall load his trailer with wood every morning. Mr. Wall's heart attack followed a period of unusually high exertion. The period of overexertion occurred when Mr. Wall placed chains around the logs and then operated the bulldozer. Mr. Wall's operation of the bulldozer was unusual and not a normal part of his work routine. We hold that there is competent evidence to support the findings of the Commission and in turn these findings support their legal conclusions. Therefore, Mr. Wall's death by heart attack was an accident within the meaning of the Workers' Compensation Act. We affirm the opinion and award of the Commission.

Affirmed.

Chief Judge ARNOLD and Judge WYNN concur.

JERRY THARP, EMPLOYEE-PLAINTIFF v. SOUTHERN GABLES, INC., SELF-INSURED EMPLOYER, (CONSOLIDATED ADMINISTRATORS, INC., SERVICING AGENT), DEFENDANT

No. COA96-573

(Filed 18 February 1997)

1. Workers' Compensation § 127 (NCI4th)— fall from roof— not caused by alcohol seizure

The Industrial Commission did not err in a workers' compensation action arising from plaintiff's fall from a roof by finding that plaintiff's injury was not proximately caused by an alcohol withdrawal seizure where plaintiff had a history of alcohol seizures and admitted to a drinking binge that ended four days prior to his injury. Upon a careful review of the record, no evidence exists that plaintiff was having an alcohol withdrawal seizure. A neurologist's testimony revealed that he did not have an opinion as to whether plaintiff had a seizure, alcohol induced or not; the most plaintiff would say in his testimony was that it was possible that it was a seizure but he did not know, suggesting that it could have been the heat; the incidents relied upon by defendant as medical evidence of prior seizures did not occur more than forty-eight hours after drinking; and the neurologist

stated that it would not be normal to have an alcohol withdrawal seizure after more than three days and that an alcohol withdrawal seizure probably would not happen five days after consuming alcohol; and plaintiff's blood alcohol level was at 0.000 at the time of the incident.

Am Jur 2d, Workers' Compensation § 256.

2. Workers' Compensation § 387 (NCI4th)— average weekly wage—evidence—business records exception

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff's average weekly wage was $455.18 where defendant alleged that this amount was derived from plaintiff's unauthenticated and incorrectly admitted hearsay evidence, but the records are admissible under the business records exception to the hearsay rule. Plaintiff testified as to the records' authenticity and that the records were made at or near the time of the transaction. Consequently, the Commission's findings of fact and conclusions of law were based on competent evidence in accordance with the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 803(6).

Am Jur 2d, Workers' Compensation §§ 582-585.

Comment Note.—Hearsay evidence in proceedings before state administrative agencies. 36 ALR3d 12.

Admissibility of physician's testimony as to patient's statements or declarations, other than res gestae, during medical examination. 37 ALR3d 778.

3. Workers' Compensation § 476 (NCI4th)— fall from roof—allegations of alcoholic seizure—unfounded litigiousness—attorney's fees

The Industrial Commission correctly awarded plaintiff attorney's fees in a workers' compensation action where the Commission stated that defendant's defense was grounded in unfounded litigiousness. Both the deputy commissioner and the full Commission found that plaintiff did not have a seizure, but suffered from an unexplained fall from the roof of a house, so that defendant's reliance upon N.C.G.S. § 97-12 was unreasonable. Furthermore, the evidence reveals that defendant denied plaintiff compensation prior to receiving his medical records based on plaintiff's seizures "over the years" despite the adjuster

being aware of relevant case law suggesting otherwise. Defendant continued to argue that N.C.G.S. § 97-12 applied at a hearing before a deputy commissioner, despite having no evidence that plaintiff actually suffered a seizure, much less one proximately caused by intoxication, and despite an inability to cite authority to support its position. When defendant took a position contrary to established case law, its actions were unreasonable and litigious. N.C.G.S. § 97-88.1.

Am Jur 2d, Workers' Compensation §§ 722, 725.

Appeal by defendant from opinion and award entered 8 March 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 January 1997.

Robert S. Hodgman & Associates, by Robert S. Hodgman, for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Timothy S. Riordan and M. Reid Acree, Jr., for defendant-appellant.

SMITH, Judge.

Plaintiff was employed as an independent contractor performing roofing work on Southern Gables' projects. On 1 July 1994, plaintiff fell from a roof to the ground. Plaintiff testified that he arrived at work at approximately 8:00 a.m. and fell at 2:00 p.m. Plaintiff claims he became dizzy just prior to his fall and has no other memory of the incident.

Plaintiff was transported to and received treatment from Moses H. Cone Memorial Hospital (Moses Cone Hospital), where he was diagnosed as suffering a T3-T4 fracture dislocation with complete paraplegia, bilateral hemopneumothorax and seizure disorder. On 1 July 1994, Dr. Elsner at Moses Cone Hospital performed a surgical decompression and stabilization of thoracic spinal fractures. Plaintiff received occupational therapy from Moses H. Cone Health Care Services, as well as Moses H. Cone Rehabilitation Center. Plaintiff also received treatment after his fall from Dr. Joseph W. Stiefel at Guilford Neurologic Associates. Plaintiff was discharged from Moses H. Cone Rehabilitation Center on 8 September 1994.

The record shows that prior to plaintiff's fall, he had a history of alcohol withdrawal seizures since 1988. Plaintiff was diagnosed as a chronic alcohol user, and smoked marijuana daily. Plaintiff's wife tes-

tified that plaintiff's binges occurred three to four times per month and that these binges lasted up to a week. Plaintiff had previously received treatment for alcohol withdrawal seizures from Moses Cone Hospital and Wesley Long Community Hospital (Wesley Long Hospital), as well as from Dr. Jeffrey J. Schmidt, a neurologist. Plaintiff admitted to a nine day drinking binge that ended 26 June 1994, four days prior to his injury. Plaintiff also has a medical history of seizures unrelated to alcohol intake. Defendant contends that plaintiff's claim was denied because plaintiff fell from the roof because of an idiopathic condition, specifically a seizure which was pre-existing and not connected to his employment.

Deputy Commissioner Tamara N. Nance heard the matter on 1 December 1994. Prior to the hearing, the parties entered into a pre-trial agreement, where an employment relationship between plaintiff and Southern Gables and plaintiff's medical records were stipulated. The deputy commissioner issued an opinion and award in which she concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant when he fell from the roof on 1 July 1994. Deputy Commissioner Nance disagreed with defendant's argument that plaintiff's claim is barred under the North Carolina General Statutes section 97-12 intoxication defense. N.C. Gen. Stat. § 97-12 (1991). Defendant appealed to the Full Commission.

On 8 March 1996, the Full Commission issued an opinion and award affirming Deputy Commissioner Nance's decision regarding whether plaintiff's injury was proximately caused by his intoxication and plaintiff's average weekly wage. Further, the Full Commission found that defendant's intoxication defense pursuant to section 97-12 was "grounded in unfounded litigiousness" pursuant to North Carolina General Statutes Section 88.1 and awarded plaintiff attorney's fees for the cost of the proceeding at the deputy commissioner level as well as $500.00 for costs. The Full Commission did not find that plaintiff required attendant medical care, and accordingly denied plaintiff's wife's claim for nursing services. Defendant appeals from the opinion and award.

Defendant argues first that the Full Commission erred in failing to find that plaintiff's injuries were proximately caused by his intoxication. We disagree.

The standard of review in cases appealed from the Industrial Commission "is limited to a determination of whether the Commis-

sion's findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings." *Ross v. Mark's Inc.*, 120 N.C. App. 607, 610, 463 S.E.2d 302, 304 (1995). Accordingly, if competent evidence exists, the Industrial Commission's findings of fact are conclusive on appeal even though there may be evidence which would support a contrary finding. *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 468 S.E.2d 396 (1996); *Fletcher v. Dana Corporation*, 119 N.C. App. 491, 459 S.E.2d 31, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 235 (1995).

[1] It is defendant's contention that it is relieved from liability under the Workers' Compensation Act because plaintiff's injury was proximately caused by his intoxication. North Carolina General Statutes section 97-12 of the North Carolina Workers' Compensation Act states:

> No compensation shall be payable if the injury or death to the employee was proximately caused by:
>
> (1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee . . . .

Defendant-employer has the burden of proving the affirmative defense of intoxication. *Anderson v. Century Data Systems*, 71 N.C. App. 540, 545, 322 S.E.2d 638, 641 (1984), *disc. review denied*, 313 N.C. 327, 327 S.E.2d 887 (1985). Defendant must "prove only that the employee's intoxication was more probably than not a cause in fact of the accident resulting in injury to the employee." *Id.*

> Proximate cause has been defined as follows:
>
> (1) in a natural and continuous sequence and unbroken by any new and independent cause produces an injury, (2) without which the injury would not have occurred, and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

Goode v. Harrison, 45 N.C. App. 547, 548-49, 263 S.E.2d 33, 34 (1980). In the case *sub judice*, the Industrial Commission specifically found that:

> 7. Plaintiff suffers from an idiopathic seizure disorder accentuated by alcohol and poor compliance with medication. However, there is insufficient evidence of record to find by its

greater weight that plaintiff's fall from the roof on 1 July 1994 was caused by an alcohol withdrawal seizure, or any other kind of seizure for that matter.

The Commission further found that:

12. This case is one of first impression in North Carolina, in that defendant's defense in this case deals with intoxication that is not contemporaneous with the employee's injury by accident, more specifically alcohol withdrawal seizures allegedly resulting in plaintiff's injury by accident. The first impression nature of this case results from the fact that past cases of precedential value have dealt only with fact scenarios under which the intoxication and the injury were contemporaneous. Defendant's defense of this claim is not persuasive or reasonable considering past case law, that the employee had a zero blood alcohol level at the time of the accident, and that there is no other evidence of plaintiff's intoxication contemporaneous with his injury by accident. Therefore, defendant's defenses of intoxication pursuant to N.C. Gen. Stat. § 97-12 as it has been interpreted to date by the courts is grounded in unfounded litigiousness pursuant to N.C. Gen. Stat. § 97-88.1.

Defendant argues its evidence shows that plaintiff had a history of alcohol withdrawal seizures as a result of his alcohol abuse and intoxication. Defendant references plaintiff's medical records from Moses Cone Hospital which indicate a history of seizures which are related to alcohol consumption, and the testimony from Dr. Schmidt, who upon evaluating plaintiff noted a history of alcohol withdrawal seizures. Defendant argues that as Dr. Schmidt's testimony indicated that alcohol withdrawal seizures generally occur two to three days after ceasing to drink, and that they can also occur up to one week afterward, that plaintiff's injury was noncompensable. Moreover, defendant contends that plaintiff's own testimony acknowledged that he may have had a seizure which caused his fall on 1 July 1994, since he admitted to feeling dizzy prior to his fall.

Notwithstanding defendant's claims that plaintiff experienced an alcohol withdrawal seizure which caused his fall, competent evidence in the record supports the Commission's findings that plaintiff did not have a seizure. Contrary to defendant's assertions, Dr. Schmidt's testimony reveals that he did not have an opinion as to whether plaintiff had a seizure, alcohol induced or not. He testified as follows:

Q: Doctor, based on the times you saw Mr. Tharp and the history he gave you and your treatment, I want you to make some assumptions. I want you to assume that he was engaged in one of his alcohol drinking binges for approximately nine or ten days ending on June 25th or June 26th of 1994 and that he did not drink thereafter from either June 25th or 26th through July 1st of '94, approximately four or five days; that he was on a roof on July 1st of '94, remembers being dizzy and does not remember much else; that he fell from that roof and hurt himself.

And assume that he was having seizure-like activity in the Emergency Room on that day—on July 1st of '94—after his fall. And assume that he had approximately seven or eight seizures per year between 1989 and 1994, and assume that he was not taking his medications for approximately or at least one year before July 1st of 1994 . . . Do you have an opinion as to whether Mr. Tharp had a seizure on the roof that day—on July 1st of '94?

. . .

A: (By the witness) No I don't.

Further, defendant alleges that plaintiff's own testimony suggests that he had a seizure on 1 July 1994; however, upon review of the record, the most plaintiff would say was that it was possible that it was a seizure but he did not know—plaintiff went on to suggest that it "[c]ould have been the heat, I don't know" as his testimony was that it was around ninety (90) degrees while he was working. Thus, from a careful review of the record, no evidence exists that plaintiff was having an alcohol withdrawal seizure. Moreover, the incidents relied upon by defendant as medical evidence of plaintiff's prior seizures did not occur more than forty-eight (48) hours after drinking. Additionally, Dr. Schmidt stated that it would not be normal to have an alcohol withdrawal seizure after more than three days and that an alcohol withdrawal seizure probably would not happen five days after consuming alcohol. Plaintiff's blood alcohol level was 0.000 at the time of the incident. Accordingly, the Commission did not err in finding that plaintiff's injury was not proximately caused by an alcohol withdrawal seizure.

[2] Defendant's second argument is that the Commission erred in concluding that plaintiff's average weekly wage was $455.18. Defendant alleges that this amount was derived from plaintiff's unauthenticated and incorrectly admitted hearsay evidence. The items

which defendant contends are hearsay evidence are records prepared by Jill and Ronald Lowery, defendant, plaintiff and several Federal Forms 1099.

However, a review of relevant case law reveals that the records are admissible under the business records exception to the hearsay rule. The business records exception to the hearsay rule states as follows:

> Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicated lack of trustworthiness. . . .

N.C.R. Evid. 803(6).

At the hearing, plaintiff testified as to the records' authenticity and that the records were made at or near the time of the transaction; thus, the records were properly admitted into evidence under the business records exception. *See State v. Rupe*, 109 N.C. App. 601, 611, 428 S.E.2d 480, 487 (1993) (holding that a witness familiar with the business records and the circumstances under which they were made may establish the authenticity of the records; that the records need not be authenticated by the person who actually made them; and that if the records are found to have been made at or near the time of the particular transaction, the authenticating person's testimony is not needed). Consequently, as the Commission's findings of fact and conclusions of law regarding plaintiff's average weekly wage were based on competent evidence in accordance with the North Carolina Rules of Evidence, defendant's argument is without merit.

[3] Defendant's third argument is that the Commission incorrectly awarded plaintiff attorney's fees. We disagree.

Our Court may review *de novo* whether defendant had a reasonable ground to bring a hearing. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 464 S.E.2d 481 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). "This requirement ensures that defendants do not bring hearings out of 'stubborn, unfounded litigiousness.' " *Id.*

at 51, 464 S.E.2d at 484 (quoting *Beam v. Floyd's Creek Baptist Church*, 99 N.C. App. 767, 768, 394 S.E.2d 191, 192 (1990)). In the instant action, the Commission stated that "defendant's defense of this claim is grounded in unfounded litigiousness pursuant to N.C. Gen. Stat. § 97-88.1." North Carolina General Statutes section 97-88.1 states that:

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

N.C. Gen. Stat. § 97-88.1 (1991).

In this action, both Deputy Commissioner Nance and the Full Commission found that plaintiff did not have a seizure, and that plaintiff suffered "an unexplained fall from the roof of a house." Thus, defendant's reliance upon section 97-12 of the North Carolina General Statutes was unreasonable. Further, the evidence reveals that defendant denied plaintiff compensation prior to receiving his medical records, stating that because plaintiff had suffered seizures "over the years" that this was enough to deny the claim. Defendant's adjuster did this despite being aware of relevant case law suggesting otherwise. *See DeVine v. Steel Co.*, 227 N.C. 684, 44 S.E.2d 77 (1947); *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E.2d 97 (1946). Moreover, despite defendant's inability to cite authority to support its position at a hearing before Deputy Commissioner Nance, defendant continued to argue that section 97-12 applied despite having no evidence that plaintiff actually suffered a seizure, much less one proximately caused by intoxication. Accordingly, when defendant took a position contrary to established case law, his actions were unreasonable and litigious. *See Troutman*, 121 N.C. App. 48, 464 S.E.2d 481. Therefore, we hold the Commission correctly concluded that defendant did not have reasonable grounds for maintaining a defense under section 97-12 of the General Statutes.

For all of the reasons stated herein, the opinion and award of the North Carolina Industrial Commission is affirmed.

Affirmed.

Judges JOHN and McGEE concur.

RONALD G. HINSON ELECTRIC, INC., PLAINTIFF-APPELLANT v. UNION COUNTY BOARD OF EDUCATION, DEFENDANT-APPELLEE

No. COA96-512

(Filed 18 February 1997)

1. Public Works and Contracts § 47 (NCI4th)— renovation of elementary school media centers—electrical work—ex parte communications—bidding reopened—summary judgment for Board erroneous

The trial court erred by granting summary judgment in favor of the Board of Education and by denying the plaintiff's motion for a preliminary injunction in an action seeking declaratory and injunctive relief arising from electrical bids for the renovation of the media centers at two elementary schools where the Board had received three bids on 2 November, the third was received late and was not opened, plaintiff's was the lower of the two bids opened, the project architect allegedly engaged in an *ex parte* conversation with a representative of the company with the late bid and learned that their bid would have been substantially less, the architect reported to the Board that he believed the bids were too high, the bidding was reopened, and the third company was awarded the electrical component of the work. The trial court was presented with and considered matters outside the pleadings, converting the Board's motion to dismiss into a motion for summary judgment. The specific provisions of N.C.G.S. § 143-132(a) govern this action over N.C.G.S. § 143-129, and the plain language of N.C.G.S. § 143-132 vested the Board with broad discretion to accept or reject any number, or all, of the 2 November bids. However, the statutory discretion accorded local boards or governing bodies is not without limitation, and the evidence, viewed in the light most favorable to the non-moving party, raises a genuine issue of material fact as to the propriety of the exercise of the Board's discretion.

Am Jur 2d, Public Works & Contracts §§ 54 et seq.

2. Injunctions § 43 (NCI4th)— restraining order dissolved—damages—unsworn statement of counsel—not evidence

The trial court erred in awarding damages in dissolving a restraining order by relying upon the unsworn statement of counsel. Such statements by a party's attorney at trial are not considered evidence.

Am Jur 2d, Injunctions §§ 323 et seq.

Appeal by plaintiff from order signed 18 December 1995 by Judge H. W. Zimmerman, Jr., in Union County Superior Court. Heard in the Court of Appeals 15 January 1997.

Jordan, Price, Wall, Gray & Jones, L.L.P., by Henry W. Jones, Jr., and A. Hope Derby, for plaintiff-appellant.

Koy E. Dawkins, P.A., by Koy E. Dawkins and Steven D. Starnes, for defendant-appellee.

MARTIN, Mark D., Judge.

Plaintiff Ronald G. Hinson Electric, Inc. (Hinson), appeals from the trial court's order dismissing its complaint, dissolving a temporary restraining order, denying all other injunctive relief, and awarding defendant Union County Board of Education (the Board) $500 in damages.

In mid-October 1995 the Board solicited bids for an addition and renovation of the media centers at New Salem and Wingate elementary schools in Union County, North Carolina (the project). On 26 October 1995, after reviewing the properly submitted bids, the Board awarded the general and mechanical components of the project to prime contractors. No bids for the electrical component of the project were received. The electrical component was subsequently rebid.

At the 2 November 1995 bid opening the Board received two electrical bids—Hinson's bid in the amount of $126,400, and Spence Electric's (Spence) bid for $131,000. A third bid, submitted by Sentry Electric (Sentry), was received late and was neither opened nor considered. At some point after the bids were opened, Frank Williams (Williams), project architect, allegedly engaged in an *ex parte* conversation with a representative of Sentry who indicated "their price would have been under $100,000."

Williams subsequently reported to the Board that he believed the 2 November bids were too high. The Board, based on William's recommendation, rejected the 2 November bids and re-opened the bidding for the electrical component of the project.

At the 21 November 1995 bid opening the Board received three bids: Hinson re-submitted its bid of $126,400 under protest; Spence submitted a bid of $121,800; and Sentry submitted a bid of $109,700. Based on the 21 November bids, the Board awarded the electrical component of the project to Sentry.

On 11 December 1995 Hinson filed a complaint seeking declaratory and injunctive relief and obtained a temporary restraining order preventing the Board from entering a contract for the electrical component of the project. The Board filed, along with its answer, a motion to dismiss Hinson's complaint for failure to state a claim upon which relief can be granted.

On 18 December 1995 the trial court, after hearing, dismissed Hinson's complaint, dissolved the temporary restraining order, denied any further injunctive relief, and awarded the Board $500 in damages.

On appeal Hinson contends, among other things, the trial court erred by (1) dismissing Hinson's complaint, (2) dissolving Hinson's temporary restraining order and denying its motion for a preliminary injunction, and (3) awarding damages to the Board.

At the outset we note our review is limited to the "record on appeal and the verbatim transcript of proceedings . . . ." N.C.R. App. P. 9(a); *Cellu Products Co. v. G.T.E. Products Corp.*, 81 N.C. App. 474, 477-478, 344 S.E.2d 566, 568 (1986). A party's brief is not a part of the record on appeal. *West v. Reddick, Inc.*, 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980), *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981). Furthermore, it is the responsibility of each party to ensure the record on appeal clearly sets forth evidence favorable to that party's position. *Produce Corp. v. Covington Diesel*, 21 N.C. App. 313, 315, 204 S.E.2d 232, 234, *cert. denied*, 285 N.C. 590, 205 S.E.2d 721 (1974); *Drouillard v. Keister Williams Newspaper Services*, 108 N.C. App. 169, 173, 423 S.E.2d 324, 327 (1992), *disc. review denied and appeal dismissed*, 333 N.C. 344, 427 S.E.2d 617 (1993). The Board failed to include certain exhibits presented to the trial court in the record on appeal. Accordingly, we cannot consider those portions of the exhibits not included in the record.

I.

[1] Hinson first contends the trial court erred by granting the Board's motion to dismiss. Specifically, Hinson argues N.C. Gen. Stat. § 143-129 required the Board to award the electrical component of the project to Hinson.

During the 18 December hearing, the trial court was presented with, and considered, matters outside the pleadings. The Board's motion to dismiss must therefore "be treated as a motion for summary judgment and disposed of in the manner and on the conditions

stated in G.S. 1A-1, Rule 56." *Roach v. City of Lenoir*, 44 N.C. App. 608, 609, 261 S.E.2d 299, 300 (1980). When ruling on a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). The motion should be granted only if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Id.* at 62, 414 S.E.2d at 341.

Chapter 143, Article 8 of the General Statutes governs the award of public contracts in North Carolina. Section 143-129 generally requires, among other things, that competitive bidding be used for "construction or repair work requiring the estimated expenditure of public money in an amount equal to or more than one hundred thousand dollars ($100,000) . . . ." N.C. Gen. Stat. § 143-129(a) (1995).

In addition, section 143-129 also prescribes the following:

> Proposals shall not be rejected for the purpose of evading the provisions of this Article. . . .
>
> All proposals shall be opened in public and shall be recorded on the minutes of the board or governing body and the award shall be made to the lowest responsible bidder or bidders, taking into consideration quality, performance, and the time specified in the proposals for the performance of the contract.

N.C. Gen. Stat. § 143-129(b) (emphasis added).

N.C. Gen. Stat. § 143-132(a), on the other hand, provides in pertinent part:

> [I]f after advertisement for bids as required by G.S. 143-129, not as many as three competitive bids have been received from reputable and qualified contractors regularly engaged in their respective lines of endeavor, said board . . . shall again advertise for bids; and if as a result of such second advertisement, not as many as three competitive bids from reputable and qualified contractors are received, such board or governing body may then let the contract to the lowest responsible bidder submitting a bid for such project, even though only one bid is received.

Id. (1995) (emphasis added).

Despite Hinson's contention section 143-129 controls, we believe the more specific provisions of N.C. Gen. Stat. § 143-132(a) govern

resolution of the instant action. *See Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) ("[i]t is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application."); *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-629, 151 S.E.2d 582, 586 (1966) (same).

As a general rule, "when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978). The plain language of section 143-132 thus vested the Board with broad discretion to accept or reject any number, or all, of the 2 November bids. *See Mullen v. Louisburg*, 225 N.C. 53, 60, 33 S.E.2d 484, 488 (1945) (" 'It is a general rule that officers of a municipal corporation, in the letting of municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or a palpable abuse of discretion, have no power to control their action.' ") (citations omitted); *Kinsey Contracting Co. v. City of Fayetteville*, 106 N.C. App. 383, 384, 416 S.E.2d 607, 608, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 149 (1992). *See also* 64 AM. JUR. 2D *Public Works and Contracts* § 76 (1972); A. Fleming Bell, II, *Construction Contracts with North Carolina Local Governments*, 23-25 (3d ed. 1996).

The statutory discretion accorded local boards or governing bodies, however, is not without limitation. Indeed, the purpose of the public contract bidding laws is "to prevent favoritism, corruption, fraud, and imposition in the awarding of public contracts by giving notice to prospective bidders and thus assuring competition which in turn guarantees fair play and reasonable prices in contracts involving the expenditure of a substantial amount of public money." *Mullen*, 225 N.C. at 58-59, 33 S.E.2d at 487.

Hinson contends the Board's decision to re-bid the electrical component of the project based upon William's recommendation—after the alleged *ex parte* communication between Williams and Sentry—constituted favoritism and an abuse of discretion by the Board. According to the affidavit of Ronald G. Hinson:

> On or about November 10, 1995, I telephoned Frank Williams, the architect for the Union County School Board project to renovate media centers at the New Salem and Wingate Elementary Schools. I asked Mr. Williams why he was recommending a rebid

> for the electrical component of the Project after my low bid was received on November 2, 1995. Mr. Williams told me that he had spoken with a representative of Sentry Electric and Mr. Williams told me that if he had opened Sentry's bid, "their price would have been under $100,000."

This evidence, viewed in the light most favorable to the non-moving party, raises a genuine issue of material fact as to the propriety of the exercise of the Board's discretion in rejecting Hinson's bid. Accordingly, the trial court erred by granting summary judgment in favor of the Board.

II.

Hinson next contends the trial court erred by dissolving the temporary restraining order and denying Hinson's motion for a preliminary injunction.

In its 18 December order, the trial court granted summary judgment to the Board and, as a consequence, summarily denied Hinson's motion for a preliminary injunction. Because we reverse the trial court's grant of summary judgment, we also reverse the trial court's denial of Hinson's motion for a preliminary injunction and remand for reconsideration in light of our disposition.

III.

[2] Hinson also contends the trial court erred by awarding the Board $500 in damages, the full amount of the bond securing Hinson's restraining order.

Rule 65(e) of the North Carolina Rules of Civil Procedure provides:

> An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction . . . without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury.

N.C. Gen. Stat. § 1A-1, Rule 65(e) (1990).

Hinson argues the trial court's finding of fact number seventeen is unsupported by competent evidence in the record. Finding of fact number seventeen provides:

17. [The Board] sustained damages in the amount of SEVEN HUNDRED FIFTY DOLLARS ($750.00). These damages are the direct result of the restraining order issued on 11 December 1995.

It is well settled the trial court's findings of fact are conclusive on appeal if supported by competent evidence in the record. *Institution Food House v. Circus Hall of Cream*, 107 N.C. App. 552, 556, 421 S.E.2d 370, 372 (1992). The present record indicates the trial court relied upon the unsworn statement of counsel that the Board suffered "about seven fifty" in damages in making finding of fact number seventeen. Such statements by a party's attorney at trial are not considered evidence. *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161 (1976). Thus, as finding of fact seventeen was not based on competent evidence, the corresponding conclusions of law are likewise erroneous. Accordingly, we reverse the trial court's award of damages.

Finally, after carefully reviewing Hinson's remaining assignments of error, we conclude they are wholly without merit.

Reversed and remanded with instructions.

Judges LEWIS and WALKER concur.

RUTH A. KING, BY AND THROUGH HER ATTORNEY-IN-FACT, WALTER A. WARREN, PLAINTIFF v. STATE OF NORTH CAROLINA, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF COASTAL MANAGEMENT AND DIVISION OF ENVIRONMENTAL MANAGEMENT, DEFENDANTS

No. COA96-310

(Filed 18 February 1997)

1. Environmental Protection, Regulation, and Conservation § 45 (NCI4th)— fill permits—Topsail Sound—findings of fact from prior proceeding—binding

The trial court did not err in an action arising from the denial of permits to place fill material on a peninsula in Topsail Sound by treating facts found in a judicial review proceeding as binding for purposes of this action where the Environmental Manage-

ment Commission's (EMC's) findings of fact were upheld in a prior appeal.

Am Jur 2d, Administrative Law § 537.

2. Environmental Protection, Regulation, and Conservation § 45 (NCI4th)— fill permits denied—takings claim—practical alternatives to proposed construction plan

In an action under N.C.G.S. § 113A-123(b) arising from the denial of permits to place fill material on a peninsula in Topsail Sound, the State met its burden of establishing that its denial of plaintiff's Section 401 certification was not an unreasonable exercise of police power by coming forward with practical alternatives to plaintiff's proposed plan.

Am Jur 2d, Constitutional Law §§ 365, 397-401.

3. Environmental Protection, Regulation, and Conservation § 45 (NCI4th); Constitutional Law § 103 (NCI4th)— denial of fill permits—takings claim—practical alternatives to construction plan

The State met its burden of proving that plaintiff's takings claim, which arose from the denial of permits to place fill material on a peninsula in Topsail Sound, lacks an essential element for purposes of summary judgment by establishing that practical alternatives exist to plaintiff's proposed construction plan. Plaintiff's evidence only establishes that the property cannot be put to its highest and best use, but the test is whether plaintiff has been deprived of all practical use and reasonable value of the property, not what particular development of the property will be most economically beneficial to plaintiff. If plaintiff submits a plan to the State for the development of the property that is consistent with the alternatives enunciated by the State and the State fails to approve such plan, then plaintiff may avail herself of the remedies available under N.C.G.S. § 113A-123(b).

Am Jur 2d, Constitutional Law § 408.

Local use zoning of wetlands or flood plain as taking without compensation. 19 ALR4th 756.

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's prohibition against taking of private property for public use without just compensation. 89 L. Ed. 2d 977.

Appeal by plaintiff from order entered 24 August 1995 by Judge James D. Llewellyn in Pender County Superior Court. Heard in the Court of Appeals 21 November 1996.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for plaintiff-appellant.

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

WALKER, Judge.

On 3 March 1989, plaintiff, Ruth A. King, by and through her attorney-in-fact, submitted an application for a major development permit under the Coastal Area Management Act (CAMA), N.C. Gen. Stat. §§ 113A-100 to -134.3 (1994), to place between 10,000 and 20,000 cubic yards of fill material on her property, which consists of an eight-acre peninsula in Topsail Sound. Plaintiff planned to build a marl/rock road down the center of the property and a fifty lot subdivision along this road. Subsequently, plaintiff modified the permit application pursuant to a consent agreement with the Division of Coastal Management (DCM) to eliminate the proposed subdivision. Thereafter, the application covered only the filling of the road bed and construction of a bulkhead around the perimeter of the peninsula. Representatives of the United States Army Corps of Engineers (COE) later determined that the interior two acres of the peninsula contained freshwater wetlands subject to flooding by storm tides and surface water runoff. Since plaintiff intended to place fill in the wetlands, she was required to obtain a permit from COE pursuant to Section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (1986). According to Section 401 of the Clean Water Act, 33 U.S.C.A. § 1341 (1986), applicants for Section 404 permits must provide COE with certification that the discharge of fill material is consistent with state water quality standards. The Division of Environmental Management (DEM), part of the Department of Environment, Health and Natural Resources, reviews Section 401 certification requests, and the Environmental Management Commission (EMC) makes the final decision to grant or deny the certification. On 14 September 1990, DEM denied plaintiff's request for Section 401 certification, and on 3 October 1990, DCM denied plaintiff's application for a CAMA permit. Plaintiff appealed the denial of the CAMA permit application to the Coastal Resources Commission (CRC) and also appealed the denial of the Section 401 certification request to EMC. On 10 October 1991,

CRC ordered DCM to issue a CAMA permit to plaintiff, but directed DCM to condition the permit on whether plaintiff obtained Section 401 certification prior to the commencement of construction. DCM issued the permit to plaintiff on 20 November 1991.

On 28 October 1991, EMC denied plaintiff's request for Section 401 certification, finding that the proposed wetland fill would degrade surrounding shellfish waters. EMC also found that there were less environmentally damaging alternatives for the construction of the road other than plaintiff's proposed plan. Plaintiff then sought judicial review of both EMC and CRC's orders.

On judicial review, the trial court reversed EMC's denial of Section 401 certification, but affirmed CRC's decision to condition the CAMA permit on whether plaintiff acquired Section 401 certification prior to the commencement of construction. EMC appealed the trial court's order to this Court, and in *King v. N.C. Environmental Mgmt. Comm.*, 112 N.C. App. 813, 436 S.E.2d 865 (1993), we reversed the order of the trial court and upheld EMC's findings of fact in support of its decision to deny plaintiff's Section 401 certification.

On 5 February 1992, plaintiff filed the present action pursuant to N.C. Gen. Stat. § 113A-123(b), alleging that the decisions of EMC and CRC (collectively, the State) limited the use of her property so as to deny her all reasonable use of the property, thereby constituting a taking without compensation. The State subsequently moved for summary judgment. In response to the State's motion for summary judgment, plaintiff presented the affidavit of James L. Powell, a registered land surveyor, who stated that the only practical way to subdivide the property was to build the road down the center of the property. Otherwise, houses would have to be constructed on "stilts" or bridges would have to be built from one side of the peninsula to the other. Plaintiff also presented the affidavit of Collice C. Moore, a licensed real estate appraiser, who opined that the property would have a fair market value of $1,360,000.00 if it were developed according to plaintiff's proposed plan, but otherwise the property would have a fair market value of $3,700.00. Moore's estimate of value was based on the approach that the property could only be developed with the road and utilities being constructed down the center of the property. The trial court granted the State's motion for summary judgment on 24 August 1995.

[1] On appeal, plaintiff first argues that the trial court erred by granting summary judgment in that the trial court erroneously treated the

findings of fact in the judicial review proceeding as established for purposes of this action. In *Weeks v. N.C. Dept. of Nat. Resources and Comm. Development*, 97 N.C. App. 215, 223, 388 S.E.2d 228, 232, *cert. denied*, 326 N.C. 601, 393 S.E.2d 890 (1990), this Court stated that "[t]he general rule is that an essential issue of fact which has been litigated and determined by an administrative decision is conclusive between the parties in a subsequent action." In *Weeks*, CRC denied plaintiff's application for a CAMA permit to build a 900-foot long pier in the tidal water adjacent to his property. *Id.* at 216-17, 388 S.E.2d at 229. Without seeking judicial review of CRC's findings, plaintiff filed a complaint pursuant to N.C. Gen. Stat. § 113A-123(b) alleging that CRC's actions were an unreasonable exercise of police power and amounted to an unconstitutional taking of his property. *Id.* at 217, 388 S.E.2d at 229. CRC moved for summary judgment based on its factual findings in plaintiff's administrative appeal. *Id.* at 218, 388 S.E.2d at 230. This Court held that because plaintiff did not object to or seek judicial review of CRC's findings of fact, he was "barred from relitigating the same issues of fact that the Commission resolved after hearing evidence concerning [his] application." *Id.* at 224, 388 S.E.2d at 233.

In the present case, plaintiff sought judicial review of EMC's findings of fact, which were upheld in the prior appeal. Since this Court upheld EMC's findings, *see King*, 112 N.C. App. 813, 436 S.E.2d 865 (1993), they are now binding on plaintiff's taking claim. Thus, the trial court did not err by treating the facts found in the judicial review proceeding as binding for purposes of this action.

[2] N.C. Gen. Stat. § 113A-123(b) states that any person affected by a final order or decision of CRC may petition the superior court, whose duty is to

> determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof . . . and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of taking without compensation. The burden of proof shall be on petitioner as to ownership and the burden of proof shall be on the Commission to prove that the order is not an unreasonable exercise of the police power, as aforesaid.

Plaintiff next contends that in order to establish that CRC's decision is not an unreasonable exercise of police power, the State must first

show that practical alternatives exist to plaintiff's proposed plan that prevent plaintiff's property from being rendered valueless. Therefore, plaintiff argues that the State has failed to come forward with evidence that practical alternatives exist to her proposed plan as required.

EMC made the following findings of fact which were upheld on judicial review, and which the trial court accepted as binding on the present action:

> f. In a letter addressed to [Plaintiff's] attorney in fact . . . DEM employee A. Preston Howard, Jr. requested that Petitioner provide information on alternatives to filling the wetlands on [Plaintiff's] property . . . .
>
> g. [Plaintiff] did not respond to Preston Howard's request for alternative proposals in his letter of April 21, 1989. [Plaintiff] has made no efforts to show that there are no practical alternatives, believing instead that the burden of developing practical alternatives rests with [DEM].
>
> h. There may be one or more practicable alternatives [for development of the property], including rerouting the proposed road from the center of the property to the south side or elevating some of the proposed houses over the wetland on pilings. [Plaintiff] has conducted no investigation and has made no showing that these alternatives are not practicable.

The State contends that because EMC's decision has no effect on three-quarters of plaintiff's property, and because other alternatives for road construction and development of the property are available, an essential element of plaintiff's takings claim, deprivation of all practical use and reasonable value, is eliminated.

Plaintiff claims that the evidence, by way of affidavits she presented, demonstrate that there are no practical alternatives to her proposed plan. However, this evidence only establishes that since plaintiff will be unable to subdivide the full eight-acre peninsula and locate the road and utilities in the center of the property, the property cannot be put to its highest and best use. The evidence presented by the State demonstrates that six acres of the peninsula can be subdivided without restriction, and that even the wetlands themselves can be developed provided that houses are built on pilings. Because the State came forward with practical alternatives to plaintiff's proposed plan in the review proceedings before EMC, the State met its burden

for purposes of establishing that its denial of plaintiff's Section 401 certification was not an unreasonable exercise of police power in violation of N.C. Gen. Stat. § 113A-123(b).

[3] The State also met its burden of proving that plaintiff's claim lacks an essential element for purposes of summary judgment. Under N.C.R. Civ. P. 56(c), summary judgment is appropriate when there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. The party moving for summary judgment may meet its burden of establishing the lack of a triable issue by proving an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party will not be able to come forward with evidence to support an essential element of its claim. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). If the moving party meets its burden, the opposing party must show that a genuine issue of fact exists or must provide an excuse for not doing so. *Id.*

By establishing that practical alternatives exist to plaintiff's proposed plan, the State has shown that an essential element of plaintiff's takings claim, the deprivation of all practical use and reasonable value of the property, does not exist. Thus, the trial court properly granted summary judgment in favor of the State.

The rule set forth by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798 (1992), also compels the conclusion that there has been no taking of plaintiff's property. In *Lucas*, the Court established two categories of regulatory action that require a finding of a compensable taking: regulations that compel physical invasions of property and regulations that deny an owner all economically beneficial or productive use of property. *Id.* at 1015, 120 L. Ed. 2d at 812-13.

Our case does not fall within the first category of regulatory takings, since there has been no physical invasion of plaintiff's property, but does fit into the second category. The standard for this second category, whether there has been a deprivation of all economically beneficial or productive use of the property, is similar to the standard set forth by our Supreme Court in *Finch v. City of Durham*, 325 N.C. 352, 384 S.E.2d 8, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989). In *Finch*, the Court stated that "the test for determining whether a taking has occurred . . . is whether the property . . . has a practical use and a reasonable value." *Id.* at 364, 384 S.E.2d at 15.

As with any property owner who wishes to develop property, plaintiff would like to maximize her profits by developing the property to the fullest extent possible. However, the test is not what particular development of the property will be most economically beneficial to plaintiff, but instead, whether plaintiff has been deprived of all practical use and reasonable value of the property. By establishing that practical alternatives exist to plaintiff's proposed construction plan, the State has met its burden of proving that plaintiff has not been deprived of all practical use and reasonable value of her property. If, however, plaintiff submits a plan to the State for the development of the property that is consistent with the alternatives enunciated by the State, and if the State fails to approve such plan, then plaintiff may avail herself of the remedies available under N.C. Gen. Stat. § 113A-123(b).

Affirmed.

Judges LEWIS and SMITH concur.

CHRISTOPHER SODERLUND, PLAINTIFF-APPELLANT v. NORTH CAROLINA SCHOOL OF THE ARTS; THE UNIVERSITY OF NORTH CAROLINA, RICHARD KUCH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND RICHARD GAIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, DEFENDANTS-APPELLEES

No. COA96-377

(Filed 18 February 1997)

Limitations, Repose, and Laches § 119 (NCI4th)— emotional distress—statute of limitations—tolled—mental disability

The trial court erred in an action arising from a relationship between a School of the Arts professor and student by dismissing plaintiff's complaint for not having been filed within the three-year statute of limitations period pursuant to N.C.G.S. § 1-52(5) and (16) where plaintiff alleged in his complaint that his mental illness rendered him incompetent as defined by N.C.G.S. § 35A-1101(7) and therefore tolled the applicable statute of limitations in accordance with N.C.G.S. § 1-17(a)(3). Defendants had sufficient notice from the allegations in plaintiff's complaint that he was prevented from filing his claims due to mental disability in that plaintiff alleged that he suffered several mental break-

downs, was diagnosed with PTSD, and was rendered incompetent within the statutory meaning due to his mental illness.

Am Jur 2d, Limitation of Actions §§ 178, 179, 186-188.

Posttraumatic syndrome as tolling running of statute of limitations. 12 ALR5th 546.

Appeal by plaintiff from order entered 20 December 1995 by Judge Donald R. Huffman in Forsyth County Superior Court. Heard in the Court of Appeals 4 December 1996.

Elliot, Pishko, Gelbin & Morgan, P.A., by Ellen R. Gelbin, for plaintiff-appellant.

Wells, Jenkins, Lucas & Jenkins, P.L.L.C., by Susan H. Gray, for defendants-appellees.

WALKER, Judge.

In his complaint, plaintiff alleged that in 1983, at age 15, he was admitted to the North Carolina School of the Arts (NCSA). Plaintiff began his schooling at NCSA as a ballet major.

In the winter of 1983, plaintiff was chosen to perform in the spring musical revue choreographed and directed by defendants Richard Kuch (Kuch) and Richard Gain (Gain). Kuch was the assistant dean and a faculty member and Gain was a faculty member in the modern dance department. According to plaintiff, Kuch and Gain convinced him that they could promote the careers of their favorite students based on their contacts and reputation in the dance community. However, without their promotion, plaintiff would be unable to find a job in this field. Kuch and Gain paid substantial attention to plaintiff, and made him feel unique and talented. Gain became plaintiff's mentor and confidant.

Further, Kuch and Gain taught their students that because dancing was a form of sexual expression, the students would become better dancers if they were sexually active, thereby improving their performances and career potential. Because sexual relationships between students and teachers were common knowledge at NCSA, plaintiff believed that such relationships were normal and acceptable as part of studying at the school.

In the spring of 1984, Gain brought plaintiff, then 16 years old, to the farmhouse he owned with Kuch. At that time, Gain served plain-

tiff alcoholic beverages and engaged in sexual relations with him. Thereafter, Gain again seduced plaintiff on several occasions, and was encouraged to do so by Kuch. Plaintiff alleges that he did not understand Gain's conduct to be wrong, but disliked the sexual relationship and therefore detached himself physically and emotionally during the seductions. Plaintiff only continued the sexual activity for fear of losing Gain's friendship and felt that if he resisted, Kuch and Gain would adversely affect his grades and dancing career. Although other faculty members were aware of plaintiff's relationship with Gain, none of them told plaintiff that this relationship was improper.

Subsequently, Kuch humiliated plaintiff during classes and rehearsals by making suggestive remarks to him in front of other students and by publicizing the fact that plaintiff and Gain were having a sexual relationship. In addition, after Gain ended his sexual relationship with plaintiff, Kuch and Gain ridiculed plaintiff about his appearance and dancing ability. As a result of such treatment, plaintiff became emotionally upset and began over-eating, drinking excessively and smoking.

At the end of the 1984 school year, Duncan Noble, the assistant dean of the ballet department, told plaintiff that he would not be invited back for the fall semester. Plaintiff then asked Kuch and Gain if he could be transferred to the modern dance department so he could stay at the school. Kuch transferred him for the summer semester but warned that he would be under intense scrutiny. During the summer session, Kuch and Gain tormented plaintiff by flirting with him on some occasions and ridiculing him on others. Kuch later refused to allow plaintiff back for the fall term.

Plaintiff did return for a summer session in 1986 because he wanted to earn the respect and praise of Kuch and Gain. Instead, Gain refused to speak to him and Kuch again verbally abused him. Because of Kuch and Gain's treatment of him, plaintiff felt severe guilt and shame and continued his self-destructive habits for the next seven years. During this time he was unable to form mature, healthy relationships with others and was unable to lead a normal life.

In the years following his residence at NCSA, plaintiff suffered several mental breakdowns. On 22 July 1992, during one of these mental breakdowns, plaintiff told his mother for the first time of his experiences with Kuch and Gain. As a result of this conversation, plaintiff understood that the actions of Kuch and Gain were improper. He thereafter began mental health therapy.

After evaluating plaintiff in the fall of 1993, a psychologist diagnosed plaintiff with post-traumatic stress disorder (PTSD), directly caused by defendants' actions. The psychologist determined that until plaintiff told his mother about defendants' actions and the diagnosis was made, plaintiff had not realized nor was he capable of understanding, the effect and consequences of defendants' conduct, the connection between their conduct and his mental illness, or the fact that he had a cause of action against them.

Plaintiff filed this action for intentional, reckless, and negligent infliction of emotional distress, negligence, constitutional claims, and punitive damages against defendants Kuch and Gain, NCSA, and UNC on 19 July 1995. Thereafter, Kuch and Gain filed a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6), and NCSA and UNC filed a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(1), (2) and (6). The trial court dismissed plaintiff's complaint pursuant to N.C.R. Civ. P. 12(b)(1), (2) and (6). Plaintiff subsequently abandoned his federal constitutional claims against Kuch and Gain, and his state constitutional and punitive damages claims against NCSA and UNC, but elected to pursue a negligence claim against NCSA and UNC under the Tort Claims Act, N.C. Gen. Stat. § 143-291(a) (1996).

The present appeal involves the dismissal of plaintiff's emotional distress, negligence, and punitive damages claims against Kuch and Gain individually, pursuant to N.C.R. Civ. P. 12(b)(6). The question for the court when deciding 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. . . ." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

Plaintiff contends that the trial court erred in dismissing his complaint for not having been filed within the three-year statute of limitations period pursuant to N.C. Gen. Stat. § 1-52 (5) and (16) (1996). A statute of limitations can provide the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint establishes that plaintiff's claim is so barred. *Long v. Fink*, 80 N.C. App. 482, 484, 342 S.E.2d 557, 559 (1986).

Plaintiff alleged in his complaint and argues on appeal that his mental illness rendered him incompetent as defined by N.C. Gen. Stat. § 35A-1101(7) (1995) and therefore tolled the applicable statute of limitations in accordance with N.C. Gen. Stat. § 1-17(a)(3) (1996). "Incompetent adult" is defined by N.C. Gen. Stat. § 35A-1101(7) as

> an adult or emancipated minor who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

The present case is similar to that of *Dunkley v. Shoemate,* 121 N.C. App. 360, 465 S.E.2d 319, *disc. review denied,* 342 N.C. 894, 468 S.E.2d 773 (1996), which we find controlling. In *Dunkley,* plaintiff was hospitalized for depression and "debilitating psychological illness." *Id.* at 361, 465 S.E.2d at 320. After plaintiff's discharge, a resident in psychiatry at the hospital, who was assigned to provide plaintiff with psychiatric outpatient treatment, engaged in non-consensual sexual intercourse with her. *Id.* at 361, 465 S.E.2d at 321. Plaintiff filed an action against the resident and his employers for battery, assault, intentional infliction of emotional distress, fraud and negligence. *Id.* Defendants answered pleading the statute of limitations as an affirmative defense. *Id.* The trial court subsequently dismissed plaintiff's claims for failure to file within the applicable statute of limitations periods. *Id.*

The question in *Dunkley* was whether plaintiff was required to plead mental disability in avoidance of the affirmative defense of the statute of limitations. *Id.* On appeal, plaintiff argued that her mental disability tolled the statutes of limitations. *Id.* at 362, 465 S.E.2d at 321. This Court stated that although N.C.R. Civ. P. 8(c) requires the statute of limitations, when used as an affirmative defense, to be pled in a responsive pleading, N.C.R. Civ. P. 8(d) "deems affirmative defenses in the answer as being denied or avoided if a reply is neither required or permitted." *Id.* N.C.R. Civ. P. 7(a) does not require a party to file a reply to an affirmative defense asserted in the answer unless ordered to do so by the court, and "a party is not required to seek permission to plead matters in avoidance of the affirmative defense." *Id.* at 362-63, 465 S.E.2d at 321-22. In light of these facts, we held that the affirmative defense of statute of limitations was deemed avoided, the issue joined, and discovery could proceed. *Id.* at 363, 465 S.E.2d at 322. Therefore, plaintiff was not required to plead mental disability in her complaint, as other allegations in her complaint were sufficient to put defendants on notice that she may have been precluded from filing her claims within the statute of limitations period because of mental disability. *Id.* The case was remanded to the trial court for a determination of whether plaintiff's condition rose to the level

of "insanity" or incompetence as defined by N.C. Gen. Stat. § 35A-1101(7), thus tolling the statute of limitations. *Id.*

Here, as in *Dunkley*, defendants had sufficient notice from the allegations in plaintiff's complaint that he may have been prevented from filing his claims due to mental disability. Plaintiff alleged that he suffered several mental breakdowns, that he was diagnosed with PTSD, and that due to his mental illness, he was rendered incompetent within the meaning of N.C. Gen. Stat. § 35A-1101(7). We therefore reverse the decision of the trial court and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

Judges LEWIS and SMITH concur.

FELANDER McLEAN, PLAINTIFF v. EATON CORPORATION, EMPLOYER, SELF-INSURED, (GAB BUSINESS INCORPORATED), DEFENDANT

No. COA96-331

(Filed 18 February 1997)

1. Workers' Compensation § 297 (NCI4th)— refusal to accept job—effect of psychological injuries

The Industrial Commission erred by determining, pursuant to N.C.G.S. § 97-32, that plaintiff's refusal to accept a job offered by defendant employer was unjustified without making additional findings regarding the impact plaintiff's psychological injuries had on his wage-earning capacity where plaintiff sustained severe injuries to his left hand in a work-related accident; the Commission found that plaintiff's depression and stress disorder were caused by his accident at work; and there was evidence that plaintiff's psychological injuries prevented him from accepting the job.

Am Jur 2d, Workers' Compensation § 399.

2. Workers' Compensation § 285 (NCI4th)— psychological injury—compensation for scheduled injury—election by claimant

The Industrial Commission's opinion and award effectively denied plaintiff benefits to which he may be entitled under

N.C.G.S. § 97-29 or N.C.G.S. § 97-30 where the Commission awarded permanent disability compensation solely for plaintiff's scheduled injury to his hand under N.C.G.S. § 97-31, plaintiff also suffered psychological injuries, and the Commission failed to assess whether N.C.G.S. § 97-29 or N.C.G.S. § 97-30 would provide him a more munificent remedy. Plaintiff should have been given the opportunity to elect the section or sections which provided him with the best monetary remedy. Any recovery plaintiff obtains under N.C.G.S. § 97-29 or N.C.G.S. § 97-30 may be in addition to any recovery he elects to receive under N.C.G.S. § 97-31 for the scheduled injury to his hand.

Am Jur 2d, Workers' Compensation § 383.

Judge WALKER dissenting.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 7 November 1995. Heard in the Court of Appeals 3 December 1996.

Ben E. Roney, Jr. for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Jeffrey R. Gilbert and Steven M. Rudisill, for defendant-appellee.

LEWIS, Judge.

While employed with defendant, plaintiff sustained severe injuries to his left hand in a 21 March 1992 work-related accident. On 15 January 1993, plaintiff and defendant entered into a Form 21 Agreement which was approved by the North Carolina Industrial Commission ("Commission"). Pursuant to this agreement, plaintiff began receiving compensation for temporary total disability.

Beginning in February 1993, plaintiff was treated by a psychiatrist for major depressive disorder and later for post-traumatic stress disorder. Upon the psychiatrist's referral, he attended counseling and therapy sessions. On 2 July 1993, plaintiff filed a Form 33 Request for Hearing regarding defendant's refusal to pay for psychiatric treatment. Defendant offered plaintiff a job as a touch-up painter beginning 20 September 1993, but plaintiff refused the position.

On 10 January 1994, a hearing was held before Deputy Commissioner Bernadine S. Ballance on plaintiff's Form 33 request. At the hearing, Deputy Commissioner Ballance noted that the parties

were proceeding on additional issues, including the extent of plaintiff's temporary total disability. On 20 January 1995, the deputy commissioner approved the psychiatric treatment and found defendant's refusal to authorize such treatment unreasonable. She also found that plaintiff was temporarily and totally disabled from 21 March 1993 through the date of the hearing and continuing until he was able to return to work or until the Commission granted defendant permission to cease the temporary total disability payments. She further found that plaintiff's refusal to accept the offered employment was justified due to his psychological disorders. Although she found that he suffered a 100% permanent loss of his hand, she reserved the issue of permanent disability for later determination.

Defendant appealed to the full Commission which adopted in part and modified in part the deputy commissioner's findings and conclusions. The Commission found that plaintiff's major depressive disorder and post-traumatic stress disorder were causally related to his 21 March 1992 injury. It approved the treatment provided by his psychiatrist and counselor as medical expenses, finding that defendant's refusal to authorize this treatment was unreasonable. The Commission further concluded that plaintiff's refusal to return to work was unjustified, determined that he was not entitled to temporary total disability after 20 September 1993, and awarded him 100% permanent disability for the loss of his left hand. Plaintiff appeals.

[1] Plaintiff first contends that the Commission erred by determining, under N.C. Gen. Stat. section 97-32, that his refusal to accept the job offered by defendant was unjustified without making additional findings regarding the impact his psychological injuries had on his wage-earning capacity. We agree.

N.C. Gen. Stat. section 97-32 provides: "If an injured employee refuses employment procured for him *suitable to his capacity* he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C. Gen. Stat. § 97-32 (1991) (emphasis added). The plain language of this statute requires that the proffered employment be suitable to the employee's capacity. If not, it cannot be used to bar compensation for which an employee is otherwise entitled. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444-45, 342 S.E.2d 798, 810 (1986). In fact, before the Commission determines, in general, that a plaintiff is employable and can earn wages, it must determine that he "can obtain a job taking into account his specific disabilities." *Bridges v. Linn-Corriher Corp.*, 90 N.C. App.

397, 401, 368 S.E.2d 388, 390, *disc. review. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). In addition, if an employee suffers a compensable injury and the injury causes an emotional disturbance which renders him unable to work, he is entitled to compensation for total incapacity under N.C. Gen. Stat. section 97-29. *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 146, 282 S.E.2d 539, 540 (1981), *disc. review denied*, 304 N.C. 725, 288 S.E.2d 380 (1982). Here, the Commission found that plaintiff's depression and stress disorder were caused by his 21 March 1992 injury at work. However, it made no findings regarding his wage-earning capacity, and it did not determine whether his psychological problems affected his ability to do the job offered him. Yet, there is evidence in the record that plaintiff's psychological injuries prevented his accepting the job.

Under these circumstances, the following additional findings and conclusions are needed: (1) the impact, if any, his psychological injuries had on his wage-earning capacity; (2) the period of time, if any, during which his psychological injuries prevented him from earning wages; (3) whether the job offered to him was suitable to his capacity, taking into account both the loss of his hand and any psychological disability he has sustained; and (4) what disability compensation, if any, he is entitled to receive for his psychological injuries. Since the omitted findings and conclusions were crucial for assessment of his right to compensation, the case must be remanded. *See Morgan v. Industries, Inc.*, 2 N.C. App. 126, 131-32, 162 S.E.2d 619, 623 (1968).

Although these errors require remand, we also address an additional matter raised by plaintiff since it may well again be a factor. *See Little v. Food Service*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978).

[2] Plaintiff asserts that the Commission's award of permanent disability under N.C. Gen. Stat. section 97-31 deprived him of his right to elect a remedy under N.C. Gen. Stat. section 97-30.

"[A] claimant who is entitled to benefits under either G.S. section 97-31 or G.S. section 97-30 may select the more munificent remedy." *Gupton v. Builders Transport*, 320 N.C. 38, 42-43, 357 S.E.2d 674, 678 (1987). A similar election is available as between G.S. sections 97-31 and 97-29. *See id.* at 41, 357 S.E.2d at 677 (citing *Whitley v. Columbia Lumber Mfg.*, 318 N.C. 89, 348 S.E.2d 336 (1986)).

The Commission awarded permanent disability compensation solely for plaintiff's scheduled injury to his hand under G.S. 97-31 without assessing whether G.S. 97-29 or G.S. 97-30 would provide him

a more munificent remedy. Its failure to make findings regarding his wage-earning capacity compounded this error.

Granted, such findings and conclusions are not required when only scheduled injuries under G.S. 97-31 are involved because "[l]osses included in the schedule are conclusively presumed to diminish wage-earning ability." *See Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 53 (1985). However, this approach is inadequate for any psychological disability suffered by plaintiff because psychological injuries are not compensable under the G.S. 97-31 schedule. *See Hill v. Hanes Corp.*, 319 N.C. 167, 176, 353 S.E.2d 392, 397-98 (1987). Rather, his psychological injuries are compensable, if at all, under G.S. 97-29 or G.S. 97-30. *Id.* at 176, 353 S.E.2d at 398. Wage-earning capacity is critical to the assessment of a plaintiff's entitlement to benefits under these sections. *See Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 251, 335 S.E.2d 327, 332 (1985).

The Commission's opinion and award effectively denied plaintiff benefits to which he may be entitled under G.S. 97-29 or G.S. 97-30. When the Commission again considers the issue of plaintiff's permanent disability, he should be given the opportunity to elect the section or sections which provides him with the best monetary remedy. Any recovery he obtains under G.S. 97-29 or G.S. 97-30 may be in addition to any recovery he elects to receive under G.S. 97-31 for the scheduled injury to his hand. The "in lieu of" clause in G.S. 97-31 does not bar recovery under other statutory sections in regard to injuries not covered by the schedule. *Hill*, 319 N.C. at 176, 353 S.E.2d at 398.

Given our disposition of these issues, we find it unnecessary to address plaintiff's remaining contentions.

Reversed and remanded.

Judge SMITH concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent after reviewing the testimonies of Dr. Scott Levin, plaintiff's orthopedic and reconstructive surgeon; Ms. Lynn Boddie, vocational rehabilitation counselor, who assisted plaintiff; and Dr. Robert Fleury, a psychiatrist who treated plaintiff's post trau-

matic stress disorders following the accident, as well as the evidence from the defendant-employer that defendant was offered a job beginning 20 September 1993 in another area of the plant. This and other evidence established that the defendant-employer met its burden thereby permitting the Commission to properly find that the "plaintiff did not justifiably refuse this offered position which was suitable to his capacity to earn wages." See McCoy v. Oxford, 122 N.C. App. 730, 471 S.E.2d 662 (1996), and Franklin v. Broyhill, 123 N.C. App. 200, 472 S.E.2d 382 (1996). I would affirm the Opinion and Award of the Commission.

STATE OF NORTH CAROLINA v. DARRELL E. HAMILTON

No. COA96-299

(Filed 18 February 1997)

1. Searches and Seizures § 35 (NCI4th)— stop of vehicle—seat belt violation—cocaine—passenger

The trial court did not err in denying defendant's motion to suppress where a police officer discovered 19.2 grams of cocaine on defendant after the officer stopped the vehicle in which defendant was a passenger. The officer had authority to stop the vehicle for the purpose of issuing a seat belt citation because he had observed that neither the driver nor the defendant was wearing one. The stop of the vehicle was therefore not inconsistent with the Fourth Amendment, even though a reasonable officer may not have made the stop.

Am Jur 2d, Searches and Seizures § 68.

2. Searches and Seizures § 35 (NCI4th)— stop of vehicle—seat belt violation—asking passenger to exit vehicle—discovery of cocaine

It was not error for the trial court to deny defendant's motion to suppress evidence of 19.2 grams of cocaine which was seized from defendant, a passenger in a vehicle which was stopped during a routine traffic violation, after defendant was asked to exit the vehicle. The police officer had probable cause to believe that the defendant passenger had committed the infraction of riding in the front seat of a vehicle without wearing a seat belt and thus

his detention was more than an inevitable incident of the stopping of the vehicle. As such, the rationale that supports allowing the police to *per se* request a driver detained for a traffic violation to exit the vehicle applies to a request to a passenger who the police have probable cause to believe has committed a crime or infraction.

Am Jur 2d, Searches and Seizures §§ 67, 68, 70.

3. Searches and Seizures § 82 (NCI4th)— traffic stop—pat-down search for weapons—discovery of cocaine

The evidence supported the trial court's denial of defendant's motion to suppress cocaine discovered during a pat-down search of defendant pursuant to a routine traffic stop. The defendant's hand began to reach toward his left side just before exiting the vehicle. The trial court found cause for the police officer to believe that the defendant was reaching for a weapon. Therefore, the pat-down of defendant was reasonable since the officer had grounds to believe the defendant could be armed and dangerous.

Am Jur 2d, Searches and Seizures §§ 74, 75, 78.

Search and seizure: "furtive" movement or gesture as justifying police search. 45 ALR3d 581.

Permissibility under Fourth Amendment of detention of motorist by police, following lawful stop for traffic offense, to investigate matters not related to offense. 118 ALR Fed. 567.

Appeal by defendant from order entered 1 September 1995 in Craven County Superior Court by Judge W. Russell Duke, Jr. Heard in the Court of Appeals 7 January 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General John R. Corne and Special Deputy Attorney General Robert T. Hargett, for the State.

William F. Ward, III, P.A., by William F. Ward, III, for defendant-appellant.

GREENE, Judge.

Darrell E. Hamilton (defendant) appeals from the trial court's order denying his motion to suppress 192.5 grams of crack cocaine that were found during a search of his person. The defendant pled

guilty to the crime of trafficking of cocaine by transportation after the court denied his motion to suppress this evidence at a pre-trial conference. As part of the plea arrangement, defendant preserved his right to appeal the denial of this motion pursuant to N.C. Gen. Stat. § 15A-979(b) (1988).

It is undisputed that on 5 May 1995 Sergeant George Shaver (Shaver) of the New Bern Police Department Narcotics unit observed the defendant and Wayne F. McDowell (McDowell) getting off a Greyhound bus from New York City at the New Bern bus station carrying only a small piece of luggage. After looking in the direction where the officer was sitting in his car, the defendant appeared nervous. He and McDowell were seen immediately entering a cab driven by the Reverend Otis Turnage (Turnage), the owner of a small cab company who was frequently in court regarding traffic violations and at that time under investigation because of a problem with his cab permit.

The evidence shows that Shaver called "the other officers in the area and told them that [he had seen] two black males [who] had exited the bus very quickly, acting in a very nervous manner, carrying one carry-on bag and had gotten into a cab and exited the area very quickly" in the direction of the Trent housing project (housing project), a neighborhood where drugs were known to be sold. Ronnie Lovick (Lovick), an investigator with the New Bern Police Department, was one of the officers whom Shaver radioed. Lovick was told to "investigate [and] use [his] skills to decide if or what was going on." Lovick then followed the cab in an unmarked car and shortly thereafter noticed that neither Turnage nor the defendant (who was in the front passenger seat) had his seat belt on. Lovick testified that he "decided to go ahead and stop them on the main part of the highway" rather than wait until they reached the housing project. Lovick further testified that he then approached the front passenger side of the car and informed the defendant that he "was a police officer" and then the defendant's "hand began to reach toward his left side" which lead Lovick to suspect he was reaching for a weapon. Lovick then asked the defendant to step outside of the car and told him that he was going to frisk him. He then had the defendant face the car and began to pat down his body. When he reached the point just below the defendant's stomach, he felt "something very, very large and very, very hard" which he thought might be a gun. He removed the item which was later discovered to be 192.5 grams of crack cocaine.

Based on this evidence and findings consistent with the evidence the trial court denied the motion to suppress concluding that both the stop and the search of the defendant were proper. In its order the trial court found that the defendant's actions "caused Lovick to be concerned for his personal safety."

The issues are whether: (I) the stop of the vehicle in which the defendant was a passenger was consistent with the Fourth Amendment prohibition against unreasonable seizures; (II) the officer had the authority, within the scope of the Fourth Amendment, to ask defendant to exit the vehicle in which he was a passenger; and (III) the search of the defendant, outside the vehicle, was consistent with the Fourth Amendment prohibition against unreasonable searches.

I

[1] The defendant argues that the stop of the vehicle in which he was a passenger for the stated purpose of issuing a citation for a seat belt violation was a mere pretext for investigating the defendant for possession of illegal drugs. As such, the defendant contends, the stop violates the Fourth Amendment. We disagree.

The United States Supreme Court has recently held that the temporary detention of a motorist upon probable cause[1] to believe that he has violated a traffic law is not inconsistent with the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist. *Whren v. United States*, — U.S.—, —, 135 L. Ed. 2d 89, 98 (1996). Probable cause exists if " 'the facts and circumstances within [the] knowledge [of the officer] were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing the offense.' " *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d. 502, 505 (1973) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964)). Thus it is immaterial to Fourth Amendment analysis that the officer may have had "ulterior motives" for the traffic stop, *id.; United States v. Stribling*, 94 F.2d 321, 323 (7th Cir. 1996), and the inquiry (under the United States Constitution) is no longer what a reasonable officer

1. In *Whren v. United States*, — U.S.—, 135 L. Ed. 2d 89 (1996), the Court did not discuss whether its ruling would also apply to those situations where the officer did not have probable cause but had reasonable suspicion to stop the vehicle. As that issue is not presented in this case we do not address it. We do note that at least one federal circuit court has extended *Whren* to reasonable suspicion cases. *United States v. Dumas*, 94 F.3d 286, 290 (7th Cir. 1996).

would do, *see State v. Morocco*, 99 N.C. App. 421, 427, 393 S.E.2d 549, 548 (1990), but instead what the officer *could* do.

In North Carolina an officer may stop and issue a citation to any motorist who "he has probable cause to believe has committed a misdemeanor or infraction." N.C.G.S. § 15A-302(b) (1988). In North Carolina "[e]ach front seat occupant [of a motor vehicle] who is 16 years of age or older" is required to wear a seat belt if the "vehicle is in forward motion on a street or highway." N.C.G.S. § 20-135.2A(a) (1993). Any person violating this statute commits an infraction. N.C.G.S. § 20-135.2A(e).

In this case there is no dispute that Lovick had probable cause to stop the vehicle in which the defendant was a passenger. The officer observed that neither the driver nor the defendant passenger was wearing a seat belt and thus had authority to stop the vehicle for the purpose of issuing a seat belt citation. The stop of the vehicle was therefore not inconsistent with the Fourth Amendment, even though a reasonable officer may not have made the stop. The trial court thus did not err in denying the motion to suppress on this basis.

II

[2] This Court has recently held that the Fourth Amendment is not violated when an officer requires a driver of a vehicle, stopped for a traffic violation, to exit the vehicle. *State v. McGirt*, 122 N.C. App. 237, 239, 468 S.E.2d 833, 834 (1996). This procedure reduces the likelihood of assault on the officer and "is not a 'serious intrusion upon the sanctity of the person.' " *Id.* (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11, 54 L. Ed. 2d 331, 336-37 (1977)).

In this case it is the passenger, not the driver, that is asked to exit the vehicle. There is substantial disagreement among the courts in other jurisdictions whether the police have the constitutional right to require passengers to exit a vehicle stopped for a traffic violation, in the absence of some individualized or particularized suspicion of that passenger. *See State v. Landry*, 588 So. 2d 345, 347 (La. 1991) (permitting police to require passengers to exit vehicle absent any particularized suspicion); *but see also Maryland v. Wilson*, 664 A. 2d 1, 10 (Md. 1995) (automatic prerogative of police during lawful traffic stop to order motorist out of vehicle does not extend to passengers, absent some individualized or particularized suspicion).

We need not address the issue raised in *Maryland* and *Landry* in this case. In those cases there is no evidence that police had proba-

ble cause to believe that the passengers in the vehicle had committed any crime or infraction. Indeed the *Maryland* court notes that the "passenger has not committed any wrongdoing, even at the level of a traffic violation." *Maryland*, 664 A. 2d at 9. In this case, Lovick had probable cause to believe that the defendant passenger had committed the infraction of riding in the front seat of a vehicle without wearing a seat belt and thus his detention was more than an inevitable incident of the stopping of the vehicle. As such, the rationale that supports allowing the police to *per se* request a driver detained for a traffic violation to exit the vehicle applies to a request to a passenger who the police have probable cause to believe has committed a crime or infraction. Accordingly the trial court did not err in denying the motion to suppress on this basis.

III

[3] While a routine traffic stop "does not justify in every instance a protective search for weapons," an officer is "permitted to conduct a 'pat-down' for weapons once the defendant is outside the automobile . . . if the circumstances give the police reasonable grounds to believe that the defendant may 'be armed and presently dangerous.' " *McGirt*, 122 N.C. App. at 239, 468 S.E.2d at 835 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 54 L. Ed. 2d 331, 337 (1977)).

In this case, the defendant's "hand began to reach toward his left side" (just before exiting the vehicle) which the trial court found caused Lovick to believe that the defendant was reaching for a weapon. This finding is supported in the evidence and we are bound by it. *State v. Crews*, 286 N.C. 41, 45, 209 S.E.2d 462, 465 (1974). Thus the pat-down for weapons was justified because Lovick had "reasonable grounds to believe the defendant could be 'armed and presently dangerous.' " *McGirt*, 122 N.C. App. at 239, 468 S.E.2d at 835 (quoting *Mimms*, 434 U.S. at 112, 54 L. Ed. 2d at 337). The trial court thus did not err in denying the motion to suppress on this basis.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

DORIS E. BECK, PETITIONER v. H. CLAY BECK, RESPONDENT

No. COA96-115

(Filed 18 February 1997)

Adverse Possession § 27 (NCI4th)— tenancy in common—allegations of property rights denied in 1973 partition petition—advent of adverse possession—not tolled by pendency of petition

Respondent is entitled to undivided ownership of the subject property by adverse possession where petitioner and respondent acquired the property as tenants by the entireties in 1944; petitioner separated from respondent in 1965 and left the property; the parties divorced in 1972, creating a tenancy in common; petitioner instituted a special proceeding for partition of the property in 1973; respondent denied that petitioner had any property rights in the property whatsoever; the case was eventually dismissed without prejudice because of petitioner's failure to prosecute the action; and respondent conducted his affairs with regard to the property from the date he filed his answer in 1973 until the date of this action as if it were his own, cutting and selling timber on the land, renting out mobile homes and a home on the property, and performing other acts consistent with ownership of the property. Respondent's 26 July 1973 answer to petitioner's partition claim amounted to an open, unequivocal denial of petitioner's rights to any part of the subject property and that was the advent of respondent's adverse possession. Although petitioner asserts that the running of the twenty year period was stopped from the filing of the partition in 1973 until its dismissal in 1978, it is the longstanding rule of North Carolina that, if an actual ouster be made, the remedy is by ejectment rather than partition. N.C.G.S. § 1-40.

Am Jur 2d, Adverse Possession §§ 15, 35, 53, 127, 130.

Appeal by petitioner from summary judgment entered 13 November 1995 by Judge L. Todd Burke in Randolph County Superior Court. Heard in the Court of Appeals 29 October 1996.

Douglas, Ravenel, Hardy & Crihfield, L.L.P., by Robert D. Douglas, III, for petitioner appellant.

Cecil & Cecil, P.A., by Robert L. Cecil, for respondent appellee.

SMITH, Judge.

The question presented by this appeal is whether respondent, a tenant in common with petitioner, has ownership of the subject property by reason of the application of the doctrine of adverse possession. Petitioner petitioned the trial court for partition of the subject property pursuant to N.C. Gen. Stat. § 46-3 (1984). Respondent answered the petition and claimed ownership of the land by adverse possession. We hold that respondent actually ousted petitioner in 1973, has held the property adversely to petitioner for more than twenty years, and is therefore entitled to undivided ownership of the subject property.

The facts of this case, in the light most favorable to petitioner, are as follows. Petitioner and respondent were married in 1923, and subsequently acquired the subject property in 1944 as tenants by the entireties. In 1965, petitioner separated from respondent and left the subject property. The parties divorced in 1972, thereby creating a tenancy in common between them.

On 6 June 1973, petitioner instituted a special proceeding against respondent for partition of the subject property (the same property which is the subject of this appeal). In the 6 June 1973 petition, petitioner alleged she was half owner of the subject property as a tenant in common with respondent. Respondent, in his answer, denied that petitioner had any property rights whatsoever in the property. Subsequently, on 25 May 1978, petitioner's case was dismissed without prejudice by the trial court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (1990), because of petitioner's failure to prosecute the partition action. Petitioner took no further action in this matter until the 20 March 1995 filing of the instant petition for partition.

The trial court found, and the record reflects, that petitioner knew in 1973 that respondent claimed the subject property as his own. Furthermore, respondent's responsive pleadings to petitioner's 1973 partition action unequivocally asserted his claim of total and exclusive ownership of the subject property. Petitioner also admitted, in her deposition testimony, that respondent had been in sole and undisturbed possession of the subject property since 1973, had collected rents and profits from the property without objection by petitioner, and had paid all taxes due upon the land.

Petitioner's deposition also indicates that she knew of, and did not object to, respondent's sale of timber cut from the land, respond-

ent's use of the land for the grazing of cattle and for farming, respondent's claim of ownership to the land during a boundary dispute with another party (not petitioner), and respondent's rental of mobile homes on the property. Finally, petitioner admitted in her deposition that respondent had "treated said real property as his own," "open and notoriously to his own use," "to the exclusion of the Petitioner," by "clear, positive, and unequivocal acts of ownership."

Respondent argues that he has possessed the subject property adversely to petitioner for more than twenty years, and is thus entitled to sole ownership of the property. Respondent does not argue adverse possession under color of title, and so, the central question in this case becomes whether respondent is entitled to sole ownership of the land pursuant to N.C. Gen. Stat. § 1-40 (1996), which allows for possession of land via the doctrine of adverse possession. N.C. Gen. Stat. § 1-40 reads as follows:

> No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability.

The focal point for adverse possession under § 1-40 is on the statutorily required period: twenty years. As between tenants in common, possession "is not considered adverse . . . unless [the adverse claimant] ousts his cotenant 'by some clear, positive, and unequivocal act equivalent to an open denial of his [cotenant's] right.' " *McCann v. Travis*, 63 N.C. App. 447, 451, 305 S.E.2d 197, 200 (1983) (quoting *Young v. Young*, 43 N.C. App. 419, 427, 259 S.E.2d 348, 352 (1979)). A cotenant's clear positive denial of another cotenant's rights in the common property is known as an "actual ouster." *Willis v. Mann*, 96 N.C. App. 450, 454, 386 S.E.2d 68, 71 (1989), *disc. review denied*, 326 N.C. 367, 389 S.E.2d 820 (1990). Actual ouster involves "an entry or possession of one tenant in common that enables a cotenant to bring ejectment against him.' " *Id.* (quoting *McCann*, 63 N.C. App. at 452, 305 S.E.2d at 200.)

In the instant case, respondent argues that he actually ousted petitioner from the subject property on 26 July 1973, the date he filed his answer in the first partition proceeding brought by petitioner. In that answer, respondent denied that petitioner had any interest what-

soever in the subject property, and claimed the property as his own. From 26 July 1973 until the date of the present action, respondent conducted his affairs with regard to the property as if it were his own. After denying petitioner's rights to the land in the initial partition proceeding (which, in and of itself, amounted to an actual ouster), respondent continued to engage in clear, positive conduct "equivalent to an open denial of [the cotenant's] right and to putting him out of the seizin." *Willis*, 96 N.C. App. at 454, 386 S.E.2d at 71 (quoting *Dobbins v. Dobbins*, 141 N.C. 210, 214, 53 S.E. 870, 871 (1906)). For instance, respondent cut and sold timber on the land, rented out mobile homes and a home on the property, and performed other acts consistent with ownership of the property. Furthermore, in her deposition, petitioner admitted that respondent "ha[d] treated said real property as his own," and was in "complete control of it."

Based on these facts, we conclude that petitioner was "actual[ly] ousted" from the property at issue on the date of respondent's filing of the answer in the first partition proceeding. *See Willis*, 96 N.C. App. at 454, 386 S.E.2d at 71. In *Willis*, on facts substantially similar to the ones at hand, this Court held "that the institution of this [Torrens] action unequivocally indicates that plaintiffs had actual notice that defendants were claiming the property to the exclusion of plaintiffs . . . . We hold that [such] evidence . . . demonstrates an actual ouster of plaintiffs." *Id.* In our view, respondent's 26 July 1973 answer to petitioner's prior partition claim amounted to an open, unequivocal denial of petitioner's rights to any part of the subject property. Thus, for § 1-40 purposes, the advent of respondent's adverse possession was 26 July 1973, the date of respondent's actual ouster of petitioner.

Accordingly, the only question left unanswered is whether the continuity of respondent's adverse possession claim was interrupted by petitioner's prior partition action of 6 June 1973. We hold that it was not. Petitioner asserts, without citation to authority, that her "filing of the [partition] proceeding in 1973, until [the proceeding's] dismissal in 1978, constitute[d] a reassertion of Petitioner's ownership and . . . stop[ped] the running of the twenty year period." Petitioner's theory is flawed, for it is the longstanding rule of North Carolina courts that "if an actual ouster be made by one tenant in common with his co-tenant, there is no longer a common possession, and the remedy is not by petition for partition, but by ejectment to recover possession of the individual moiety." *Thomas v. Garvin*, 15 N.C. 223, 224 (1833). Applied here, the rule in *Garvin* necessarily means that

petitioner's 1973 partition action did not interrupt respondent's adverse possession of the property, and so the clock continued ticking for § 1-40 purposes.

Both of the instant parties have cited the *Willis* decision as shedding light on the continuity of possession issue. In *Willis*, this Court was faced with a continuity problem similar to the instant one, albeit in the context of a Torrens proceeding. *Willis*, 96 N.C. App. at 455, 386 S.E.2d at 71. The general purpose of the Torrens system is, much like a claim for title by adverse possession, " 'to secure by a decree of court, or other similar proceeding[], a title impregnable against attack . . . and to protect the registered owner against all claims or demands not noted on the book for the registration of titles.' " *State v. Johnson*, 278 N.C. 126, 144, 179 S.E.2d 371, 383 (1971) (quoting Frederick B. McCall, *The Torrens System—After Thirty-Five Years*, 10 N.C.L. Rev. 329, 330 (1932)).

In *Willis*, the plaintiffs' predecessor in title had filed a Torrens action against the defendant (an adverse possession claimant) in 1969, and had dismissed that same action in 1981. *Willis*, 96 N.C. App. at 455, 386 S.E.2d at 71. In a subsequent action to quiet title to the same property, the *Willis* plaintiffs asserted that "the period between the filing of the action (1969) and of the dismissal (1981) broke defendants' continuity of possession . . . ." *Id.* The *Willis* Court dismissed this argument, without citation to authority, by holding that "the mere institution of the Torrens proceedings did not break the continuity of defendants' [adverse possession claim]." *Id.*

The result in *Willis* is consistent with the rule from *Garvin*, and as such, we are bound by both holdings. Therefore, the pendency of petitioner's 1973 petition for partition (through its dismissal by the trial court in 1978), had no effect on the accrual of respondents' adverse possession claim. *Garvin*, 15 N.C. at 225. Having ousted petitioner in 1973, and having held the property adversely to petitioner for more than twenty years, respondent is entitled to sole ownership of the property as its adverse possessor. N.C. Gen. Stat. § 1-40, *Morehead v. Harris*, 262 N.C. 330, 343, 137 S.E.2d 174, 186 (1964).

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

CHARLES JEFFREY ELROD v. LINDA GAINES ELROD

No. COA96-407

(Filed 18 February 1997)

1. Trial § 559 (NCI4th)— Rule 59 motion to modify order—denied—assignments of error to original order—properly raised

Assignments of error relating to alleged errors of law in an order in a visitation dispute requiring a mother to send her children to public school rather than home schooling them were properly before the Court of Appeals where the mother did not appeal from that order but filed a motion to modify within 10 days of its entry, the motion to modify did not specifically refer to N.C.G.S. § 1A-1, Rule 59, but alleged that the order was based on specifically enumerated errors of law, that motion was denied, and appeal was timely taken from the denial. The motion to modify was properly considered a Rule 59(e) request, although the mother had not entered any objection to the original order, because it was timely filed and the issues raised related to matters in the order as opposed to errors at trial. Because timely appeal was entered from the order denying the motion to modify, the assignments of error relating to the original order were properly before the Court of Appeals.

Am Jur 2d, New Trial §§ 333 et seq.

2. Appeal and Error § 170 (NCI4th)— child visitation—requirement that children be in public school—subsequent order—requirement in abeyance—not moot

A requirement in an order arising from a visitation dispute that the children be enrolled in public school rather than home schooled was not a moot question where a subsequent consent order had allowed the home schooling as long as the mother cooperated with the father's visitation. The prohibition against home schooling was not stricken but merely held in abeyance.

Am Jur 2d, Appellate Review §§ 640 et seq.

3. Infants or Minors § 46 (NCI4th)— home schooling—visitation dispute—issue of home schooling not properly before court

A portion of an order in a child visitation dispute requiring that the children attend public school rather than being home

schooled was reversed where the previous order granting custody had reserved the issue of visitation rights. Once an order of custody is entered without any limitations with respect to the education of the children, that order can be modified only upon a showing of a substantial change in circumstances and upon the further showing that a modification of the custody order is in the best interests of the children. Here, there is no evidence or finding of any change of circumstances and the issue of whether it was in the best interests of the children to attend the public schools was not properly before the trial court.

Am Jur 2d, Infants §§ 28 et seq.

Validity, construction, and application of Uniform Child Custody Jurisdiction Act. 96 ALR3d 968.

What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJ) or the Parental Kidnapping Prevention Act (PKPA). 78 ALR4th 1028.

Appeal by defendant from order entered 22 January 1996 in Buncombe County District Court by Judge Gary S. Cash. Heard in the Court of Appeals 7 January 1997.

Baley, Baley & Clontz, P.A., by Stanford K. Clontz, for plaintiff-appellee.

Thomas D. Roberts for defendant-appellant.

GREENE, Judge.

Linda Gaines Elrod (Ms. Elrod) appeals from a 22 January 1996 Order denying her motion to modify a 14 August 1995 Order requiring her to "enroll the minor children in a public school."

Ms. Elrod and Charles Jeffrey Elrod (Mr. Elrod) were married in 1979 and two children were born of the marriage. The parties separated on 6 April 1994 and Ms. Elrod retained custody of the children. On 4 May 1994 Mr. Elrod filed an action seeking "specific visitation rights," alleging that Ms. Elrod had denied him any visitation with the children. Ms. Elrod filed an answer and counterclaim requesting that she "be granted the care, custody, and control of the minor children." On 4 October 1994 the trial court entered an Order granting custody of the children to Ms. Elrod and "held in abeyance" Mr. Elrod's claim

for visitation. On 17 March 1995 the trial court entered an Order permitting Mr. Elrod to visit with the children under "the direction and supervision of Mr. [Tim] Carlson," a family counselor.

On 5 June 1995 the trial court found Ms. Elrod in contempt of court because of her "failure to present the minor children to Mr. Carlson's office" for visitation as scheduled by Mr. Carlson. On 5 June 1995 the trial court appointed Dr. Smith Goodrum (Dr. Goodrum) to "assist the Court and the parties in the development of an appropriate plan for the minor children's visitation with" Mr. Elrod. Dr. Goodrum later reported to the trial court that Ms. Elrod was "home schooling" the children and that as a result, "their socialization and ability to care for themselves [was] very difficult." On 14 August 1995, the trial court concluded that "it would be in the best interest of the minor children to be enrolled in a public school" and ordered Ms. Elrod to so enroll the children. The Order also directed that Mr. Elrod have visitation with the children at Dr. Goodrum's office once it was determined that Mr. Elrod was "sufficiently stable" and after he received a "psychiatric evaluation." On 21 August 1995 Ms. Elrod filed a "Motion To Modify" the 14 August Order by striking the requirement that she enroll the children in the public schools. She alleged that the trial court committed an error of law in entering this directive. Upon denial of this motion Ms. Elrod timely appealed (on 15 February 1996) that denial to this Court. On 6 February 1996 the trial court, based on the "parties' consent," entered an Order allowing the children to be "home schooled . . . as long as [Ms. Elrod] cooperates with [Mr. Elrod's] visitation with the children."

The issues presented are whether: (I) this Court may review the 14 August 1995 Order for errors of law when Ms. Elrod did not timely appeal from that Order; (II) the issues raised in this appeal are moot because of the 6 February 1996 Order; and (III) the trial court erred, while determining Mr. Elrod's visitation rights, in requiring Ms. Elrod to send the children to public school.

I

[1] Ms. Elrod argues that the trial court committed errors of law when it entered its 14 August 1995 Order requiring her to send the children to public school. Although she did not appeal that Order, she did timely appeal the denial of her "Motion To Modify" that Order.

"The appropriate remedy for errors of law committed by the [trial] court is either appeal or a timely motion for relief under

N.C.G.S. Sec. 1A-1, Rule 59(a)(8) (1983)." *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988). Rule 59(e) provides that an order or judgment may be modified on any of the grounds listed in subsection (a), N.C.G.S. § 1A-1, Rule 59(e) (1990), including errors of law "occurring at the trial and objected to by the party making the motion." N.C.G.S. § 1A-1, Rule 59(a)(8) (1990). The motion seeking a modification must be "served not later than 10 days after entry of the judgment" or order. N.C.G.S. § 1A-1, Rule 59(e).

In this case, the "Motion To Modify" the 14 August 1995 Order was filed and served within 10 days of the entry of the Order and although not specifically referencing Rule 59, does allege that the 14 August Order was based on specifically enumerated errors of law. Although Ms. Elrod had not prior to the filing of the motion entered any objection to the Order, because the motion was timely filed and because the issues raised in the motion relate to matters in the Order (as opposed to errors allegedly occurring during a trial), it is properly considered a Rule 59(e) request to modify the 14 August Order because of errors of law. Because timely appeal was entered from that Order, the assignments of error relating to the alleged errors of law committed in the entry of the 14 August 1995 Order are properly before this Court.

II

[2] "In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, *Peoples v. Judicial Standards Comm'n of North Carolina*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979). "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Id.*

Mr. Elrod argues that because the trial court (on 6 February 1996) entered a consent Order allowing Ms. Elrod to home school the children, there is no longer any controversy between the parties with respect to that issue, the only issue raised on appeal. We disagree. The 6 February Order only provides Ms. Elrod relief from the 14 August 1995 Order (requiring public school for the children) "as long as [she] cooperates with [Mr. Elrod's] visitation with the children." In other words, the prohibition against home schooling has not been

stricken from the 14 August Order, its enforcement is merely being held in abeyance. Ms. Elrod has neither received the relief she has requested nor has the controversy between the parties with regard to home schooling been settled. Until this issue is settled, the possibility of the reinstatement of the public school requirement will continue to cloud or indirectly influence the issues of visitation.

III

[3] In this case the trial court, at the time of the 4 October 1994 Order granting custody to Ms. Elrod, reserved the issue of Mr. Elrod's visitation rights. Thus that issue remained before the trial court and it was authorized to enter such orders with respect to visitation as were "in the best interest" of the children. *In re Jones*, 62 N.C. App. 103, 105, 302 S.E.2d 259, 260 (1983). This broad grant of authority, however, did not permit the trial court to enter an order prohibiting the custodial parent from home schooling the children when there is no evidence in this record suggesting that the home schooling interfered with Mr. Elrod's visitation rights. Indeed the record reveals the trial court delayed any implementation of child visitation privileges for Mr. Elrod because he was in need of psychiatric care.

We recognize that the trial court in a child custody proceeding is not precluded from prohibiting in some circumstances, as a condition of the custody grant, the home schooling of the children, cf. *In re McMillan*, 30 N.C. App. 235, 237, 226 S.E.2d 693, 695 (1976) (children adjudicated neglected where parents did not send them to school), even if the home schooling is recognized as legal. *Cf. In re Devone*, 86 N.C. App. 57, 61, 356 S.E.2d 389, 391 (1987) (mentally retarded child adjudicated neglected where parent taught the child at home although the home schooling met "all the criteria for non-public schools"). Once, however, an order of custody is entered without any limitations with respect to the education of the children, that order can be modified only upon a showing of a substantial change in circumstances and upon the further showing that a modification of the custody order (including limitations on the custody grant) is in the best interest of the children. *MacLagan v. Klein*, 123 N.C. App. 557, 565, 473 S.E.2d 778, 787 (1996) (affirming trial court's restriction of parental discretion in child's religious training). In this case there is no evidence of any change of circumstances and indeed the trial court made no such finding. Thus the issue of whether it was in the best interest of the children to attend the public schools was not properly before the trial court and could not support the imposition of a limitation on Ms. Elrod's custody grant.

Accordingly that portion of the 14 August 1995 Order requiring Ms. Elrod to enroll the children in the public schools is

Reversed.

Judges EAGLES and MARTIN, John C., concur.

COLLINS & AIKMAN PRODUCTS CO., FORMERLY COLLINS & AIKMAN CORPORATION, PLAINTIFF-APPELLANT v. THE HARTFORD ACCIDENT & INDEMNITY COMPANY, DEFENDANT-APPELLEE

No. COA96-288

(Filed 18 February 1997)

Attorneys at Law § 64 (NCI4th); Insurance § 382 (NCI4th)—summary judgment—declaratory judgment action—attorney fees and expenses—not recoverable—litigation

Plaintiff could not recover attorney's fees and expenses incurred in a declaratory judgment action in which the superior court found for defendant liability insurer, but the Court of Appeals reversed, holding that the policy covered punitive damages. Attorney's fees incurred by the insured, the non-breaching party, are not recoverable as damages where those fees are incurred in the course of litigation to determine coverage and compel the insurer to perform its duties.

Am Jur 2d, Damages §§ 611, 615; Insurance §§ 1772, 1773.

Appeal by plaintiff from order entered 29 January 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 1996.

Beginning 1 March 1987, defendant Hartford issued a commercial umbrella policy designed to cover plaintiff Collins & Aikman Products Company until 1 March 1988. On 29 February 1988, the negligence of one of plaintiff's employees caused an automobile accident in which two other motorists were killed. As plaintiff's primary insurance carrier at that time, the Aetna Casualty and Surety Company ("Aetna") defended the ensuing legal action against plaintiff. At trial,

the verdict against plaintiff included an award of punitive damages and the aggregate of the actual and punitive damages awarded was greater than the primary coverage provided by Aetna. Defendant Hartford Accident and Indemnity Company ("Hartford"), as the carrier providing excess coverage, denied that its policy included coverage for punitive damages.

Defendant Hartford filed a declaratory judgment action in United States District Court for the Southern District of New York to determine the question of coverage. The action was later stayed after the New York federal court agreed with plaintiff that this issue should be litigated in North Carolina. After a negotiated settlement with the decedents' estates, the parties remaining reserved their rights to resolve questions of liability and indemnity among themselves. Thereafter, plaintiff filed a declaratory judgment action on the issue of coverage in Mecklenburg County Superior Court. The Superior Court found for defendant Hartford, but this Court reversed, holding that the policy did cover punitive damages. *Collins & Aikman Corp. v. Hartford Acc. & Indem. Co.*, 106 N.C. App. 357, 416 S.E.2d 591 (1992), *aff'd*, 335 N.C. 91, 436 S.E.2d 243 (1993). Plaintiff then voluntarily dismissed its claims for damages arising from defendant's refusal to cover punitive damages.

On 4 October 1995, plaintiff filed a complaint against defendant Hartford seeking attorney's fees and expenses incurred in defending the New York action and in prosecuting the North Carolina declaratory judgment action and alleging that these fees were damages incurred because of defendant's breach. Plaintiff moved for summary judgment and defendant moved to dismiss. The trial court granted summary judgment for defendant after converting defendant's motion to dismiss into a motion for summary judgment.

Plaintiff appeals.

Parker, Poe, Adams & Bernstein, L.L.P., by Irvin W. Hankins, III, and Josephine H. Hicks, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey and Charles George, for defendant-appellee.

EAGLES, Judge.

The dispositive issue here is whether attorney's fees may be awarded as damages for an insurer's breach of its duty to indemnify. Plaintiff cites our Supreme Court's decision in *Jamestown Mut. Ins.*

Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 219, 176 S.E.2d 751, 754 (1970), in support of its argument that attorney's fees and litigation expenses are awardable as damages in insurance coverage disputes. After careful consideration of the records and briefs, we disagree.

While the Supreme Court in *Jamestown* did allow attorney's fees to be awarded as damages, it did so only because the insurer there breached its duty to defend rather than its duty to indemnify. *Id.* *Jamestown* is consistent with the general rule that the victorious party's attorney's fees are not recoverable except in instances (1) where the breached insurance contract was one for legal services or, in other words, a contract creating a duty to defend, (2) where the insurer acted in bad faith in denying coverage, or (3) where otherwise authorized by contract or statute. *Perkins v. American Mut. Fire Ins. Co.*, 4 N.C. App. 466, 467-68, 167 S.E.2d 93, 94-95 (1969). Under both *Jamestown* and *Perkins*, attorney's fees are awardable only in an amount equal to the value of the legal defense denied to the insured because of the insurer's breach. The *Jamestown* decision does not stand for the proposition that attorney's fees may be awarded as damages where the fees sought are those incurred by the insured while litigating the issue of coverage and alleging that the insurer breached its duty to defend.

We note that a typical primary insurance contract imposes two principal duties on the insurer in exchange for the premiums paid by the insured: (1) a duty to indemnify the insured, within policy limits, for the amount of any judgment awarded against the insured; and (2) a duty to provide legal services in defense of a claim against the insured. Unlike the situation where the insurer breaches only its duty to indemnify, a breach of an insurer's duty to defend generally forces the insured himself to bear the full financial burden of asserting his own legal defense. In this respect a primary insurance contract creating a duty to defend is, in effect, a contingent, fixed-price contract for legal services. In order to make "whole" the non-breaching party (the insured in cases where coverage is found), the value of the legal defense contracted for by the insured must be awarded as damages, with those damages measurable in attorney's fees.

This reading of the Supreme Court's decision in *Jamestown* neither conflicts with nor erodes the general rule as previously articulated by this Court. *See Perkins*, 4 N.C. App. at 467-68, 167 S.E.2d at 94-95. In *Perkins* we reviewed an order of the trial court denying

recovery of attorney's fees in a coverage action either as a component of costs or as an element of damages. *Id.* Affirming the trial court's refusal to award fees as either damages or costs, the *Perkins* court stated:

> The general rule is that, in the absence of any contractual or statutory liability therefor, attorney fees and expenses of litigation incurred by the plaintiff or which plaintiff is obligated to pay in the litigation of his claim against the defendant, are not recoverable as an item of damages, either in a contract or a tort action.

Id. This general rule continues in effect today with regard to coverage litigation.

We hold that attorney's fees incurred by the insured (the non-breaching party here) are not recoverable as damages where those fees are incurred in the course of litigation to determine coverage and compel the insurer to perform its duties. Our decision today does not hold that an insured's attorney's fees can never be recovered in coverage litigation. Attorney's fees clearly can be recovered in situations, for example, where an insurer acts in bad faith in denying coverage or where recovery of fees is otherwise authorized by contract or statute.

Finally, we note also that we have long recognized that the rules governing insurance contracts at times vary from those governing more conventional contractual situations. In insurance contracts, we encounter the disparity in bargaining power and sophistication of parties that is often reflected in adhesion contracts. With this in mind we note that were *Perkins* not the law of North Carolina, we might well reach a different result. We need not address plaintiff's remaining assignments of error.

Affirmed.

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

CARRIE S. GILLIAM, PLAINTIFF v. FIRST UNION NATIONAL BANK, DEFENDANT

No. COA96-579

(Filed 18 February 1997)

Trial § 227 (NCI4th)— voluntary dismissal—appeal by same party—dismissed

Plaintiff's appeal from the dismissal of a class action arising from the set-off of an account against an existing debt was dismissed where her attorney had taken an oral voluntary dismissal without prejudice after conferring with his client; oral notice of a voluntary dismissal is effective and satisfies the requirements of N.C.G.S. § 1A-1, Rule 41. The voluntary dismissal terminated the action and no underlying action thereafter existed in the trial court from which an appeal could have been taken.

Am Jur 2d, Dismissal, Discontinuance & Nonsuit §§ 9 et seq.

Appeal by plaintiff from order entered 28 November 1995 and amended 12 December 1995 by Judge Julius A. Rousseau, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 30 January 1997.

Daniel J. Park and David P. Atkins for plaintiff-appellant.

Petree Stockton, L.L.P., by R. Rand Tucker, for defendant-appellee.

SMITH, Judge.

On 17 January 1986, default judgment was obtained by Northwestern Bank against plaintiff and her former husband on a note the two had signed for money to use in their business. In December of 1985, defendant First Union acquired Northwestern Bank and acquired the rights of Northwestern Bank with respect to plaintiff's debt and obligation. At the time of this action, plaintiff's debt remained outstanding, and with interest, exceeded $20,000.00.

On 30 March 1989, plaintiff opened a checking account with First Union. Plaintiff signed a New Deposit Account Application when she opened this account. In this agreement she acknowledged and agreed that the Depositor's Agreement would govern the bank's right to set off funds in the account against other debts owed by the

customer to First Union. The agreement fully describes the bank's right to set off.

On 17 August 1988, defendant served upon plaintiff a Notice of Rights to Have Exemptions Designated and plaintiff moved to claim exempt property on 9 September 1988. On 18 October 1988, an order was entered designating exempt property. As a result, defendant was unable to obtain payment of its judgment. Defendant did not file any further notices to claim exempt property regarding the judgment.

On 30 November 1993, First Union set off $1,166.00 from plaintiff's account in partial satisfaction of her outstanding indebtedness to First Union, leaving $1.51 in the account. This caused several checks which plaintiff had written to be returned for insufficient funds and resulted in overdraft charges. Plaintiff did not deny the outstanding indebtedness, but complained that First Union should not have been able to exercise its right of set off without following the judicial procedures for execution, including serving a Notice of Rights to Have Exemptions Designated and obtaining a Writ of Execution prior to execution.

Plaintiff filed suit alleging conversion, unfair trade practices and for a class action certification. On 24 October 1994, plaintiff served her First Set of Interrogatories and on 22 November 1994, defendant filed its Responses to the First Set of Interrogatories. On 13 December 1994, plaintiff filed a Motion to Compel Answers to Interrogatories; however, plaintiff did not request that the Motion be calendared for hearing, thus this Motion was never heard. Plaintiff also requested that the period for conducting discovery be extended to 28 February 1995. On 3 February 1995, plaintiff served her First Request for Production of Documents. Defendant responded on 6 March 1995. Plaintiff again asked for and received a extension on discovery until 31 May 1995. On 5 June 1995, plaintiff filed a Motion to Compel the Production of Documents requested in her First Motion to Compel Production of Documents after the period for discovery had expired. On 17 July 1995, plaintiff filed a calendar request for that Motion, but prior to hearing, asked that the Motion be removed from the calendar; thus, that Motion was not heard.

On 12 September 1995, plaintiff served upon defendant her Fourth Set of Interrogatories. Defendant served its Responses to the Fourth Set of Interrogatories on 16 October 1995. Plaintiff served a Motion to Compel Answers to her Fourth Set of Interrogatories on 10 November 1995, Motion to Compel Production of Documents Second

Request, Motion to Compel Production of Documents First Request, Motion to Compel Answers to Plaintiff's First Set of Interrogatories, Motion to Compel Answers to Plaintiff's Fourth Set of Interrogatories and Motion to have Claim Certified as a Class Action (third claim of complaint); however, plaintiff did not file the motions until 27 November 1995, the date the trial was scheduled to begin. Plaintiff also served a calendar request and notice of hearing on her Motion for Class Certification and Motions to Compel Discovery on 10 November 1995.

At the hearing held on 27 November 1995, plaintiff did not present evidence in support of her Motion for Class Certification, and subsequently voluntarily dismissed her action without prejudice following the trial court's verbal order denying plaintiff's Motion for Class Certification, pursuant to Rule 23 of the Rules of Civil Procedure and dismissing her third claim denominated class action. Defendant First Union subsequently filed a Motion to Amend that order, and an amended order dismissing plaintiff's claim for class action was entered on 12 December 1995. Plaintiff appeals from the order dismissing the third claim and denying class action certification.

We note that plaintiff's attorney in open court after conferring with his client, took an oral voluntary dismissal without prejudice. As held by our Supreme Court in *Danielson v. Cummings*, 300 N.C. 175, 265 S.E.2d 332 (1980), oral notice of a voluntary dismissal is effective and satisfies the requirements of Rule 41 of the North Carolina Rules of Civil Procedure. "Upon the filing of the notice of dismissal by the plaintiff herein, the action terminated. The case was closed and nothing further could be done regarding it." *Lowe v. Bryant and Lowe v. Bryant*, 55 N.C. App. 608, 611, 286 S.E.2d 652, 654 (1982); *See also Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973). Accordingly, as the voluntary dismissal terminated the action and as no underlying action thereafter existed in the trial court from which an appeal could have been taken, plaintiff's appeal is dismissed. *Id.* Further, we note that defendant had previously made a motion to dismiss this appeal which was denied by our Court based on grounds unrelated to the holding herein.

Appeal dismissed.

Judges JOHN and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 FEBRUARY 1997

CANNON v. CANNON No. 96-501	Pitt (95CVS1816)	Affirmed
DONATHAN v. WILSON No. 96-172	Moore (93CVD122)	Affirmed
GREGORIS v. SNAVELY No. 96-422	Orange (93CVD1713)	Dismissed in part and Affirmed in part
HAMLIN v. BASF CORP. No. 96-518	Ind. Comm. (470092)	Affirmed
HOWELL v. COFFEY No. 96-392	Wayne (95CVS1201)	Affirmed
MULLIS v. AMP, INC. No. 96-527	Ind. Comm. (349374)	Affirmed
O'CONNOR v. DAUGHETY No. 96-832	Currituck (94CVS150)	Affirmed
ONSLOW COUNTY v. K. HOPE, INC. No. 96-960	Onslow (95CVS2835)	Vacated and Dismissed
ONSLOW COUNTY v. TREANTS ENTERPRISES No. 96-968	Onslow (95CVS2837)	Vacated and Dismissed
POWELL v. PERDUE FARMS, INC. No. 96-378	Ind. Comm. (362526)	Affirmed
POWELL v. SINGER FURNITURE CO. No. 96-205	Ind. Comm. (173065)	Affirmed
STATE v. ALEXANDER No. 96-933	Cabarrus (95CRS9719)	No Error
STATE v. BOLDEN No. 96-116	Mecklenburg (94CRS87837) (94CRS88345) (94CRS88346) (94CRS88348) (94CRS88349) (94CRS88350) (94CRS88351) (94CRS88352)	No Error

STATE v. HEATH No. 96-972	Lenoir (95CRS5259)	Felonious larceny: No Error. Felonious possession of stolen goods: Vacated and remanded
STATE v. HOLOMAN No. 96-867	Forsyth (95CRS29639) (95CRS29640) (95CRS29642) (95CRS38847)	No Error
STATE v. LEE No. 96-300	Hertford (94CRS4704)	Vacated and Remanded
STATE v. McLAUGHLIN No. 96-329	Guilford (94CRS76902) (94CRS76903) (94CRS76904) (94CRS76905) (93CRS60592)	No Error
STATE v. OLIVER No. 96-791	Mecklenburg (95CRS60840) (95CRS60841)	No Error
STATE v. OWENS No. 96-765	Wake (95CRS69572) (95CRS80309)	No Error
STATE v. ROBINSON No. 96-816	Mecklenburg (95CRS60818) (95CRS60819)	No Error
STATE v. WATSON No. 96-695	Edgecombe (95CRS4413)	No Error
VANCE COUNTY v. COLLIER No. 96-523	Vance (93CVD646)	Dismissed
ZEDLAR v. McCANLESS No. 95-1286	Guilford (94CVS5988)	Affirmed

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BROWN v. ST. ONGE No. 96-253	Mecklenburg (92CVD9904 DSC)	Reversed
CITY OF WINSTON-SALEM v. YARBROUGH No. 95-1377	Forsyth (92CVS1551)	Affirmed

COFFEY v. KEY No. 96-332	Caldwell (94CVD997)	No Error
CROUCH v. JONES No. 96-375	Davidson (94CVD1307)	Affirmed
EDWARDS v. JONES No. 96-1296	Orange (85CVD377)	Affirmed in part, vacated and remanded in part for further proceedings consistent with this opinion.
HALL v. BOBBY MURRAY CHEVROLET No. 95-1235	Wake (94CVS151)	Affirmed
HEWITT v. HEWITT No. 96-325	Wake (90CVD13618)	Affirmed
HUGHES v. URBAN SOUTH CORP. No. 96-363	Guilford (93CVS10514)	Dismissed
IN RE DAVIS No. 96-599	Wilson (92J71)	Vacated and Remanded
KEEL v. REHM No. 96-414	Wayne (94CVS2362)	Affirmed
MOOSE v. COBURN No. 96-480	Iredell (91CVS1892)	No Error
PEREZ v. PENTES DESIGN No. 96-308	Mecklenburg (94CVS10148)	Reversed and Remanded
RATLEY CONSTRUCTION CO. v. RICHMOND COUNTY BD. OF EDUC. No. 96-316	Richmond (92CVS705)	No Error
STANFIELD v. WILLIAMS No. 96-367	Harnett (94CVS1570)	Dismissed
STATE v. ALLEN No. 96-262	Cumberland (92CRS5711)	Judgment and commitment on the maintaining charge is vacated. We find no error in trial and sentencing on the trafficking charge.

STATE v. BAZEMORE No. 96-631	Northampton (93CRS2846) (93CRS2847) (93CRS2848) (93CRS2849)	Affirmed
STATE v. BRIDGERS No. 96-956	Edgecombe (95CRS8751)	No Error
STATE v. BRITT No. 96-681	Wake (95CRS83328)	Dismissed
STATE v. COLVIN No. 96-769	Guilford (95CRS28961)	No Error
STATE v. COOMBS No. 96-576	Mecklenburg (95CRS20007)	No Error
STATE v. FLEMMING No. 96-976	Mecklenburg (94CRS81839)	No Error
STATE v. FOUNTAIN No. 96-195	Duplin (94CRS5930) (94CRS1106)	No Error
STATE v. HYMES No. 96-936	Harnett (95CRS16048)	Affirmed
STATE v. MANN No. 96-351	Carteret (94CRS12501)	No Error
STATE v. MURPHY No. 96-590	Forsyth (95CRS29680) (95CRS29681)	No Error
STATE v. PETERSON No. 96-941	Forsyth (95CRS35254) (95CRS35262)	Affirmed
STATE v. PICKETT No. 96-943	Pender (93CRS4207) (93CRS4208)	No Error
STATE v. ROBINSON No. 96-600	Wayne (94CRS12792)	No Error
STATE v. SIMMONS No. 96-979	Gaston (95CRS22174)	No Error
STATE v. SMITH No. 96-702	Alamance (95CRS27852)	No Error
STATE v. WHITEHEAD No. 96-353	Craven (95CRS1043) (95CRS1970)	No Error

STATE v. WILLOUGHBY No. 96-474	Wilson (95CRS9027) (95CRS9028) (95CRS9029) (95CRS9030)	No Error
STATE v. WILSON No. 96-940	Davidson (93CRS16466)	No Error
STATE v. WRIGHT No. 96-973	Mecklenburg (95CRS75080) (95CRS62206)	No Error
STATE v. YARZUE No. 96-284	Mecklenburg (95CRS29023)	Affirmed
TOWN OF ELKIN v. SMITH No. 96-550	Surry (92CVS844)	Affirmed
WHITE v. WHITE No. 96-735	Richmond (94CVS866)	Appeal Dismissed

G.P. PUBLICATIONS, INC., AND TECHNOLOGY FUNDING SECURED INVESTORS II, PLAINTIFFS v. QUEBECOR PRINTING—ST. PAUL, INC., AND SIGNAL RESEARCH, INC., DEFENDANTS

No. COA96-248

(Filed 4 March 1997)

1. Corporations § 208 (NCI4th)— successor corporation—liability for old corporation's debts—exceptions to general rule

Generally, the purchaser of all or substantially all the assets of a corporation is not liable for the debts of the old corporation. However, exceptions to this general rule permit successor liability when (1) there is an express or implied agreement by the purchasing corporation to assume the debt or liability, (2) the transfer amounts to a *de facto* merger of the two corporations, (3) the transfer of assets was done to defraud the corporation's creditors, or (4) the purchasing corporation is a "mere continuation" of the selling corporation in that it has some of the same shareholders, directors, and officers.

Am Jur 2d, Corporations §§ 2575, 2577, 2707-2727.

Similarity of ownership or control as basis for charging corporation acquiring assets of another with liability for former owner's debts. 49 ALR3d 881.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution. 72 ALR4th 419.

2. Corporations § 208 (NCI4th)— successor corporation—liability for old corporation's debts—foreclosure sale under UCC

A foreclosure sale under UCC § 9-504 does not absolutely preclude successor liability on the theory that a new corporation is a mere continuation of a prior debtor corporation. Therefore, a successor liability claim was not absolutely barred where a secured creditor purchased the debtor's assets at a UCC § 9-504 foreclosure sale. N.C.G.S. § 25-9-504.

Am Jur 2d, Corporations §§ 2575, 2724.

Similarity of ownership or control as basis for charging corporations acquiring assets of another with liability for former owner's debts. 49 ALR3d 881.

Comment note.—validity and construction of state statute making successor corporation liable for taxes of predecessor. 65 ALR3d 1181.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution. 72 ALR4th 419.

3. Corporations § 208 (NCI4th)— UCC foreclosure—asset purchase by secured creditor—liability for old corporation's debts—mere continuation—instructions

Where a secured creditor purchased the assets of the debtor corporation in a UCC § 9-504 foreclosure sale and continued the debtor's publishing business in an attempt to recover on the delinquent loan, the trial court erred by instructing the jury on the broadened "substantial continuity" test for determining whether the successor corporation was liable for the old corporation's debt to an unsecured creditor. Rather, the trial court should have instructed the jury only as to the elements of the mere continuation test followed in North Carolina: continuity of ownership, inadequacy of consideration, or lack of some of the elements of a good faith purchaser for value.

Am Jur 2d, Corporations § 2627.

Similarity of ownership or control as basis for charging corporation acquiring assets of another with liability for former owner's debts. 49 ALR3d 881.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution. 72 ALR4th 419.

4. Corporations § 208 (NCI4th)— UCC foreclosure—asset purchase by secured creditor—new corporation not mere continuation of old

A corporation formed by a secured creditor after purchasing the assets of the debtor corporation at a UCC § 9-504 foreclosure sale was not a mere continuation of the debtor corporation and was thus not liable for the debtor corporation's debt to an unsecured creditor where it was uncontroverted that the debtor cor-

poration does not share any common stockholders or directors with either the successor corporation or the secured creditor, and the jury found that the foreclosure sale, including the price paid for the debtor corporation's assets, was commercially reasonable.

Am Jur 2d, Corporations §§ 2624-2628.

Liability of shareholders, directors, and officers where corporate business is continued after its dissolution. 72 ALR4th 419.

5. Appeal and Error § 175 (NCI4th)— instructions—issue not reached—mootness

The issue of whether the trial court's instruction defining "gross" was erroneous was moot and will not be addressed by the appellate court where the jury did not reach the question of whether the secured creditor acquired the debtor's assets for "grossly inadequate" consideration after it found that a foreclosure sale of the debtor's assets was commercially reasonable.

Am Jur 2d, Trial §§ 1121, 1139, 1142.

6. Unfair Competition or Trade Practices § 31 (NCI4th)— unfair practice—standing to bring action

Only a debtor and its officers, and not an unsecured creditor of the debtor, had a right to bring an action under N.C.G.S. § 75-1.1 against a secured creditor based upon alleged threats to bring civil and RICO actions against the debtor's officers if the debtor's board of directors did not agree to a friendly foreclosure.

Am Jur 2d, Extortion, Blackmail and Threats §§ 96, 128-132.

Truth as defense to state charge of criminal intimidation, extortion, blackmail, threats, and the like, based upon threats to disclose information about victim. 39 ALR4th 1011.

Initiating, or threatening to initiate, criminal prosecution as ground for disciplining counsel. 42 ALR4th 1000.

Civil action for damages under state racketeer influenced and corrupt organizations acts (rico) for losses from racketeering activity. 62 ALR4th 654.

7. Unfair Competition or Trade Practices § 48 (NCI4th)—unfair practice—absence of damages

The evidence supported the jury's finding that an unsecured creditor was not damaged by the secured creditor's commission of an unfair practice in violation of N.C.G.S. § 75-1.1 by threatening to bring civil and RICO actions against the debtor's officers and directors if the debtor's board of directors did not agree to a friendly foreclosure; therefore, the trial court did not err in the denial of the unsecured creditor's motion for judgment notwithstanding the verdict on the issue of damages.

Am Jur 2d, Extortion, Blackmail and Threats §§ 96, 128-132.

Truth as defense to state charge of criminal intimidation, extortion, blackmail, threats, and the like, based upon threats to disclose information about victim. 39 ALR4th 1011.

Initiating, or threatening to initiate, criminal prosecution as ground for disciplining counsel. 42 ALR4th 1000.

Civil action for damages under state racketeer influenced and corrupt organizations acts (rico) for losses from racketeering activity. 62 ALR4th 654.

Appeal by plaintiff G.P. Publications, Inc., and defendant Quebecor Printing—St. Paul, Inc. from judgment entered 13 June 1995 by Judge W. Steven Allen in Guilford County Superior Court. Heard in the Court of Appeals 29 October 1996.

Adams Kleemeier Hagan Hannah & Fouts, PLLC, by J. Alexander S. Barrett, and Russell & King, by Edward L. Bleynat, Jr., for plaintiffs.

Blanco Takabery Combs & Matamoros, by Peter J. Juran, Rider, Bennett, Egan & Arundel, by Patrick J. Rooney, and Parker Poe Adams & Bernstein, by Catherine B. Arrowood, for defendant Quebecor Printing—St. Paul, Inc.

WYNN, Judge.

Plaintiffs G.P. Publications, Inc. ("G.P.") and Technology Funding Secured Investors II ("TFSI II") filed a complaint against defendants Quebecor Printing—St. Paul, Inc. ("Quebecor") and Signal Research,

Inc. ("Signal") in October 1992, seeking a declaratory judgment that a foreclosure sale conducted by TFSI II on Signal's assets was commercially reasonable. TFSI II is a California limited partnership that makes secured loans to technology-oriented companies. Signal, formerly a Delaware corporation that published books and magazines about computers and video games, was a customer of Quebecor, a Minnesota corporation whose principal business is printing.

This matter came on for jury trial in May 1995. The plaintiffs' evidence tended to show the following:

In February 1991, TFSI II extended a $2.5 million credit to Signal for debt financing and obtained a first priority security interest in all of Signal's assets. Meanwhile, Quebecor provided printing services to Signal on credit such that by December 1991, Signal owed Quebecor $2.6 million. Quebecor, however, never obtained a security interest in Signal's assets nor obtained guarantees from Signal's management or equity holders. Thus, the debt owed by Signal to Quebecor was completely unsecured.

The basis for this litigation started when Signal defaulted on its loan obligations to TFSI II in late 1991. Repeated work-out negotiations with TFSI II failed, and Signal fired its employees and ceased all operation on 13 February 1992. On 17 February 1992, a majority of Signal's disinterested directors agreed to TFSI II conducting a consensual foreclosure on its assets.

To help preserve the collateral, TFSI II entered into consulting agreements with three former Signal employees: Mike Romano, its head of advertising; Tom Valentino, vice president of finance and its controller; and Selby Bateman, an editor. TFSI II alleged that it relied upon these individuals to determine whether Signal's assets could be: (1) liquidated; (2) sold to a third party; or (3) utilized in an effort to develop a new company.

In an attempt to privately sell Signal's assets, TFSI II contacted over thirty publishers, brokers and Signal competitors. This effort resulted in only one offer: $200,000 in cash and a $1.6 million promissory note in exchange for all the assets, which TFSI II declined due to the lack of adequate cash. Thereafter, TFSI II prepared to conduct a public foreclosure sale under Article 9 of the Uniform Commercial Code ("UCC") at Signal's former offices in Greensboro, North Carolina. It sent Gerry Hansen and Anthony Todd, officers with TFSI II's managing partner, Technology Funding, Inc. ("TFI") and both cer-

tified public accountants, to conduct due diligence on its behalf. Todd estimated a reasonable bid price to be $1.1-$1.2 million for all the collateral.

Regarding the notice given for the foreclosure sale, the parties stipulated to the following facts:

> TFSI II conducted a foreclosure sale on the assets of Signal on March 6, 1992. It had previously posted notice of the sale in accordance with North Carolina law and sent notice to all parties entitled thereto, as well as to the other parties TFSI II thought might be interested in bidding on the assets.

TFSI II did not provide formal notice to Quebecor, which, as an unsecured creditor, was not entitled to it.

In anticipation of the foreclosure sale, a group of Signal investors considered making a bid on the assets. Steve Purcelli, a Signal director and representative for the group, testified that the investors considered bidding $1 to $1.5 million, but ultimately declined to do so because "it would not provide us with an adequate return on our investment."

The foreclosure sale resulted in a single bid by TFSI II. It purchased substantially all of Signal's assets, including its fixed assets, inventory, accounts receivable, intangibles and trademarks for a $1.8 million credit bid. The total debt outstanding to TFSI II at the time was $2.25 million, with the bid leaving a deficiency of $425,000.

After conducting the sale, TFSI II attempted to recover further on its loan by launching G.P. Publications, Inc. ("G.P."), a magazine-publishing business. TFSI II transferred the former Signal assets to G.P. for a $1.8 million promissory note. In addition, TFSI II and its affiliated partnership, Technology Funding Secured Investors III ("TFSI III"), each invested $200,000 in G.P. shares. There was no evidence that either TFSI II or TFSI III ever owned Signal stock, nor that Signal's investors ever owned stock in G.P., TFSI II or TFSI III.

G.P. started business on 9 March 1992, three and a half weeks after the Signal shutdown. It hired a number of employees who had previously worked for Signal. However, G.P's board of directors and officers were made up of individuals who were never affiliated with Signal, with the exception of Romano, Valentino, and Bateman, who now assumed upper management roles. G.P. carried on business at the former Signal location, but paid no Signal debts. TFSI II alleged

that it was unsuccessful in its efforts to liquidate or sell G.P. for an amount even approaching a full recovery on the Signal debt, so it launched new magazine titles and invested still further in G.P. in an attempt to interest a purchaser.

In April 1992, Quebecor obtained a default judgment against Signal for $2.6 million. Quebecor subsequently conducted discovery in aid of its judgment at Signal's offices in New Jersey. At that time, G.P. used a part of the office space for its operations, and had possession of Signal's records. Upon learning that G.P. was searching for a buyer, Quebecor's attorney contacted G.P. regarding potential litigation in a letter dated 4 September 1992:

> I have been informed . . . that GP Publications, Inc. is considering selling its assets and operations. Please be advised that if a sale does take place, my client may be forced to assert any claims that it may have against Signal Research, Inc. and/or GP Publications, Inc., against the purchasing entity [sic].

Thereafter, plaintiffs filed this declaratory judgment action against Quebecor and Signal to have the sale of assets declared proper and not subject to being collaterally attacked or otherwise set aside by Quebecor. Signal failed to answer and default judgment was entered against it.

Quebecor answered and filed a counterclaim against plaintiffs, alleging various theories of successor liability, tortious interference with contract, and fraudulent and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes. Quebecor's evidence at trial tended to show the following:

TFSI II froze Signal's bank accounts and refused to release funds necessary for Signal to meets its payroll causing a complete shutdown of Signal. In a 12 February 1992 letter to Hansen, Robert Lock, president and chairman of Signal's Board of Directors, stated that TFSI II's refusal to allow Signal to meet its payroll "has clearly damaged our business" and noted that "[w]hen done in the context of expressing interest in running the assets yourself is especially troublesome."

Prior to the foreclosure sale, TFSI II entered into consulting agreements with Valentino, Romano and Bateman in an effort to continue the Signal business. Bateman met with Signal employees regarding the possibility of continuing to publish Signal magazines

for a new owner. Valentino evaluated the financial and advertising aspects of a continuation.

Signal's Board of Directors considered filing a Chapter 7 bankruptcy petition which would have resulted in the liquidation of the company's assets. Robert Lock, President and Chairman of Signal, discussed this possibility with TFSI II's Gerry Hansen during a telephone conversation. In a follow-up letter to Hansen dated 13 February 1992, Lock noted his expectation that the board would instruct him to "file a Chapter 7 tomorrow afternoon unless we can do something to keep the assets protected." Thereafter, Hansen threatened "severe implications" and "other avenues of recourse" if Signal filed for bankruptcy. At a 17 February 1992 meeting, TFSI II's attorney informed counsel for Signal that TFSI II was considering suing Lock and Valentino. Quebecor contends that, as a result of this threat, Signal's Board then voted to consent to the "friendly foreclosure" desired by TFSI II.

Thereafter, TFSI II sent foreclosure sale notices to other publishing companies. However, the notices were addressed to no person or department in particular and were sent out only seven days before the scheduled sale. The notices generated almost no interest. The only company to express interest was Compute magazine. TFSI II responded to Compute's inquiry with an offer to sell Signal's assets for a $2.5 million "fire sale" price. However TFSI II provided Compute with no details regarding the assets to be sold and refused to allow Compute to perform its own due diligence.

Quebecor alleges that TFSI II made a conscious decision not to inform it of the foreclosure sale out of fear that Quebecor would have stopped the sale by initiating an involuntary bankruptcy. Upon purchasing Signal's assets, TFSI II transferred them to G.P. for a $1.8 million promissory note.

Quebecor offered evidence showing that all the former Signal employees hired by G.P performed the same functions at the new company that they had previously performed at Signal. G.P. continued to occupy and run the business operations out of Signal's offices in Greensboro and New Jersey. G.P. maintained Signal's mailing addresses, telephone numbers and fax numbers. Quebecor alleged that G.P. produced and sold magazines virtually identical to those produced and sold by Signal and maintained relationships with Signal's vendors, distributors and advertising representative.

Finally, Quebecor alleged that TFSI II paid inadequate consideration for Signal's assets. Quebecor's valuation expert testified that the collateral was worth from $3.5 to $5 million at the time of the foreclosure sale. Quebecor also introduced an investment proposal, created 3 days after the foreclosure sale, in which TFSI II valued G.P. at $2.5 to $3 million.

At the close of all the evidence, the trial court allowed: (1) TFSI II's motion for directed verdict on Quebecor's claim that TFSI II was a "mere continuation" of Signal; (2) TFSI II and G.P.'s motion for directed verdict on Quebecor's claims for tortious interference with contractual rights; and (3) G.P.'s motion for directed verdict on Quebecor's fraudulent trade practice claim. The trial court submitted the remaining issues to the jury which found, *inter alia*, that: (1) TFSI II's sale of Signal's assets was commercially reasonable; (2) TFSI II had not purchased the assets for "grossly inadequate consideration"; (3) G.P. was a "mere continuation" of Signal, but Quebecor had not sustained any damage; and (4) TFSI II wrongfully threatened Signal's board of directors and officers with a civil lawsuit and RICO action if they did not agree to a friendly foreclosure.

In light of the jury's finding that G.P. was a mere continuation of Signal, the trial court entered a judgment in which it held that "Quebecor's remedy as a creditor of the now defunct Signal . . . is to hold G.P. Publications, Inc. . . . liable for Signal's debts." Both parties appeal the trial court's judgment.

G.P.'S APPEAL

The deciding issues raised by G.P.'s appeal are: (I) Whether a commercially reasonable sale under UCC § 9-504 necessarily precludes successor liability, and (II) if not, whether the trial court erred by submitting to the jury the successor liability theory that G.P. was a "mere continuation" of Signal. We hold that while § 9-504 is not an absolute bar to successor liability, the issue of "mere continuation" should not have been submitted in this case. Accordingly, we reverse that part of the judgment holding G.P. liable for Signal's debts on the basis of the "mere continuation" theory of successor liability.

[1] We note at the outset that generally, the purchaser of all or substantially all the assets of a corporation is not liable for the old corporation's debts. *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 687, 370 S.E.2d 267, 269 (1988) (citations omitted). However, there exist four well-settled exceptions to this general rule against

successor liability: (1) where there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) where the transfer amounts to a *de facto* merger of the two corporations; (3) where the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) where the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers. *Id.* (citations omitted).

[2] Relying on this last exception, Quebecor premised one of its two successor liability claims on the theory that G.P. was a "mere continuation" of Signal. Prior to considering that contention, however, we must address the threshold issue of whether a UCC Article 9 foreclosure sale acts as an absolute bar against finding successor liability. We hold that it does not.

Plaintiffs argue that UCC § 9-504 necessarily preempts a mere continuation claim because the very purpose of conducting such a sale is to extinguish all inferior interests and convey title free of all claims or encumbrances.[1]

While no North Carolina case directly addresses this particular issue, we find federal case law instructive. In *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F. Supp. 265 (D.N.J. 1994), the United States District Court for New Jersey considered "whether a bank's sale of collateral under a secured agreement pursuant to section 9-504 permits the purchaser not only to take the assets free of any security interest in the collateral but also precludes any claim of successor liability being asserted against the purchasing corporation." *Id.* at 273. After a comprehensive review of other case law on this issue, the court observed, "not only has [defendant] failed to cite any authority for its claim that the purchase of assets at a 9-504 sale *ipso facto* precludes a finding of successor liability; the relevant authorities actually suggest the opposite." *Id.* at 275. The court went on to note that "in successor liability cases the courts should not elevate form over substance." *Id.* Thus, it concluded that "nothing in the UCC supports [defendant's] argument that the 9-504 sale provides a safe harbor against successor liability claims." *Id.* at 274.

1. G.P. argues that under the terms of the Loan and Security Agreement between Signal and TFSI II, the North Carolina UCC governs the remedies upon default, while Quebecor argues that California's UCC applies. Since we find the California and North Carolina versions of UCC § 9-504 to be substantially similar to each other and would therefore produce the same result in this case, we do not address their arguments.

We agree with the *Glynwed* court that nothing in UCC § 9-504 absolutely precludes successor liability on the theory that a new corporation is a mere continuation of a prior debtor corporation. As the *Glynwed* court noted, this Court must not elevate form over substance, rather we must look to the substance of the transaction to determine its true nature. We reject plaintiff's suggestion that allowing a successor liability action to proceed following a 9-504 sale would violate Article 9. Instead, we note that UCC § 1-103 provides that principles of equity supplement the provisions of the UCC unless they are displaced by a particular provision. The mere continuation theory of the equitable doctrine of successor liability supplements the provisions of 9-504. We believe that neither the drafters of the UCC nor the state legislatures which enacted comparable provisions intended to elevate form over substance by providing an absolute bar against successor liability following a 9-504 sale where the new corporation is a mere continuation of the original debtor.

Since we hold that a successor liability claim is not *absolutely* barred where a secured creditor purchases the debtor's assets via Article 9, we now set forth our reasons for holding in this case that the issue of "mere continuation" should not have been submitted to the jury.

The traditional rule regarding "mere continuation" is that "a corporate successor is the continuation of its predecessor if only one corporation remains after the transfer of assets and there is identity of stockholders and directors between the two corporations." *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 724 (N.D.Ind. 1996) (citing *U.S. v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992); *Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management Corp.*, 817 F. Supp. 225, 231 (D.N.H. 1993); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F. Supp. 124, 129 (N.D.Ill. 1993)). "This exception encompasses the situation where one corporation sells its assets to another with the same people owning both corporations." *Ninth Ave. Remedial Group*, 195 B.R. at 724 (citing *City Environmental, Inc. v. U.S. Chemical Co.*, 814 F. Supp. 624, 635 (E.D.Mich. 1993)). Therefore, the traditional approach emphasizes continuity of stockholders and directors between the selling and purchasing corporation. *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 487 (8th Cir. 1992); *Carolina Transformer Co.*, 978 F.2d at 838.

A review of the case law reveals that North Carolina follows the traditional approach to the "mere continuation" theory. *See Bryant v.*

Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995); *Coffin v. ISS Oxford Services, Inc.*, 114 N.C. App. 802, 443 S.E.2d 352 (1994); *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 370 S.E.2d 267 (1988). This jurisdiction also considers two factors in addition to the issue of continuity of ownership: (1) inadequate consideration for the purchase; and (2) lack of some of the elements of a good faith purchaser for value. *Id.* at 687, 370 S.E.2d at 269 (citations omitted). In fact, a purchaser conceivably could be found to be the corporate successor of the selling corporation even though there is no continuity of ownership. *See L.J. Best Furniture Distributors v. Capital Delivery Service*, 111 N.C. App. 405, 432 S.E.2d 437 (1993).

[3] In the instant case, the trial court instructed the jury as to the elements that make up the traditional test; however, it also provided the following instruction:

> You may also consider factors such as the following in determining whether G.P. is a mere continuation of Signal . . . whether there was a continuity of management personnel, physical location, assets and general business operations; whether there was a cessation of the ordinary business of Signal Research, Inc; whether G.P. . . . assumed the liabilities ordinarily necessary for the uninterrupted continuation of the business of Signal; whether G.P. employed many of the same employees and served many of the same customers as Signal had.
>
> Not all of these factors need to be present in order for you to determine that G.P. was a mere continuation of Signal. Rather, you must determine whether, under all the facts and circumstances surrounding the transactions, given the factors just set out, G.P. is a mere continuation of Signal. (Emphasis added).

We conclude that the trial court erred in its instruction to the jury regarding the elements of the "mere continuation" exception. It appears that in its charge to the jury, the trial court applied a broadened test of successorship, called the "substantial continuity" or "continuity of enterprise" test. *See Mexico Feed*, 980 F.2d at 487. The "substantial continuity" test does consider identity of stockholders and corporate officers; however, this issue is not determinative. *Id.* at 488 n. 10. This approach considers a series of factors in determining whether one corporation is the successor of another: (1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location;

(4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operation; and (8) whether the successor holds itself out as a continuation of the previous enterprise. *Id.* (citations omitted); *Carolina Transformer Co.*, 978 F.2d at 838 (citations omitted).

The "substantial continuity" test has evolved from the traditional "mere continuation" test "in contexts where the public policy vindicated by recovery from the implicated assets is paramount to that supported by the traditional rules delimiting successor liability." *Mexico Feed*, 980 F.2d at 487. The test has been applied in cases such as labor relations, product liability and environmental regulation. *Id.*

This broader test originated with a line of Supreme Court labor relations cases, the seminal case being *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 38 L. Ed. 2d 388 (1973). In *Golden State*, an employer sold its business after the National Labor Relations Board had found that it was guilty of an unfair labor practice in discharging an employee. In a subsequent back-pay specification proceeding, the Board held that although the purchaser was a bona fide purchaser, it should be responsible for reinstating the employee with back pay. The Ninth Circuit enforced the order and on certiorari, the Supreme Court unanimously affirmed.

The *Golden State* Court extended the traditional approach to the "mere continuation" theory of successor liability in order to further the public policy behind the National Labor Relations Act. The Court noted that

> "[w]hen a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices . . . as a continuation of the predecessor's labor policies."

Golden State, 414 U.S. at 184, 38 L. Ed. 2d at 402-03. The Court held that under these circumstances, extending liability to the successor corporation was appropriate in order to protect victimized employees, to avoid labor unrest and to prevent a deterrent effect on the exercise of rights guaranteed employees by the Act. *Id.* at 185, 38

L. Ed. 2d at 403. The Court noted that the purchaser's knowledge of pending unremedied wrongs made broadening the net of liability fair:

> Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sale contract which will indemnify him for liability arising from the seller's unfair labor practices."

Id. (citation omitted).

Likewise, in the context of environmental cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), successor liability has been imposed under the "substantial continuation" theory. In *Carolina Transformer Co.*, 978 F.2d 832:

> [T]he children of the owner of the selling corporation owned the purchasing corporation. The father also controlled the purchasing corporation, and could write checks on the purchaser's corporate account. There was no colorable question of the purchaser's knowledge of and benefit from the seller's conduct for which CERCLA liability attached, or of the seller's and purchaser's practical identity.

Mexico Feed, 980 F.2d at 489. Under the traditional approach, there would have been no successor liability because there was no overlap of stock ownership between the seller and the buyer corporations. However, the court adopted the "substantial continuity" approach and held the buyer corporation liable noting that were it to hold to the contrary, "an otherwise responsible corporation could all but completely wash its hands of its environmental liability." *Carolina Transformer Co.*, 978 F.2d at 840. "Such a result," the court noted, "would not serve the remedial purpose of CERCLA, nor would it further the Congressional intent that those responsible for disposal of hazardous wastes, rather than the public, should bear the cost of remedying the pollution." *Id.*

"Even in cases of good faith, a bona-fide successor reaps the economic benefits of its predecessor's use of hazardous disposal methods, and, as the recipient of the benefits, is also responsible for the costs of those benefits." *Mexico Feed*, 980 F.2d at 487. In *Mexico Feed*, the successor corporation retained the same employees, delivered

the same service to the same clients, and kept the name of its predecessor for several years. However, the Eighth Circuit refused to impose successor liability under the "substantial continuity" test because of the lack of notice of potential liability or ties between the successor and predecessor corporations. Id. at 489-90.

In the instant case, we find that the trial court erred by applying the "substantial continuity" test rather than the more restrictive traditional test to determine whether a successor corporation is a mere continuation of its predecessor. In the context of a commercially reasonable sale under UCC § 9-504, allowing successor liability based on factors other than inadequate consideration and identity of ownership might have a chilling effect on potential purchasers who would have to be concerned that by acquiring a foreclosed business, they would also acquire liabilities they never intended to assume. While a strong public policy supports the discharge of subordinate claims after a UCC foreclosure sale, the law must not encourage the elevation of form over substance.

Quebecor cites a number of "mere continuation" cases which apply the "substantial continuity" test. *See e.g. Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 73 (3d Cir. 1993); *Fiber-Lite Corp. v. Molded Acoustical Prod. of Easton, Inc.*, 186 B.R. 603, 609 (E.D.Pa. 1994), *aff'd*, 66 F.3d 310 (3d Cir. 1995); *Glynwed*, 869 F.Supp. at 275-76. It also contends that the court's instruction as to these additional factors was appropriate based on language in *L.J. Best* in which this Court noted that a mere continuation claim might be appropriate because in addition to lack of consideration, there was evidence that the purchasing corporation leased the same trucks as the selling corporation, had the same employees, and serviced some of the same customers. *L.J. Best*, 111 N.C. App. at 409, 432 S.E.2d at 440. Nevertheless, we believe that the courts in those cases applied this broader test without appreciating the rationale behind it. *See Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1265 (9th Cir. 1990) (court refused to apply substantial continuity test because purchaser had no knowledge of seller's potential CERCLA liability); *U.S. v. Atlas Minerals & Chemicals, Inc.*, 824 F. Supp. 46, 50-52 (E.D.Pa. 1993); *Allied Corp.*, 812 F. Supp. at 129. *But see Kleen Laundry & Dry Cleaning Services*, 867 F. Supp. at 1144 (finding that a successor could be held liable under CERCLA even if it did not know that predecessor had engaged in conduct that could lead to CERCLA liability). We note that the courts in the above cases would have obtained the same result if they had applied the traditional test for mere con-

tinuation. *See Luxliner*, 13 F.3d at 74 (continuity of shareholders and officers); *Fiberlite*, 186 B.R. at 606 (continuity of management); *Glynwed*, 869 F. Supp. at 276 (continuity of officers, directors and shareholders).

Since we believe that no public policy is served by applying the "substantial continuity" test in a situation like the instant case, where a creditor purchases collateral following a § 9-504 sale and continues the debtor's business in order to recover on a delinquent loan, we conclude that the trial court should have instructed the jury only as to the elements that make up North Carolina's "mere continuation" test: Continuity of ownership, inadequacy of consideration, or lack of some of the elements of a good faith purchaser for value.

[4] Significantly, it is uncontroverted in the instant case that Signal does not share any common stockholders or directors with G.P. or TFSI II. Although G.P. did hire former Signal management employees, Romano, Valentino, and Bateman, there is no evidence that any of these three men played a large role in running Signal.

As to the issue of the adequacy of the consideration paid for Signal's assets, the trial court instructed the jury that they had to find that the method, manner, time, place and terms of the sale, including the price, were reasonable in order to answer "yes" to the issue of whether the sale was commercially reasonable, which it did. Since these factors were decided in G.P.'s favor, it follows that the jury's finding that G.P. was a mere continuation of Signal was based on the additional factors that make up the "substantial continuity" test.

Thus, when considered in light of the traditional "mere continuation" theory of successor liability, the uncontroverted evidence that Signal does not share any common stockholders or directors with G.P. or TFSI II combined with the jury's determination that the sale was commercially reasonable thereby answering the question of whether adequate consideration had been paid, mandates the conclusion that G.P. was not a "mere continuation" of Signal. Since the evidence fails to support a finding of mere continuation, the trial court should have granted G.P.'s motion for a directed verdict and the judgment entered by the trial court must be reversed.

Since we hold in G.P.'s favor on the issue of successor liability, we need not address its remaining assignments of error.

QUEBECOR'S APPEAL

In its cross-appeal, Quebecor asks this Court to consider whether the trial court erred by: (I) denying its motion for relief from judgment for failing to use the proper remedy in its disposition of the "mere continuation" claim; (II) granting TFSI II's motion for directed verdict on Quebecor's successor liability claim against it; (III) improperly limiting consideration of the SEC definition of "succession" to impeachment purposes; (IV) improperly instructing the jury on the definition of "gross" and denying its motion for J.N.O.V. on the issues of commercial reasonableness and grossly inadequate consideration; (V) granting G.P.'s motion for directed verdict on its counterclaim against G.P. for unfair trade practices and denying Quebecor's motion for J.N.O.V. on the issue of damages on its counterclaim for unfair trade practices against TFSI II; (VI) denying its motion to join TFSI III as a necessary party; and (VII) granting G.P.'s motion for a stay and setting the bond at $100,000.

I, II, III and VI

Quebecor raises several objections that pertain to its successor liability claim based on the "mere continuation" exception. Since we have already concluded that G.P. was not liable as a mere continuation of Signal, there is no need to address the merits of these issues.

IV.

[5] Quebecor also alleged that G.P. was subject to successor liability for having paid "grossly inadequate consideration" for Signal's assets. Quebecor contends that the trial court's definition of "gross" as meaning "out of all measure, beyond allowance, or flagrant" connoted a moral element to the term, which North Carolina law rejects.

We decline to address the merits of this argument for the following reason. The trial court informed the jury that if they found that the sale of Signal's assets was commercially reasonable (and therefore the sale price was reasonable), they were not to decide whether the transfer was for grossly inadequate consideration; rather, they were to automatically answer this second issue "no." Since the jury decided that the sale was commercially reasonable, presumably they did not address the second issue of whether the transfer was for grossly inadequate consideration. Therefore, Quebecor's argument is moot.

V.

[6] At trial, Quebecor asserted claims for unfair trade practices against both TFSI II and G.P. under N.C.G.S. § 75-1.1, arising from the plaintiffs' conduct in acquiring and operating Signal's assets. The trial court granted directed verdict as to G.P. and submitted this issue to the jury only as to TFSI II. The jury found that TFSI II "wrongfully threaten[ed] one or more of the officers or director of Signal Research, Inc. with a civil lawsuit against him or them personally if the Signal Board of Directors did not agree to a friendly foreclosure" and that it "wrongfully threatened a RICO action against one or more of the officers or directors personally if the Signal Board of Directors did not agree to a friendly foreclosure." However, the jury also found that Quebecor had not been damaged as a proximate result of the unfair and deceptive conduct and awarded it nothing.

Quebecor first assigns as error the trial court's decision to grant G.P.'s motion for directed verdict. For the following reason, we affirm the trial court's decision.

A fraudulent practice claim is considered a personal tort. *See Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 688, 413 S.E.2d 268, 271 (1992). The purpose of the act is to protect the *victim* from deceptive or oppressive conduct. *Id.* at 689, 413 S.E.2d at 272. In *Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales and Service*, 91 N.C. App. 539, 372 S.E.2d 901 (1988), defendants filed a counterclaim alleging deceptive and fraudulent trade practices in that the plaintiff competitor submitted low bids for contracts and then later overcharged its customers. The defendants alleged injury because the competitor secured contracts upon which defendants had also bid and because plaintiff lured away some of defendants' customers with its seemingly-lower prices. This Court held that the activity complained of provided no cause of action under Section 75-1.1, noting that "[a]ssuming defendants' allegations to be true, the *customers* of [plaintiff], if anyone, would appear to have a claim under Section 75-1.1." *Id.* at 545, 372 S.E.2d at 904 (emphasis in original).

Similarly, in the instant case, we hold that only Signal and the officers who were threatened with civil suits by TFSI II have the right to bring an action under Section 75-1.1 for the activity of which Quebecor complains. Therefore, the trial court acted appropriately in granting directed verdict for G.P.

[7] Quebecor next assigns as error the court's denial of its motion for judgment notwithstanding the verdict on the issue of damages. We affirm the trial court's order.

The trial court is vested with discretion to decide whether or not to set aside the jury's verdict or grant judgment notwithstanding the verdict on the issue of damages, and its decision will not be disturbed on appeal absent an abuse of that discretion. *Cole v. Duke Power Co.*, 81 N.C. App. 213, 225, 344 S.E.2d 130, 137, *disc. review denied*, 318 N.C. 281, 347 S.E.2d 462 (1986). In the case *sub judice*, the jury found that TFSI II had committed unfair trade practices but, since Quebecor was not damaged by this conduct, it was not entitled to recover damages. The jury impliedly determined that the $1.8 million paid by TFSI II for Signal's assets was fair by finding that the public foreclosure sale of Signal's assets conducted by TFSI II was commercially reasonable, and Signal's assets were not purchased by TFSI II for grossly inadequate consideration. The record indicates that the $1.8 million received from the sale of Signal's assets was insufficient to meet the debt owed to the secured creditor and there was no excess available for Quebecor as an unsecured creditor. This would have been the likely result upon sale of Signal's assets even under bankruptcy. In light of this fact, we cannot find that the trial court's refusal to set aside the jury's determination that Quebecor suffered no damages was an abuse of discretion. Accordingly, we affirm the trial court's denial of Quebecor's motion for judgment notwithstanding the verdict on the issue of damages.

We have examined Quebecor's remaining assignment of error and find it without merit.

CONCLUSION

For the reasons set forth above, we reverse the judgment of the trial court holding G.P. liable for Signal's debt to Quebecor on the grounds that G.P. is a "mere continuation" of Signal. With regard to Quebecor's counterclaims for unfair trade practices, we affirm the trial court's order granting directed verdict for G.P. and denying judgment notwithstanding the verdict for Quebecor.

Reversed in part and affirmed in part.

Judges GREENE and MARTIN, John C. concur.

MICHAEL G. MARKHAM AND TERRY MARKHAM GIBSON, PLAINTIFF-APPELLEES v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT v. K. J. SMITH BUILDERS & REALTY, INC., THIRD-PARTY DEFENDANT-APPELLEE

No. COA96-436

(Filed 4 March 1997)

1. Trial § 114 (NCI4th)— insurance claim—structural collapse of house—consolidation denied—nucleus of facts—common legal issues lacking

The trial court did not abuse its discretion by denying defendant Nationwide Mutual Fire Insurance Company's motion to consolidate cases arising from the structural collapse of a house where there was a common nucleus of facts but few, if any, common legal issues. Consolidation would have created an extremely cumbersome case for the court to manage while unnecessarily increasing the burden on the jury.

Am Jur 2d, Actions § 133.

2. Insurance § 464 (NCI4th)— loss of house—insurance claim wrongfully denied—subrogation—right of insurer extinguished

It was not error for the trial court to grant summary judgment to third-party defendant Smith Builders because Nationwide Mutual Fire Insurance Company's right of subrogation was extinguished by settlement of the case between plaintiff and defendant Smith where defendant Nationwide wrongfully denied the plaintiffs' claim stemming from the loss of their home. Since Nationwide's actions forced the plaintiffs to retain counsel and independently pursue their rights against the alleged tortfeasor, common equity mandates the insurer must also accept the risk of losing its subrogation right.

Am Jur 2d, Insurance §§ 1810, 1813.

Rights and remedies of property insurer as against third-person tortfeasor who has settled with insured. 92 ALR2d 102.

3. Limitations, Repose and Laches § 29 (NCI4th)— statute of limitations—structural damage to house—expert testimony as to date—directed verdict denied

The trial court did not err in an action arising from the structural collapse of a house by submitting the statute of limita-

tions issue to the jury where there was evidence presented that the structural damage to plaintiffs' home did not occur more than three years prior to the date the plaintiffs instituted the action.

Am Jur 2d, Building and Construction Contracts § 114; Trial § 857.

4. Insurance § 724 (NCI4th)— structural collapse of home—exclusion—conflicting evidence as to cause—directed verdict denied

It was proper for the trial court to deny defendant Nationwide Mutual Fire Insurance Company's motions for a directed verdict and judgment notwithstanding the verdict in an action arising from the structural collapse of plaintiffs' home. The policy provided coverage for the collapse of a building which has been defined to include settling which suddenly and materially impairs the integrity of the building, but expressly excluded damage caused by settling. Evidence presented at the trial indicated that the damage could have been caused by non-compensable settling; but a reasonable juror could have also inferred from the same evidence that plaintiffs' residence was rendered uninhabitable by settling "which suddenly and materially impaired the structure or integrity of the building." The meaning of ambiguous language within an insurance policy is a question of law for the court, but, when the facts and circumstances surrounding a claim remain in dispute (especially causation), it is for the jury and not the court to determine whether the ultimate cause of the claimed damages falls within the scope of the policy's exclusionary provisions as defined by the trial court.

Am Jur 2d, Insurance § 463; Trial § 857.

What constitutes "collapse" of a building within coverage of property insurance policy. 71 ALR3d 1072.

5. Insurance § 724 (NCI4th)— latent defects exclusion—ambiguous—not effective

The trial court did not err by submitting to the jury the issue of whether damage from the structural collapse of plaintiffs' home was excluded by a latent defects exclusion in their insurance policy where the policy was ambiguous as to the definition of latent defects and a reasonable juror could find from the conflicting evidence that the damage resulted from faulty design or

construction, not an inherent defect in the construction materials. Any ambiguity in an insurance contract must be construed against the insurer and, absent a contrary definition in the policy, a latent defect exclusion encompasses only an inherent defect in the materials used in construction which could not be discovered by any known or customary test and does not include faulty design or construction.

Am Jur 2d, Insurance § 463; Trial § 857.

What constitutes "collapse" of a building within coverage of property insurance policy. 71 ALR3d 1072.

6. Damages § 57 (NCI4th)— structural collapse of house—settlement with builder—no set-off for insurance company

It cannot be said that the trial court erred in refusing to grant defendant Nationwide a $150,000 set-off against plaintiffs' $275,000 judgment in a claim arising from the structural collapse of plaintiffs' home where plaintiffs had settled with third party defendant Smith Builders, but plaintiffs' claim included damages for negligent acts occurring before 20 August 1990, the jury awarded damages only for losses suffered after 20 August 1990, and a portion of the $150,000 settlement may reasonably be viewed as compensation for damages suffered for the time period outside the scope of the award in the present case. The settlement agreement was not in the record; it was Nationwide's burden to include all pertinent information and it cannot be said on this record that the court erred by refusing to grant the credit.

Am Jur 2d, Damages § 589; Insurance §§ 1813, 1814.

7. Appeal and Error § 242 (NCI4th)— surety bond—statutory—requirements

The trial court erred by requiring Nationwide to post a $2,000 appeal bond. The plain language of N.C.G.S. § 1-285 places the amount of the surety bond in the sole discretion of the trial court with the single caveat that the amount cannot exceed $250.

Am Jur 2d, Appellate Review § 358.

Appeal by defendant from judgment entered 27 October 1995 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 8 January 1997.

Richard M. Warren and Adams, Kleemeier, Hagan, Hannah & Fouts, by James W. Bryan, for plaintiff-appellees.

Wilson & Iseman, L.L.P., by Urs R. Gsteiger, for defendant-appellant.

Carruthers & Roth, P.A., by Kenneth R. Keller and John M. Flynn, for third-party defendant-appellee.

MARTIN, Mark D., Judge.

Defendant Nationwide Mutual Fire Insurance Company (Nationwide) appeals from jury verdict awarding plaintiffs Michael Markham and Terry Markham Gibson (Markhams)[1] $275,000 in damages for the "structural collapse" of their residence.

On 28 February 1986 the Markhams purchased a lot located at 8103 Willow Glen Trail in Guilford County, North Carolina. On 4 March 1986 the Markhams entered into a contract with third-party defendant K. J. Smith Builders & Realty (Smith Builders) for the construction of a residence on the above lot.

In or around late November 1986, Michael Markham purchased an Elite Homeowners Policy HO-3 (Elite policy) from Nationwide. The Elite policy, by its own terms, covers "structural collapse," but excludes "inherent vice; latent defect; . . . settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings."

After moving into the house, the Markhams experienced a stream of problems relating to, among other things, the walls, foundation, and footings. These problems continued until the Markhams, on 19 July 1991, abandoned their residence because it was structurally unsafe for habitation.

In or about April 1991, the Markhams filed a claim under the Elite policy which Nationwide subsequently denied. On 19 August 1993 the Markhams instituted an action against Smith Builders and K.J. Smith, individually—case no. 93 CVS 8698 (Smith case). On 20 August 1993 the Markhams instituted the present action against Nationwide alleging contractual and extra-contractual claims. On 6 December 1993 Nationwide filed a third-party complaint against Smith Builders

1. Although now divorced, Terry Markham Gibson and Michael Markham were married at the time of the alleged structural collapse. Therefore, we will refer to them collectively as "the Markhams."

asserting, "if a judgment is entered for [the Markhams] for any damages alleged in their complaint, [] Nationwide have and recover of [Smith Builders] the amount of such judgment, plus costs and attorneys fees[.]"

On 25 January 1995 Nationwide made a motion to consolidate the instant case and the Smith case. The trial court denied Nationwide's motion to consolidate. On 1 February 1995 the Markhams agreed to settle the Smith case for $150,000. On 22 February 1995 the trial court granted summary judgment to Smith Builders on Nationwide's third-party subrogation claim.

After hearing all the evidence in the present case, the jury returned the following verdict:

1. Did the [Markhams'] residence structurally collapse?

   [Yes.]

2. Was coverage of the damage to [the Markhams'] home excluded by the policy?

   [No.]

3. Did the collapse occur after August 20, 1990?

   [Yes.]

   If "yes", go to Issue 4 and 5. If "no", return to the courtroom.

4. What amount of damages are the [Markhams] entitled to recover for covered damage to [their] home?

   $275,000.

5. What amount of damage are the [Markhams] entitled to recover for loss of use?

   $0 for Mr. Markham.

   $0 for Ms. Gibson.

The above verdict was entered by the trial court on 27 October 1995. On 27 September 1995 Nationwide filed a motion for judgment notwithstanding the verdict (JNOV) and for a new trial, or, in the alternative, for a $150,000 credit on the judgment. On 13 November 1995 the trial court denied Nationwide's post-trial motions.

On appeal, Nationwide contends the trial court erred by: (1) failing to consolidate the instant case and the Smith case; (2) granting

summary judgment to Smith Builders; (3) denying Nationwide's motions for directed verdict and JNOV; (4) failing to properly instruct the jury; (5) refusing to grant Nationwide a $150,000 credit on the judgment; and (6) ordering Nationwide to post a $2000 appeal bond.

At the outset we note Nationwide failed to cite any authority in support of its contention the trial court erroneously instructed the jury, and we, thus, decline to consider this issue. *See* N.C.R. App. P. 28(b)(5).

I.

[1] Nationwide first alleges the trial court abused its discretion by refusing to consolidate the present action with the Smith case.

N.C. Gen. Stat. § 1A-1, Rule 42(a) provides, in pertinent part, that "[w]hen actions involving a common question of law or fact are pending in one division of the court, the judge . . . may order all the actions consolidated . . . ." *Id.* (1990) (emphasis added). A trial court's ruling on a Rule 42 motion will not be reversed on appeal absent a manifest abuse of discretion. *In re Moore*, 11 N.C. App. 320, 322, 181 S.E.2d 118, 120 (1971). Indeed, when the trial court's failure to consolidate is assigned as error, the appellant must establish that it was injured or prejudiced. *Id.*

Admittedly, the present case and the Smith case share a common nucleus of basic facts. These two cases, however, have few, if any, common legal issues. Consolidation of the instant action and the Smith case would therefore have created an extremely cumbersome case for the trial court to manage while also unnecessarily increasing the burden on the jury. Accordingly, the trial court did not abuse its discretion by denying Nationwide's motion to consolidate.

II.

[2] Nationwide next contends the trial court erred by granting summary judgment to Smith Builders because Nationwide's right of subrogation was not extinguished by settlement of the Smith case.

A motion for summary judgment should be granted if, and only if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). Such evidence must be viewed in the light most favorable to

the non-moving party with all reasonable inferences also drawn in favor of the non-movant. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-207, 210 S.E.2d 289, 291 (1974) " 'Irrespective of who has the burden of proof at trial . . . , upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact . . . and that he is entitled to judgment as a matter of law.' " *Id.* at 206, 210 S.E.2d at 291 (*quoting Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972)). The burden does not shift to the non-movant until the movant proffers sufficient evidence to "negative[] [the non-movant's] claim . . . in its entirety." *Id.*

"[I]t is a well established rule that if an insured settles with or releases a wrongdoer from liability for a loss before payment of the loss has been made by the insurance company, the insurance company's right of subrogation against the wrongdoer is thereby destroyed." *Hilley v. Insurance Co.*, 235 N.C. 544, 549, 70 S.E.2d 570, 574 (1952). *Cf. Insurance Co. v. Insurance Co.*, 49 N.C. App. 32, 38, 270 S.E.2d 510, 514 (1980) (insurer may not be subrogated to greater rights than possessed by insured). Nevertheless, a tortfeasor or wrongdoer cannot avoid the subrogation rights of an insurer by simply executing a release when, at a minimum, (a) the insurer was involved in the adjustment process, and (b) the tortfeasor or wrongdoer was on notice of the insurer's potential subrogation rights. *See Insurance Co. v. Bottling Co.*, 268 N.C. 503, 507, 151 S.E.2d 14, 17 (1966). As stated by our Supreme Court,

> " 'After the loss has been paid by the insurer, or the insurance is in the process of adjustment, a third person, having knowledge of the fact, cannot make settlement with insured for the loss, his liability being to insurer to the extent of the insurance paid; and if a third person makes such settlement it is no defense to a suit by insurer against him.' "

Id. (*quoting Insurance Co. v. Spivey*, 259 N.C. 732, 734, 131 S.E.2d 338, 340 (1963)) (emphasis added).

In the instant action, on 8 November 1993, Nationwide filed a third-party complaint against Smith Builders alleging potential subrogation rights. Smith Builders was thus on notice of Nationwide's potential subrogation rights prior to its release by the Markhams around February 1995. Therefore, Nationwide's subrogation rights were preserved if, and only if, Nationwide was engaged in the adjustment process after it denied the Markhams' claim in 1991.

"In the law of insurance, the adjustment of a loss is the ascertainment of its amount and the ratable distribution of it among those liable to pay it." BLACK'S LAW DICTIONARY 43 (6th ed. 1990). The term adjustment "has also been defined as the settling and ascertaining of the amount of indemnity which the insured, after making all proper allowances, is entitled to receive . . . ." 44 AM JUR. 2D *Insurance* § 1674 (1982). Neither definition necessarily implies an insurer must admit liability on a claim to be involved in the adjustment process. *See id.* The above definitions do indicate, however, that an insurer which outright denies a potential claim is not involved in the adjustment process. *Cf. Sexton v. Continental Casualty Co.*, 816 P.2d 1135, 1137 (Okla. 1991); *Roberts v. Fireman's Ins. Co.*, 101 A.2d 747, 749-750 (Pa. 1954). Simply put, "[a]n insurer may not complain of its . . . loss of subrogation rights when the settlement comes after the insurer denied coverage under the policy." *Sexton*, 816 P.2d at 1138. *See also Roberts*, 101 A.2d at 749-750. To hold otherwise would result in an insured "los[ing] the true value of that contract for which he has paid his premium." *Poole v. William Penn Fire Ins. Co.*, 84 So. 2d 333, 336 (Ala. 1955). *Cf. Brandon v. Insurance Co.*, 301 N.C. 366, 370, 271 S.E.2d 380, 383 (1980) (insurer may waive any right in policy inserted for its benefit).

In the instant action, as found by the jury, Nationwide wrongfully denied the Markhams' claim under the Elite policy in 1991. On 1 February 1995, almost four years after Nationwide's denial, the Markhams settled with Smith Builders. Stated succinctly, Nationwide's actions forced the Markhams to retain counsel and independently pursue their rights against the alleged tortfeasor. Where, as here, an insurance company remains inactive when confronted with substantial evidence coverage exists, equity mandates the insurer must also accept the risk of losing its subrogation rights. *See Powers v. Calvert Fire Ins. Co.*, 57 S.E.2d 638, 642 (S.C. 1950). *See also Board of Architecture v. Lee*, 264 N.C. 602, 612, 142 S.E.2d 643, 650 (1965) ("equity protects the vigilant").

We reject Nationwide's argument that loss of their subrogation rights under the present circumstances (*i.e.*, a close question of liability under the Elite policy) is a "severe sanction" not contemplated by the law. Indeed, "[t]he remedy for the apparent dilemma lay in [Nationwide's] hands," *Powers*, 57 S.E.2d at 641, as Nationwide could have, *among other things*, instituted a declaratory judgment action to determine whether coverage existed under the Elite policy, *see Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 522, 369

S.E.2d 128, 129 (1988). In any event, allowing Nationwide to proceed with its subrogation claim under the present circumstances would, without question, undermine the public policy of encouraging voluntary settlement between tortfeasor and aggrieved party. *See Dixie Lines v. Grannick*, 238 N.C. 552, 555, 78 S.E.2d 410, 413 (1953) (out-of-court settlements are favored and encouraged by the law).

Our holding is consistent with the well established principle that "equity protects the vigilant, and not those who sleep on their rights . . . ." *Board of Architecture*, 264 N.C. at 612, 142 S.E.2d at 650. Moreover, as the legal landscape in this substantive area of the law—settlement or release between insured and tortfeasor defeats the insurer's subrogation rights—has long been settled, *see Hilley*, 235 N.C. at 549, 70 S.E.2d at 574, Nationwide cannot credibly argue their loss of potential subrogation rights constitutes a "severe sanction."

Nationwide further argues if this Court finds the release destroyed Nationwide's right to subrogation, then we must also conclude, as a matter of law, the Markhams "have violated their insurance contract, [thereby] voiding the policy." We summarily reject this argument because, in light of Nationwide's own actions, it cannot now "complain of its . . . loss of subrogation rights . . . ." *Sexton*, 816 P.2d at 1138. *See also Roberts*, 101 A.2d at 749-750.

Accordingly, the trial court did not err in granting summary judgment in favor of Smith Builders.

III.

[3] Nationwide also alleges the trial court erred by denying its motions for directed verdict and JNOV. Specifically, Nationwide argues the Markhams' claims are barred by either (A) the statute of limitations, or (B) the settling and latent defect exclusion in the policy.

Because both a motion for directed verdict and a JNOV motion 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), courts apply the same standard to both motions, *Moon v. Bostian Heights Volunteer Fire Dept.*, 97 N.C. App. 110, 111, 387 S.E.2d 225, 226 (1990). In either situation, the evidence presented at trial must be considered 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). Further, any conflicts or inconsistencies in the evidence must be resolved in favor of the non-movant. *Id.*

A.

The Elite policy states that any suit instituted under the policy must be filed "within three years after the occurrence causing loss or damage." See N.C. Gen. Stat. § 1-52 (1996). Specifically, Nationwide argues the damage to the Markhams' residence "occurred" and was discovered in 1987—more than three years prior to 20 August 1993, the date the Markhams instituted the present action.

The three-year statute of limitation imposed on claims under the Nationwide policy is, as are all such limitation periods, " 'inflexible and unyielding.' " *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 356, 301 S.E.2d 459, 462 (*quoting Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957)), *disc. review denied*, 309 N.C. 319, 306 S.E.2d 791 (1983). Further, once a defendant properly pleads the statute of limitations as an affirmative defense, the burden is on the plaintiff to establish its claim is not time barred. *Burkhimer v. Gealy*, 39 N.C. App. 450, 452, 250 S.E.2d 678, 680, *disc. review denied*, 297 N.C. 298, 254 S.E.2d 918 (1979).

At trial, the Markhams presented the testimony of several expert witnesses. Our review of this expert testimony indicates, when viewed, as we must, in the light most favorable to the non-movant, *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337-338, that the Markhams presented sufficient evidence the alleged "structural collapse" occurred after 20 August 1990. It necessarily follows the trial court did not err by submitting the statute of limitations issue to the jury.

B.

[4] Nationwide also contends the damage to the Markhams' residence falls within one of two exclusions in the Elite policy—the settlement exclusion or the latent defect exclusion.

As a threshold consideration, Nationwide asserts the trial court committed reversible error by submitting Issue II—Was coverage of the damage to [the Markhams'] home excluded by the [Elite] policy?—to the jury. By submitting this issue, the trial court, according to Nationwide, impermissibly "abdicated her responsibility [to interpret the meaning of certain terms in the Elite policy] and created reversible error."

Admittedly, the meaning of ambiguous language within an insurance policy is a question of law for the court. *Trust Co. v. Insurance*

Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Nevertheless, when, as here, the facts and circumstances surrounding a claim—especially causation—remain in dispute, it is for the jury, not the trial court, to determine whether the ultimate cause of the claimed damages falls within the scope of the policy's exclusionary provisions, as defined by the trial court. *Cf. Wilson v. Bellamy*, 105 N.C. App. 446, 464, 414 S.E.2d 347, 357 (credibility is for jury), *disc. review denied*, 331 N.C. 558, 418 S.E.2d 668 (1992); *James v. R.R.*, 236 N.C. 290, 293, 72 S.E.2d 682, 684 (1952) ("jury must [determine] what the evidence proves."); *Brinkley v. Insurance Co. and Transport Co. v. Insurance Co.*, 271 N.C. 301, 305, 156 S.E.2d 225, 228 (1967) ("functions of the jury and the judge are separate and distinct, and neither may invade the province of the other."). Therefore, as the trial court defined all applicable ambiguous language in the Elite policy during its jury charge, Nationwide's argument must fail.

1.

The Elite policy provides coverage for the collapse of a building, but expressly excludes damage caused by "settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings" (settling exclusion).

The term "collapse," when, as here, ambiguous, has been defined to include " 'settling, cracking, shrinking, bulging or expansion' [which] . . . suddenly and materially impair[s] the structure or integrity of the building," even though a policy contains a settling exclusion. *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 513, 428 S.E.2d 238, 242 (1993). Nationwide correctly asserts the record contains some evidence to support its proposition the Markhams' damage was caused entirely by non-compensable settling. A reasonable juror could nonetheless also conclude the expert testimony proffered by the Markhams, taken in the light most favorable to them, *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337-338, establishes the Markhams' residence was rendered uninhabitable by settling which "suddenly and materially impair[ed] the structure or integrity of the building," *Guyther*, 109 N.C. App. at 513, 428 S.E.2d at 242. *Cf. Garrett v. Overman*, 103 N.C. App. 259, 262, 404 S.E.2d 882, 884, *disc. review denied*, 329 N.C. 787, 408 S.E.2d 519 (1991) (if reasonable mind may find evidence supports claim, motion for directed verdict must be denied). We therefore conclude the Markhams' claim was not, as a matter of law, barred by the settling exclusion.

2.

[5] The Elite policy also excludes from the scope of coverage any damage caused by latent defects. The term "latent defect" is, however, not defined by the policy.

Nationwide argues a latent defect exclusion should embrace situations:

> where defective construction, design, or fabrication of property results in the property's failure or deterioration before its normal life, and the defect is not apparent upon reasonable inspection but only after a post-failure examination by an expert . . . .

Carty v. American States Ins. Co., 9 Cal. Rptr. 2d 1, 3 (1992) (*quoting Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, 270 Cal. Rptr. 405, 410 (1990)). The Markhams', on the other hand, assert

> the great majority of the cases construing "latent defect" exclusions in policies of insurance limit the meaning of a latent defect to some inherent defect in the materials used in construction which could not be discovered by any known or customary test and do not include faulty design or construction within the meaning of this provision.

Mattis v. State Farm Fire and Casualty Co., 454 N.E.2d 1156, 1162 (Ill. App. Ct. 1983) (emphasis added) (citations omitted). Coupling the lack of uniformity among other jurisdictions addressing this issue and the absence of an express definition in the Elite policy, the present latent defect exclusion is, at best, ambiguous.

In North Carolina, any ambiguity in the provisions of an insurance contract must be construed against the insurer. *See Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. 91, 97, 436 S.E.2d 243, 247 (1993). Further, as our courts are not favorably disposed toward provisions limiting the scope of coverage, exclusions are " 'to be strictly construed to provide the coverage which would otherwise be afforded by the policy.' " *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453 (*quoting Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981)), *disc. review denied*, 333 N.C. 790, 431 S.E.2d 22 (1993). Toward that end, we adopt, as did the trial court, the definition of latent defect enunciated in *Mattis*—a latent defect exclusion, absent a contrary definition in the policy, encompasses only an "inherent defect in the materials used in construction

which could not be discovered by any known or customary test and do[es] not include faulty design or construction . . . ." *Mattis*, 454 N.E.2d at 1162.

Even though there was evidence to the contrary, we believe, after carefully reviewing the present record in the light most favorable to the Markhams, *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337-338, that a reasonable juror could find the damage to the Markhams' residence resulted from faulty design or construction, not an inherent defect in the construction materials. Thus, Nationwide was not entitled to judgment as a matter of law. *See Garrett*, 103 N.C. App. at 262, 404 S.E.2d at 884 (if reasonable mind may find evidence supports claim, motion for directed verdict must be denied).

In sum, as the record, taken in the light most favorable to the Markhams, indicates the present action was instituted within the applicable limitation period and none of the exclusions within the Nationwide policy apply to the Markhams' claim, the trial court properly denied Nationwide's motions for directed verdict and JNOV.

IV.

[6] We next consider whether the trial court erred by refusing to grant Nationwide a credit or set-off against the total judgment for the $150,000 the Markhams received from settling the Smith case.

As a general rule, in contract actions, " '[p]ayment of compensation . . . to plaintiff by a third party . . . against whom a claim for damages is made with respect to the same subject matter may be shown in reduction of damages for breach of contract.' " *Duke University v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 681, 384 S.E.2d 36, 47 (1989) (*quoting* 25 C.J.S. *Damages* § 97 (1966)). Simply put, although plaintiff is entitled to full recovery for its damages, *see Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 615, 306 S.E.2d 519, 526, *disc. review denied*, 310 N.C. 154, 311 S.E.2d 294 (1983), plaintiff is nevertheless not entitled to "double recovery" for the same loss or injury, *Holland v. Utilities Co.*, 208 N.C. 289, 292, 180 S.E. 592, 594 (1935). *See also Baity v. Brewer*, 122 N.C. App. 645, 647, 470 S.E.2d 836, 837-838 (1996); *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 134, 141-142, 468 S.E.2d 69, 74-75 (1996). As stated by our Supreme Court, "any amount paid by anybody . . . for and on account of any injury or damage should be held for a credit on the total recovery . . . ." *Holland*, 208 N.C. at 292, 180 S.E. at 593-594.

At first blush, the $275,000 awarded in the subject action and the $150,000 settlement appear to compensate the Markhams for the same loss—destruction of their residence. Careful review of the Smith case, however, indicates the Markhams claimed damages for, among other things, allegedly negligent acts arising before 20 August 1990. The jury, here, awarded damages only for losses suffered after 20 August 1990. It naturally follows a portion of the $150,000 settlement in the Smith case may reasonably be viewed as compensation for damages suffered for the time period outside the scope of the award in the present case. Nationwide is thus not necessarily entitled to a credit of $150,000 against the instant judgment.

In any event, Nationwide failed to include the settlement agreement in the present record. *Cf. Cellu Products Co. v. G.T.E. Products Corp.*, 81 N.C. App. 474, 477-478, 344 S.E.2d 566, 568 (1986) (this Court can only "judicially know what appears of record"). In fact, the present record is devoid of any evidence from which this Court could determine what portion, if any, of the $150,000 settlement compensated the Markhams for damages incurred after 20 August 1990. Therefore, as this Court can only judicially know that which is of record, *id.*, and it was Nationwide's burden to include all pertinent information in the record, *Crowell Constructors, Inc. v. State ex rel Cobey*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991), we cannot say the trial court erred by refusing to grant Nationwide a $150,000 credit against the Markhams' $275,000 judgment.

V.

[7] Finally, Nationwide alleges the trial court erred by ordering Nationwide to post an appeal bond in the amount of $2000.

N.C. Gen. Stat. § 1-285 provides, in pertinent part:

> (a) To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in the sum of two hundred fifty dollars ($250.00), or any lesser sum as might be adjudged by the court . . . .

Id. (1996) (emphasis added). The plain language of this statute places the amount of the surety bond in the sole discretion of the trial court with but one caveat—the surety amount cannot exceed $250. Therefore, the trial court erred by requiring Nationwide to post a $2000 surety bond before proceeding with this appeal. Accordingly,

we reverse the trial court's order and remand with instruction that Nationwide be refunded $1750.

Finally, we note, after carefully reviewing the present record, that Nationwide's remaining assignments of error are without merit.

No error; remanded for correction of amount of appeal bond.

Judges LEWIS and SMITH concur.

REBECCA BEAUCHESNE, PETITIONER v. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENT

No. COA95-914

(Filed 4 March 1997)

1. Public Officers and Employees § 53 (NCI4th)— exhaustion of leave time—dismissal—applicable administrative code

In an action arising from the dismissal of an employee who was unable to return to work after she had exhausted her leave time, the State Personnel Commission committed no error of law in determining 25 NCAC 1D.0519 to be applicable, and in determining that consideration of the factors set out in 25 NCAC 1E.1104 was neither necessary nor appropriate because 25 NCAC 1D.0519 covers circumstances wherein an employee is presently absent from work, has no leave time to cover the absence, and is therefore subject to separation. 25 NCAC 1E.1104 governs requests for unpaid leave at some future date, regardless of whether the employee has available leave time.

Am Jur 2d, Job Discrimination § 1067; Wrongful Discharge § 190.

2. Public Officers and Employees § 53 (NCI4th)— exhaustion of leave—application for leave without pay—not an alternative proposal

In an action arising from petitioner's discharge from a secretarial position at the Ackland Museum at the University of North Carolina at Chapel Hill after exhausting her sick and vacation leave, her application for unpaid leave did not qualify as an alter-

native proposal under 25 NCAC 1D.0519(b) because it is evident that the accommodations anticipated in that provision do not include leave without pay, but rather such alternatives as reduction in hours from full to part-time, or alteration of the work schedule to make the employee available to perform critical work.

Am Jur 2d, Job Discrimination § 1067; Wrongful Discharge § 190.

3. Public Officers and Employees § 53 (NCI4th)— leave exhausted—employee terminated—State Personnel Commission review—whole record test

The trial court did not err in an action arising from petitioner's discharge as a secretary for the Ackland Museum at the University of North Carolina at Chapel Hill by upholding the State Personnel Commission's ruling as neither arbitrary nor capricious where a review of the whole record revealed substantial evidence to support the Commission findings that petitioner was properly terminated under applicable provisions of 25 NCAC 1D.0519 and petitioner presented no evidence of when, if ever, she would return to work.

Am Jur 2d, Administrative Law §§ 529-532.

4. Public Officers and Employees § 53 (NCI4th)— shared leave application—failure to process—no agency action—not a contested case

The State Personnel Commission properly ruled that petitioner did not have a right of appeal regarding the failure to process in a timely manner a shared leave application. The failure to process petitioner's application did not involve a disciplinary action, petitioner has proffered no allegations of discrimination, and there is no provision in the State Personnel Act indicating that agency action on a request for shared leave gives rise to a contested case.

Am Jur 2d, Administrative Law §§ 498, 499.

Judge GREENE concurring in the result.

Appeal by petitioner from order entered 17 April 1995 by Judge Osmond Smith in Alamance County Superior Court. Heard in the Court of Appeals 19 April 1996.

North State Legal Services, Inc., by Carlene McNulty, for petitioner-appellant.

Attorney General Michael F. Easley, by Associate Attorney General M. A. Kelly Chambers and Assistant Attorney General Anne J. Brown, for defendant-appellee.

JOHN, Judge.

Petitioner Rebecca Beauchesne argues the trial court erred by affirming the State Personnel Commission's [SPC] decision that she was not unfairly denied leave without pay and that she could not pursue an appeal based on her application for shared leave. We conclude petitioner's contentions are unavailing.

Petitioner was employed by the Ackland Art Museum (the museum) at the University of North Carolina at Chapel Hill (the University) from 9 September 1987 until she was terminated 29 May 1992. At the time of her discharge, petitioner's position, classified Secretary IV, was the only secretarial position in the museum. Petitioner was responsible for seventy-five percent of the correspondence processed by the museum, serving in addition as receptionist and telephone operator. Her duties also included managing the museum payroll, circulating mail, and filing.

Petitioner left work early on 13 April 1992 due to a migraine headache and was subsequently hospitalized. Petitioner informed her employer that she would be unable to return to work for the remainder of the week. In letters to the museum dated 22 April and 28 April 1992, Dr. Xaver Hertle (Dr. Hertle) explained that petitioner had been hospitalized and that he was unsure when she would be able to return to work. Dr. Hertle's 28 April letter requested that petitioner be considered for shared leave, a process by which an employee might utilize accumulated leave voluntarily donated by another employee, *see* N.C. Admin. Code tit. 25, r. 1E.1301 *et seq.* (effective 1 May 1990), and included petitioner's application for such leave. Petitioner's 6 May letter to museum director Dr. Charles Millard (director Millard) also referred to her request for shared leave. However, director Millard neither affixed his signature in the designated space on the request form, nor forwarded it for approval to the University's shared leave coordinator in the Department of Human Resources.

Before receiving Dr. Hertle's 28 April letter, director Millard sent petitioner correspondence dated 30 April 1992, indicating she had

exhausted her available sick and vacation leave and in fact was 42 hours overdrawn on allotted leave time. In this letter, director Millard stated the museum had processed the paperwork to place petitioner on leave without pay retroactive to 6 April 1992, pending a final decision concerning her position at the museum.

In an 8 May letter to petitioner, director Millard reported he would be unable to grant additional unpaid leave, citing the importance of petitioner's position to the museum, the inadequacy of temporary help, and budget constraints. He further indicated she must either return to work full time by 18 May 1992 or submit alternative proposals for accommodating the museum's needs as well as her own.

On 13 May 1992, Dr. Hertle wrote director Millard that petitioner was unable to return to work for the foreseeable future. Dr. Hertle requested that petitioner be placed on short term disability, and that director Millard forward the necessary forms. Director Millard replied 18 May 1992, indicating he had received no alternative proposals from petitioner concerning accommodation of the museum's needs, but extending the deadline for such proposals to 25 May. Director Millard also provided petitioner with the appropriate contact to apply for short term medical disability. *See* N.C.G.S. § 135-100 *et seq.* (1995). Petitioner's application for short term disability of one year beginning 13 June 1992 was approved following her termination and was subsequently extended for an additional year.

Petitioner's 21 May reply to director Millard contained no alternative proposal. In a letter dated 28 May 1992, director Millard notified petitioner she would be separated effective 29 May 1992 due to "unavailability when leave is exhausted."

Petitioner appealed through the grievance process of the University, her discharge ultimately being upheld by University Chancellor Paul Hardin (Hardin). Hardin nonetheless recommended that petitioner's shared leave application be processed, and that she be allowed an extension of time to receive donated leave. Petitioner testified she eventually obtained donated leave satisfying all but thirty-two hours of her shared leave request.

Petitioner filed a request for a contested case hearing before the Office of Administrative Hearings (OAH) on 16 December 1992. She alleged the University had "acted erroneously; arbitrarily or capriciously; failed to act as required by law or rule; and/or failed to use

proper procedure." The matter was heard 21 June 1993 before Administrative Law Judge Brenda B. Becton (the ALJ), who rendered a recommended decision in petitioner's favor 1 October 1993. In making her decision, the ALJ analyzed petitioner's termination under the factors set forth in N.C. Admin. Code tit. 25, r. 1E.1104 (November 1990) (25 NCAC 1E.1104).

However, in a 15 August 1994 decision containing its own findings of fact and conclusions of law, the SPC upheld Hardin's action. The SPC concluded as a matter of law that petitioner's application for leave without pay was subject to review under N.C. Admin. Code tit. 25, r. 1D.0519 (November 1989) (25 NCAC 1D.0519), and that substantial evidence supported her discharge thereunder. With respect to petitioner's request for voluntary shared leave, the SPC concluded:

> The State Personnel Act does not provide a right to challenge the denial of such leave. Therefore, the State Personnel Commission has no jurisdiction over this issue.

On 15 September 1994, petitioner sought judicial review in the trial court. The matter was heard 27 March 1995 and, "[a]fter reviewing the whole record," the court affirmed the decision of the SPC in an order filed 17 April 1995. Petitioner appeals.

Petitioner first argues the SPC failed to address whether the University, in denying her leave without pay, considered factors such as petitioner's needs, the likelihood of her returning to duty, and the ability of the University to reinstate her to a position of like status and pay upon her return. *See* 25 NCAC 1E.1104. She further contends the SPC's findings of fact were not supported by substantial evidence, and that its failure to adopt the ALJ's recommended findings was arbitrary and capricious. Petitioner's contentions cannot be sustained.

Judicial review of an administrative decision is governed by the North Carolina Administrative Procedure Act (the APA). N.C.G.S. § 150B-1 *et seq.* (1995). Under the APA, the court reviewing a final agency decision may affirm the agency, remand for further proceedings, or it may reverse or modify the decision

> if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> . . . .

(4) Affected by other error of law;

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

(6) Arbitrary or capricious.

G.S. § 150B-51(b).

On appeal from the trial court to this Court, our task is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. *Haynes v. N.C. Dept. of Human Resources*, 121 N.C. App. 513, 515, 470 S.E.2d 56, 57 (1996); *Gray v. Orange County Health Dept.*, 119 N.C. App. 62, 73, 457 S.E.2d 892, 900, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 511 (1995); *In re Appeal of Harper*, 118 N.C. App. 698, 701, 456 S.E.2d 878, 880, *disc. review denied*, 340 N.C. 567, 460 S.E.2d 317 (1995); *Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 566-67, 452 S.E.2d 337, 344 (1995).[1] However, we need consider only "those grounds for reversal or modification argued by the petitioner before the superior court, and properly assigned as error on appeal to this Court." *Professional Food Services Mgmt. v. N.C. Dept. of Admin.*, 109 N.C. App. 265, 268, 426 S.E.2d 447, 449 (1993).

[1] Petitioner's argument the SPC erroneously failed to address the factors set out in 25 NCAC 1E.1104 in approving her termination is tantamount to assertion of an error of law. *See Amanini*, 114 N.C. App. at 678, 443 S.E.2d at 120 ("rules, regulations and policies promulgated by the [SPC under statutory authority] have the force and effect of law," and erroneous interpretation thereof by agency constitutes an error of law). Accordingly, our *de novo* review of this contention is required. *See In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). *De novo* review compels a court to consider a question anew, as if not considered or decided below. *Friends of Hatteras Island*, 117 N.C. App. at 567, 452 S.E.2d at 344.

The SPC determined petitioner was properly terminated on grounds of "unavailability" pursuant to 25 NCAC 1D.0519. Relevant portions of the regulation state:

1. The concurrence herein highlights the divergence in opinions of this Court regarding our role on appeal of matters first decided in an administrative proceeding. The problem received detailed discussion in *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674-76, 443 S.E.2d 114, 118-19 (1994), and further in *Willoughby v. Bd. of Trustees of State Employees Ret. Sys.*, 121 N.C. App. 444, 446-47, 466 S.E.2d 285, 287-88 (1996).

.0519 UNAVAILABILITY WHEN LEAVE IS EXHAUSTED

(a) An employee may be separated on the basis of unavailability when the employee becomes or remains unavailable for work after all applicable leave credits and benefits have been exhausted and agency management does not grant a leave without pay for reasons deemed sufficient by the agency. Such reasons include, but are not limited to, lack of suitable temporary assistance, criticality of the position, budgetary constraints, etc. Such a separation is an involuntary separation, and not a disciplinary dismissal . . . .

(b) Prior to separation, the employing agency shall meet with or at least notify the employee in writing, of the proposed separation, the efforts undertaken to avoid separation and why the efforts were unsuccessful. The employee shall have the opportunity in this meeting or in writing to propose alternative methods of accommodation. If the proposed accommodations are not possible, the agency must notify the employee of that fact and the proposed date of separation. . . .

(c) Involuntary separation pursuant to this Rule may be grieved or appealed. The employing agency must also give the employee a letter of separation stating the specific reasons for the separation and setting forth the employee's right of appeal. The burden of proof on the agency in the event of a grievance is not just cause as that term exists in G.S. 126-35. Rather, the agency's burden is to prove that the employee was unavailable and that the agency considered the employee's proposed accommodations for his unavailability and was unable to make the proposed accommodations or other reasonable accommodations.

Petitioner maintains director Millard, when reviewing her application for unpaid leave, should have considered the factors listed in 25 NCAC 1E.1104 in addition to those set out in subsection (a) above. 25 NCAC 1E.1104 reads as follows:

.1104 AGENCY RESPONSIBILITY

The decision to grant leave without pay is an administrative one for which the agency head must assume full responsibility. Factors to consider are needs of the employee requesting leave, workload, need for filling employee's job, chances of employee returning to duty, and the obligation of the agency to reinstate employee to a position of like status and pay. It is the responsi-

> bility of the agency to administer leave without pay in a manner that is equitable to all of its employees. Reinstatement to the same position or one of like seniority, status and pay must be made upon the employee's return to work unless other arrangements are agreed to in writing. If it is necessary to fill a position which is vacant by leave without pay, the position may be filled by a temporary or time-limited permanent appointment, whichever is appropriate.

Petitioner misapprehends the purport of the two regulations.

The foregoing sections governing unpaid leave apply in different situations. 25 NCAC 1D.0519 is contained in that portion of Title 25 labelled "SECTION .0500—SEPARATION," which also includes regulations dealing with resignation and retirement. Statutory authority for its enactment is derived specifically from N.C.G.S. § 126-4(7a) (1993), which provides that "the State Personnel Commission shall establish policies and rules governing . . . [t]he separation of employees," and N.C.G.S. § 126-35 (1993), which dictates procedures to be used in disciplinary actions against state employees.

By contrast, 25 NCAC 1E.1104 is situated in the segment of Title 25 denominated "SECTION .1100—OTHER LEAVES WITHOUT PAY;" leave under this section may be granted for "educational purposes, vacation, or for any other reasons deemed justified by the agency head and the State Personnel Director," 25 NCAC 1E.1101. Statutory authority for 25 NCAC 1E.1104 is listed as being derived from N.C.G.S. § 126-4, the section setting forth powers and duties of the SPC, as a whole.

25 NCAC 1D.0519 covers circumstances wherein an employee is presently absent from work, has no leave time to cover the absence, and is therefore subject to separation. On the other hand, 25 NCAC 1E.1104 governs requests for unpaid leave at some future date, regardless of whether the employee has available leave time. In the former situation, because the employee is immediately absent from work, there may be a need for swift agency action; 25 NCAC 1D.0519 thus allows an agency to deny leave without pay "for reasons deemed sufficient by the agency." By contrast, 25 NCAC 1E.1104 requires that certain factors be considered by the agency in deciding whether to grant leave without pay, such as the "needs of the employee" and the "obligation [*i.e.*, ability] of the agency to reinstate employee to a position of like status and pay" when he or she returns. Obviously, consideration of such factors is more easily accomplished when

the agency has advance notice of the employee's desire for leave time.

Under the circumstances *sub judice*, we conclude the SPC committed no error of law in determining 25 NCAC 1D.0519 to be applicable to its review of petitioner's termination upon denial of her application for unpaid leave, and that consideration of the factors set out in 25 NCAC 1E.1104 was neither necessary nor appropriate.

[2] Notwithstanding, petitioner points to the requirement of 25 NCAC 1D.0519(b) that the agency consider alternative proposals to separation put forward by the employee. Petitioner insists her application for unpaid leave qualified as an alternative proposal which was not properly considered by director Millard. However, when 25 NCAC 1D.0519(a) and (b) are read together, it is evident the accommodations anticipated in the latter section do not include leave without pay, but rather such alternatives as reduction in hours from full to part-time, or alteration of work schedule to make the employee available to perform critical work. Indeed, inclusion of unpaid leave as an accommodation under 25 NCAC 1D.0519(b) would render the discussion of unpaid leave in 25 NCAC 1D.0519(a) redundant. When possible, a regulation is to be construed to give all parts meaning. *Cf. Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (statutory provisions dealing with same subject matter should be construed to give meaning to each provision). Petitioner's contention that her request for unpaid leave constituted a proposed accommodation is therefore unfounded.

[3] Regarding petitioner's claim that the SPC's decision was not supported by substantial evidence and was arbitrary or capricious, the "whole record" test must be employed. *See Friends of Hatteras Island*, 117 N.C. App. at 567, 452 S.E.2d at 344. In applying the "whole record" test, the reviewing court must examine all competent evidence, including that which contradicts the agency's findings, to determine if the agency decision is possessed of a rational basis in the evidence. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530-31, 372 S.E.2d 887, 889-90 (1988). However,

> the "whole record" test does not allow the reviewing court to replace the [agency's] judgment as between two reasonable conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Further, the court may not "disturb an agency's assess-

ment of the credibility of the witnesses and the weight and sufficiency" to be given the evidence. *Teague v. Western Carolina University*, 108 N.C. App. 689, 692, 424 S.E.2d 684, 686, *disc. review denied*, 333 N.C. 466, 427 S.E.2d 627 (1993).

As to the "arbitrary or capricious" standard, this Court has observed that meeting the required showing is a difficult task. *See Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). Under this measure, the reviewing court may not overturn decisions within an agency's discretion "when that discretion is exercised in good faith and in accordance with the law." *Id.* Nonetheless, agency decisions may properly be characterized as "arbitrary or capricious" if they are

> "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ."

Id. (citations omitted).

The trial court's order indicates it employed the "whole record" test in determining whether the SPC's decision was supported by substantial evidence or was arbitrary or capricious, and petitioner does not contend otherwise. The trial court having exercised the appropriate scope of review concerning these issues, we turn to an examination of the "whole record" in light of petitioner's assignments of error to determine if the record sustains the court's ruling affirming the SPC. *See Friends of Hatteras Island*, 117 N.C. App. at 566-67, 452 S.E.2d at 344.

Review of the "whole record" reveals substantial evidence to support the SPC's findings that petitioner was properly terminated under applicable provisions of 25 NCAC 1D.0519. Petitioner became unavailable for work upon falling ill 13 April 1992 without sick or vacation leave. She presented no evidence as to when, if ever, she might be able to return to work. In the meantime, her position as the only secretary in the museum was not adequately filled by part-time employees, resulting in considerable disruption. Moreover, petitioner failed to respond to director Millard's request to provide a proposal regarding how her needs could be accommodated with those of the museum. Such evidence, taken as a whole, supports the SPC's determination that director Millard properly evaluated and subsequently denied petitioner's request for leave without pay under 25 NCAC 1D.0519.

Indeed, petitioner in her appellate brief tracks the factors set out in the regulation by asserting that

> her job was critical to the University and that her absence would cause a hardship on the smooth running of the Ackland Art Museum. The record reflects that she was a good employee and that in her absence things tended to fall apart. Employees could not get their work out, improper information was given to customers calling in, routine phone calls were handled improperly, payroll could not be handled properly, mail was lost and papers were misfiled. As the only secretary in the department, her position was vital, and temporary help was certainly not as good as having Petitioner on the job.

Moreover, we reiterate that notwithstanding petitioner's failure to submit a proposed accommodation, the museum attempted to accommodate her absence by hiring temporary help. Substantial evidence in the record reveals this solution did not meet the needs of the museum.

The trial court therefore correctly determined petitioner failed to demonstrate that the SPC's challenged findings were "unsupported by substantial evidence . . . in view of the entire record as submitted." In addition, the SPC's decision may not fairly be characterized as "patently in bad faith" or failing "to indicate . . . 'the exercise of judgment,' " *Lewis*, 92 N.C. App. at 740, 375 S.E.2d at 714, and the trial court thus did not err in upholding the SPC's ruling as neither "arbitrary [n]or capricious."

II.

[4] We turn next to petitioner's argument asserting failure to process her application for shared leave in a timely manner. The record indicates petitioner's request for shared leave accompanied Dr. Hertle's 28 April letter to director Millard, who neglected either to sign the request or to forward it for approval to the University shared leave coordinator. In his testimony, director Millard conceded he was unfamiliar with details of the University's shared leave policies, and that the Department of Human Resources had previously indicated petitioner's application was not handled properly.

The University responds that even if petitioner's shared leave application is accurately described as having been processed in a tardy fashion, the SPC correctly concluded it had no jurisdiction over the decision regarding shared leave and that it accordingly could not

consider any failure to act on petitioner's application. The SPC's Conclusion of Law #7 stated that:

> The [University] had the authority to review the merits of the voluntary shared leave request and approve or disapprove such a request. There is no obligation for an agency to grant an employee the opportunity for voluntary shared leave. The State Personnel Act does not provide a right to challenge the denial of such leave. Therefore, the State Personnel Commission has no jurisdiction over this issue.

Petitioner contends that denial of the prompt opportunity to assemble shared leave constituted a contested case under the jurisdiction of the SPC. As petitioner is asserting the SPC committed an "error of law" in its determination of lack of jurisdiction, our *de novo* review is again required. *See McCrary*, 112 N.C. App. at 165, 435 S.E.2d at 363. Based on the discussion which follows, we hold there is no right of appeal regarding processing of an employee's shared leave application.

Initially, we observe that

> [t]here is no inherent right of appeal from an administrative decision to either the OAH or the courts. "No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of common law, *unless the right is granted by statute.*"

Empire Power Co. v. N.C. Dept. of E.H.N.R., 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994) (emphasis added) (quoting *In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963)). The University is expressly exempted from the administrative hearings provisions of the APA, N.C.G.S. § 150B-1(f); accordingly, petitioner may be entitled to an OAH hearing, and subsequent review by the SPC, only if otherwise statutorily provided. *Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995).

The University properly maintains the controlling statute is N.C.G.S. § 126-37(a) (1993), *see Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 343, 389 S.E.2d 35, 38 (1990), *overruled on other grounds*, *Empire Power*, 337 N.C. at 584, 447 S.E.2d at 777, the relevant section of which provides:

> Appeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B . . . . The State Personnel Commission shall make a final decision in these cases as provided in G.S. 150B-36.

The University further contends petitioner's claim does not fall within the purview of G.S. § 126-37(a), thereby depriving OAH and the SPC of jurisdiction over her grievance.[2] We agree.

The University's failure to process petitioner's application for shared leave in a timely manner did not involve a disciplinary action, and petitioner has proffered no allegations of discrimination with regards to treatment of her application for shared leave. In addition, we have reviewed the State Personnel Act and have found no provision indicating that agency action on a request for shared leave gives rise to a contested case. We therefore conclude the SPC had no jurisdiction to consider petitioner's appeal on this issue.

In sum, petitioner's request for unpaid leave was properly considered by application of the factors set forth in 25 NCAC 1D.0519(a). Further, substantial evidence in the record supports her involuntary separation in consideration of these factors, and the decision to terminate petitioner may not properly be characterized as arbitrary and capricious. Finally, failure to act on petitioner's application for shared leave in a timely manner did not give rise to a contested case under the State Personnel Act. The trial court thus did not err in affirming the decision of the SPC.

Affirmed.

Judge GREENE concurring in the result.

Judge MARTIN, Mark D., concurs.

Judge GREENE concurring in the result:

I agree with the result reached by the majority. I do not agree that the majority has applied the correct standard of review. The majority

2. N.C.G.S. § 126-34.1 (effective 1 June 1995) now specifies with particularity those "personnel actions or issues" which may constitute the basis for "a contested case" under the State Personnel Act. However, the amended statute is inapplicable to the instant appeal.

states the standard of review for this Court: "[O]ur task is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." I believe this Court's standard of review is the same as that of the superior court. *Dockery v. N.C. Dep't of Human Resources*, 120 N.C. App. 827, 829, 463 S.E.2d 580, 582 (1995); *Wilkie v. N.C. Wildlife Resources Comm'n*, 118 N.C. App. 475, 482, 455 S.E.2d 871, 876 (1995); *Fain v. State Residence Comm. of UNC*, 117 N.C. App. 541, 543, 451 S.E.2d 663, 665, *aff'd*, 342 N.C. 402, 464 S.E.2d 43 (1995); *Brooks v. Ansco & Assocs.*, 114 N.C. App. 711, 715-16, 443 S.E.2d 89, 91-92 (1994); *Teague v. Western Carolina University*, 108 N.C. App. 689, 691, 424 S.E.2d 684, 686, *disc. rev. denied*, 333 N.C. 466, 427 S.E.2d 627 (1993); *Jarrett v. N.C. Dep't of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991). In other words, this Court's duty is to review the decision of the administrative agency (not the order of the superior court) in accordance with section 150B-51. *Cf. Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 627, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980) (all appellate courts are bound by the same standards of review). Indeed the majority in this case reviewed the "whole record" of the administrative agency and determined that there was "substantial evidence to support the SPC's findings that petitioner was properly terminated."

I acknowledge that there are two lines of cases in this Court with respect to this Court's standard of review of cases from the Superior Court when that court has reviewed a decision of an administrative agency. Our Supreme Court, however, has held that the Court of Appeals must exercise the same standard of review as that exercised by the superior court when the review relates to an administrative agency decision. *See Brooks, Comm'r of Labor v. Grading Co.*, 303 N.C. 573, 579-81, 281 S.E.2d 24, 28-29 (1981); *cf. Concrete Co.*, 299 N.C. at 626-27, 265 S.E.2d at 382-83 (Court of Appeals must exercise same standard of review as the superior court when reviewing zoning decisions of town board).

STATE OF NORTH CAROLINA v. DEBORAH ANN CLIFTON

No. COA95-1335

(Filed 4 March 1997)

1. Appeal and Error § 418 (NCI4th)— assignment of error—not argued—abandoned

Assignments of error not brought forth or argued are deemed abandoned pursuant to N.C.R. App. P. 28(a).

Am Jur 2d, Appellate Review §§ 18, 88, 89; Homicide § 560.

2. Evidence and Witnesses § 1767 (NCI4th)— evidence admitted—experiment—dissimilarities—actual circumstances—limited conclusions

The trial court in a second-degree murder prosecution properly admitted the results of experiments that demonstrated that it was probable that defendant was in close proximity to the defendant's husband at the time that he was shot because of the back splatter blood stains. The state's expert witness acknowledged the dissimilarity of the experiment and the actual circumstances and clearly indicated his limited conclusions that the blood splatter on the right shoulder of the defendant's blouse was the result of the person wearing the blouse being in close proximity to a source of blood at the time it was being acted upon by a force.

Am Jur 2d, Evidence §§ 996, 998, 1000-1004, 1012.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains. 66 ALR4th 588.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation. 9 ALR5th 369.

3. Evidence and Witnesses § 1757 (NCI4th)— second-degree murder—blood splatter tests—relevant—not prejudicial

The trial court in a second-degree murder prosecution properly admitted the results of blood splatter experiments where the experiments were relevant in that they demonstrated that it was more probable that defendant was in close proximity to the vic-

tim at the time the gun was fired; furthermore, the experiments cast doubt on the credibility of defendant's statements to police that she did not remember being close to her husband at the time of the shooting and that she did not see the shooting.

Am Jur 2d, Evidence §§ 996, 998, 1000-1004, 1012.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains. 66 ALR4th 588.

Admissibility, in criminal prosecution, of expert opinion evidence as to "blood splatter" interpretation. 9 ALR5th 369.

4. Homicide § 342 (NCI4th)— motion to dismiss—involuntary manslaughter—evidence sufficient

It was not error for the trial court to deny defendant's motion to dismiss charges of involuntary manslaughter in the death of defendant's husband where the state provided evidence of defendant's statements the day of the shooting; that defendant's husband had been happy just prior to the shooting; that defendant was in close proximity to her husband with back splatter blood stains on the right shoulder of her blouse; that shortly before the shooting, defendant and her husband were arguing about a new pickup truck and pistol; that both defendant and her husband had been drinking at the time of the shooting; evidence concerning the path of the bullet and the wound itself contradicted the possibility of self-infliction; evidence that self-infliction of such a wound by the victim with the .44 caliber pistol that was thirteen inches in length with a seven and three eighths inch barrel would be physically difficult; that the pistol was found lying on the kitchen counter some 54 inches from the body of the victim while his glasses were askew on the floor near the body; that no blood was found on the pistol; that the victim's father did not hear about his son's death from his daughter-in-law; that defendant did not speak to her father-in-law for over a year prior to trial; and that both defendant and her husband were right handed.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 62, 91, 92.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter. 19 ALR4th 861.

5. Criminal Law § 1649 (NCI4th Rev.)— second-degree murder—funeral expenses—restitution—insufficient findings

The trial court erred in ordering defendant to pay the victim's father $3,000 in restitution for funeral expenses where the record revealed no evidence of the cost of victim's funeral, or who paid it. A trial court's order of restitution must be supported by competent evidence in the record; restitution is not intended to punish defendants, but to compensate victims.

Am Jur 2d, Criminal Law §§ 1052, 1055.

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

6. Criminal Law § 1214 (NCI4th Rev.)— second-degree murder—sentencing—prior offense—pardon of forgiveness—judicial notice improper

It was improper for the trial court to take judicial notice of defendant's prior conviction for purposes of enhancing defendant's sentence where the judicial notice was of defendant's pardon of forgiveness for her 1979 conviction of accessory after the fact to robbery with a dangerous weapon. By taking judicial notice of the pardon of forgiveness and by finding that defendant's prior conviction constituted an aggravating factor, the trial court infringed upon the prerogatives of the governor. There are two types of pardons in North Carolina: A pardon of innocence, which is a full pardon; and a pardon of forgiveness, which is a conditional pardon. A conditional pardon can be revoked only by the governor and only after the governor has performed his administrative duty of evaluating any violations of the conditions of the pardon.

Am Jur 2d, Evidence § 142; Habitual Criminals and Subsequent Offenders § 13.

Appeal by defendant from judgment entered 30 June 1995 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 21 October 1996.

On 12 May 1994 defendant argued with her husband, James Clifton, in their kitchen about the purchase of a new pistol and truck. Both defendant and her husband had consumed alcohol. Defendant's husband had a blood alcohol level of 0.15.

At 9:20 p.m. Youngsville Volunteer EMS Sue Etta Allen responded to a 911 emergency call made by defendant. As Allen entered their kitchen, she observed defendant sitting on the left side of James Clifton's body which lay on the kitchen floor in a pool of blood. Defendant had blood on her hands, face, and blouse. Defendant stood and ran out of the house into the yard hollering, "Help me, help me." Defendant was "frantic, hysterical, and very upset."

Another rescue worker, Justin Scott Gailey, arrived immediately after Allen. He began to assist Allen and noticed James Clifton had ceased breathing and did not have a pulse. Gailey observed a large wound in the armpit area of James Clifton's left side. The rescue workers began CPR. They continued treatment of James Clifton until an ambulance crew arrived to assist them.

At about 9:30 p.m. Chief Deputy Walter Beckham of the Franklin County Sheriff's Department arrived at defendant's residence. Chief Deputy Beckham spoke with defendant. Defendant repeatedly stated that if her husband were dead she would kill herself. Defendant also stated that if she had already left her husband this would not have happened. Chief Deputy Beckham noticed that defendant had on a shirt and pants but no shoes. Defendant told Chief Deputy Beckham that she and her husband had been arguing about a new truck and a new pistol, that her husband had shot himself, that she did not see her husband shoot himself, that she did not remember being close to her husband when he shot himself, and that her husband had put the gun in his mouth on previous occasions. With her permission, Chief Deputy Beckham wiped defendant's hands for a gunshot residue test. Chief Deputy Beckham went back into the kitchen and observed that a pistol lay on its sales receipt on the kitchen counter about six feet from the body.

At around 10:10 p.m Director Steven R. Jones of the Franklin County Sheriff's Department Bureau of Identification examined the kitchen and photographed it. He found a .44 caliber Ruger Super Redhawk double-action revolver lying on the counter on a sales paper, next to an open, nearly full bottle of beer. The pistol was thirteen inches in length with a seven and three eights inch barrel. The pistol's butt was fifty four inches from the corner of the stove, beneath which James Clifton had fallen. He also found, behind the stove island and on the kitchen counter, a pair of eyeglasses face down on the floor, a lead bullet core some two and a half inches from the glasses, and a copper jacket from a bullet. Jones observed blood

and tissue spattering on the kitchen counters and refrigerator. A portion of the bullet had struck the refrigerator. Director Jones looked for a suicide note, but did not find one. He collected the bloody clothes defendant had worn so they could be tested.

James Clifton's father heard about his son's death from a deputy. On the morning following his son's death, he telephoned defendant. Defendant told him she did not know what happened and then handed the phone to her friend with whom she had stayed all night. Defendant did not talk to Mr. Clifton again at any time before the trial.

On 18 April Special Agent Jed Taub of the serology section of the SBI conducted tests and determined that there was no blood on the gun retrieved from the kitchen. In his expert opinion, he determined that the force of the bullet of the type that struck James Clifton may, on penetration, caused a fine mist of blood, known as back splatter, to spray back in the direction from which the shot came. He observed that the bullet upon exit from the body would produce considerably more and larger drops of blood travelling in the same direction as the bullet, known as forward splatter. The back splatter would generally not travel more than 10 to 18 inches.

On 17 May 1994 SBI Special Agent Eugene Bishop tested the .44 caliber Ruger pistol recovered from the scene, found that it was in good working order, and determined that the fragmented bullet that killed James Clifton came from it.

Associate Chief Medical Examiner Karen E. Chancellor performed an autopsy on James Clifton. The autopsy revealed that a single large bullet entered James Clifton's body under his left arm in the armpit area and partially exited near the midline of his upper back. The entry wound was surrounded by powder residue and powder stippling from a gun. This indicated that upon the firing of the gun the barrel of the weapon was in close proximity to the body. Dr. Chancellor observed dense powder stippling on the upper inside of James Clifton's arm, near the elbow, and to a lesser degree on his left forearm. Dr. Chancellor determined that James Clifton died as a result of extensive bleeding caused by a gunshot.

SBI Agent David McDougall conducted experiments to produce blood splatter patterns on white poster board and on a white undershirt. Agent McDougall obtained the patterns from his experiments by firing both a .22 caliber pistol and the .44 caliber Ruger into a

blood-soaked sponge, and by slapping a blood source by hand. He compared the results of his experiment to defendant's blood soaked blouse. He found the fine droplets of blood covering the upper right shoulder and back of the blouse were a distinct misting-type stain consistent with the back splatter pattern he produced on the undershirt. While he concluded that this indicated defendant was in close proximity to James Clifton at the time the gun was fired, he also found that these results were not helpful in determining who was holding the gun at the time of the shooting.

By true bill of indictment returned 23 May 1994 defendant was charged with first degree murder of James Clifton. On 26 June 1995 defendant was arraigned upon a charge of second degree murder. Upon a plea of not guilty, on 30 June 1995 the jury found defendant guilty of involuntary manslaughter. The trial judge took judicial notice of defendant's pardon of forgiveness and considered it for purposes of sentencing. Upon finding that aggravating factors outweighed mitigating factors, the trial judge sentenced defendant to ten years imprisonment and recommended work release when eligible. As a condition of work release, defendant was ordered to pay restitution in the amount of $3,000.00 to James Clifton's father for funeral expenses. Defendant appeals from this judgment imposing sentence and ordering her to pay restitution.

Attorney General Michael F. Easley, by Assistant Attorney General John A. Greenlee, for the State.

Mark A. Perry for defendant-appellant.

EAGLES, Judge.

[1] Defendant fails to bring forward or argue assignments of error 4, 6, 7, 8, 9, 10, 11 and 12 in her brief. These assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(a).

[2] We first consider whether the trial court erred by allowing evidence of results of blood splatter experiments conducted by the State's witness over defendant's objection on the grounds that the experiments were not conducted under substantially similar circumstances to those prevailing at the time of the shooting and that the experiment was not relevant.

In order for experimental evidence to be admissible it must be relevant and the experiment must be conducted under circumstances substantially similar to those prevailing at the time of the occurrence

in controversy. *State v. Phillips*, 228 N.C. 595, 598, 46 S.E.2d 720 (1948); *State v. Wright*, 52 N.C. App. 166, 173-74, 278 S.E.2d 579, 585, *disc. review denied*, 303 N.C. 319, 281 S.E.2d 658 (1981). The requirement of substantial similarity does not require precise reproduction of circumstances to be admissible. *Id.* The trial court must consider whether there are dissimilarities in conditions likely to distort the results of the experiment, and whether the dissimilarities may be adjusted or explained so that their effects can be understood by the jury. *State v. Jones*, 287 N.C. 84, 97-98, 214 S.E.2d 24, 33-34 (1975); *Wright*, 52 N.C. App. at 174, 278 S.E.2d at 585. If the differences in the conditions are explainable by the expert witness, precise reproduction of the circumstances is not required. *Id.* Candid acknowledgement of dissimilarities and limitations of the experiment are enough to insulate the testimony from prejudice great enough to warrant reversal. *Wiles v. N.C. Farm Bureau Insurance Co.*, 85 N.C. App. 162, 165-66, 354 S.E.2d 248, 250, *disc. review denied*, 320 N.C. 517, 358 S.E.2d 533 (1987). Whether an experiment was conducted under substantially similar conditions is a question of law and is reviewable by the appellate courts. *Wright*, 52 N.C. App. at 173, 278 S.E.2d at 585 (*citing State v. Jones*, 287 N.C. 84, 214 S.E.2d 24 (1975)).

The experiments were conducted by firing .22 caliber and .44 caliber revolvers through blood soaked sponges and by slapping a blood source by hand. White paper and a tee shirt were placed in close proximity to the sources of blood to record the blood spray patterns. The State's expert testified that these methods of experimentation were standard procedure conducted by his agency, that the results obtained were indicative of or similar to blood patterns observed in other actual shootings, and that the results seen in the experiment were consistent with the stains actually found on defendant's blouse in evidence.

While there were differences between the circumstances of the experiments and of the shooting, the expert witness acknowledged the dissimilarity of the sponge used in the experiments from human flesh and that his experiments could not identify who held the weapon at the moment of firing. He also stated that variables of caliber, muzzle velocity, and other factors could influence the result. He clearly communicated his limited conclusion: "Based on the blood stain analysis detailed in this report, the blood splatter on the right shoulder of the [defendant's blouse] is the result of the person wearing the [blouse] being in close proximity to a source of blood at the time it was being acted upon by a force."

[3] Defendant also argues that the experiments were not relevant pursuant to N.C. Rule Evid. 401 which provides, "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, the experiments demonstrated that it was more probable that defendant was in close proximity to James Clifton at the time the gun was fired because of the back splatter blood stains on the right shoulder of her blouse. Furthermore, the experiments cast doubt on the credibility of defendant's statements to Chief Deputy Beckham that she did not remember being close to her husband at the time of the shooting and that she did not see the shooting. Accordingly, we conclude that the trial court properly admitted the results of the experiments.

[4] The second issue is whether the trial court committed reversible error by denying defendant's motion to dismiss for insufficiency of the evidence.

The test for sufficiency of the evidence to support a conviction in a criminal case is whether there is substantial evidence of all elements of the offense charged that would allow any rational trier of fact to find beyond a reasonable doubt that defendant committed the offense. *State v. Richardson*, 342 N.C. 772, 785, 467 S.E.2d 685, 692, *cert. denied*, —— U.S. ——, 136 L.Ed.2d 160 (1996). Substantial evidence is that relevant evidence which a reasonable mind would accept as sufficient to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449, 439 S.E.2d 578, 585 (1994). "The law will not allow a conviction on evidence that merely gives rise to a suspicion or a conjecture that defendant committed a crime." *State v. Lambert*, 341 N.C. 36, 42, 460 S.E.2d 123, 127 (1995). On sufficiency of evidence review, the evidence "must be viewed in a light most favorable to the State, and the State is to receive any reasonable inference that can be drawn from the evidence." *State v. Hardy*, 339 N.C. 207, 236, 451 S.E.2d 600, 617 (1994).

Involuntary manslaughter is the "unintentional killing of a human being without malice proximately caused by a culpably negligent act or omission." *State v. McKoy*, 122 N.C. App. 482, 485, 470 S.E.2d 542, 544, *disc. review denied*, 343 N.C. 755, 473 S.E.2d 622 (1996). Culpable negligence means any act or omission which evidences a disregard for human rights and safety. *State v. Burton*, 119 N.C. App. 625, 633, 460 S.E.2d 181, 188 (1995). The act or omission must be so

careless or reckless that it "imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *State v. Meadlock*, 95 N.C. App. 146, 149, 381 S.E.2d 805, 806, *disc. review denied*, 325 N.C. 434, 384 S.E.2d 544 (1989).

The jury confronted a single question in reaching their verdict of guilty of involuntary manslaughter: Did defendant pull the trigger of the gun that killed James Clifton? The State presented the following evidence that assisted the jury in answering the question in the affirmative: Defendant's statements the day of the shooting; evidence that James Clifton had been happy just prior to the shooting; evidence that defendant was in close proximity to James Clifton with back splatter blood stains on the right shoulder of her blouse; evidence that shortly before the shooting, defendant and James Clifton were arguing about a new pickup truck and pistol; evidence that both defendant and James Clifton had been drinking at the time of the shooting; evidence concerning the path of the bullet and the wound itself, in the left armpit, coursing slightly down and through the body, coupled with the strong powder residue and stippling present on James Clifton's inside upper arm and left forearm, contradicted the possibility of self-infliction; evidence that self-infliction of such a wound by the victim with the .44 caliber pistol that was thirteen inches in length with a seven and three eighths inch barrel would be physically difficult; evidence that the pistol was found lying on the kitchen counter some 54 inches from the body of James Clifton while the victim's glasses were askew on the floor near the body; evidence that no blood was found on the pistol; evidence that James Clifton's father did not hear about his son's death from his daughter-in-law; evidence that defendant did not speak to her father-in-law for over a year prior to trial; and evidence that both defendant and James Clifton were right handed. We conclude that the trial court correctly determined that there is sufficient evidence to justify submission of the case to the jury. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

[5] The third issue is whether the trial court erred in ordering defendant to pay $3,000.00 in restitution for funeral expenses to the father of James Clifton where defendant failed to object to the order of restitution and where there was nothing in the record to support a finding that any amount of restitution was due or to whom it might be payable.

Generally, in order to preserve a question for appellate review a party must have presented the trial court with a timely objection or motion, stating the specific grounds for the ruling the party desired the court to make. N.C.R. App. P. 10(b)(1); *see State v. Reid*, 322 N.C. 309, 312, 367 S.E.2d 672, 674 (1988). Immediately after the trial court sentenced defendant and ordered her to pay restitution, the court asked defendant if there was anything further for the court. At that time defendant renewed her motion to dismiss. At no time prior to the court's order to pay restitution did the prosecution request restitution or present evidence supporting an order of restitution. Therefore, it appears that defendant had little if any opportunity to object specifically to the order to pay restitution. Despite defendant's failure to object, we review this order in our discretion pursuant to N.C.R. App. P. 2.

A trial court's award of restitution must be supported by competent evidence in the record. *State v. Wilson*, 340 N.C. 720, 459 S.E.2d 192 (1995); *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992); *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *affirmed*, 318 N.C. 502, 349 S.E.2d 576 (1986). In *Daye* this Court stated that to justify an order to pay restitution, "there must be something more than a guess or conjecture as to an appropriate amount of restitution. Restitution is not intended to punish defendants, but to compensate victims. There is no predetermined fine or presumption of damages." 78 N.C. App. at 757-58, 338 S.E.2d at 561 (1986). After careful review of the record we find no evidence of the cost of James Clifton's funeral or who paid for it. Accordingly, we conclude that the trial court erred in ordering payment of restitution.

[6] The final issue is whether the trial court erred in finding as an aggravating factor that defendant had a prior conviction punishable by more than sixty days and therefore improperly sentenced the defendant to a maximum term of ten years.

The weighing of factors in aggravation and mitigation is within the sound discretion of the sentencing court, and will not be disturbed upon appeal absent a showing of an abuse of discretion. *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982), *aff'd and modified on other grounds*, 308 N.C. 379, 302 S.E.2d 230 (1983). G.S. 15A-1340.4(e) (1988) provides in pertinent part that prior convictions "may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." The permissible methods of proof of prior convictions in G.S. 15A-1340.4(e) are per-

missive, not mandatory or exclusive. *State v. Brewer*, 89 N.C. App. 431, 436, 366 S.E.2d 580, 583, *cert. denied*, 322 N.C. 482, 370 S.E.2d 229 (1988). Here the trial court noted that North Carolina Rules of Evidence provide that evidence of a conviction is not admissible if the conviction has been pardoned; however, during a sentencing proceeding the rules of evidence are suspended. N.C.R. Evid. 609, 1101(b)(3). Here, the trial court took judicial notice of defendant's pardon of forgiveness for her 1979 conviction of accessory after the fact to robbery with a dangerous weapon and considered her 1979 conviction an aggravating factor during sentencing.

No decisions in North Carolina have specifically addressed whether a trial court during sentencing may consider a pardoned offense as an aggravating factor.

This issue raises a potential conflict between the executive and judicial functions under the North Carolina Constitution. The North Carolina Constitution provides the governor with the exclusive prerogative to issue pardons. N.C. CONST. art. III, § 5(6); *see State v. Lewis*, 226 N.C. 249, 37 S.E.2d 691 (1946). Here the trial court took judicial notice of defendant's pardon as proof of a prior conviction in order to impose additional punishment for defendant's crime of involuntary manslaughter. In short, the issues we face are: Is the court impinging on the governor's executive power to pardon by increasing defendant's sentence for a present offense based on a prior pardoned offense and may the court properly use the governor's pardon of a prior conviction as proof of that prior conviction? There is a conflict of authority on these issues in other jurisdictions. *See* G. Van Ingen, Annotation, *Pardon as Affecting Consideration of Earlier Conviction in Applying Habitual Criminal Statute*, 31 A.L.R.2d 1181 (1953).

A number of courts have held a pardoned conviction cannot be used as a basis for increasing the punishment of a second subsequent offender. 31 A.L.R.2d at 1189; *see Havens v. State*, 429 N.E.2d 618 (Ind. Sup. Ct. 1981); *Guastello v. Dept. of Liquor Control*, 536 S.W.2d 21 (Mo. Sup. Ct. 1976); *Fields v. State*, 85 So.2d 609 (Fla. Div. A 1956); *Kelly v. State*, 185 N.E. 453 (Ind. Sup. Ct. 1933); *State v. Childers*, 2 So.2d 189 (La. Sup. Ct. 1941); *State v. Lee*, 132 So. 219 (La. Sup. Ct. 1931); *State v. Martin*, 52 N.E. 188 (Ohio Sup. Ct. 1898); *Edwards v. Commonwealth*, 78 Va. 39 (1883). Courts following this view have reasoned that the additional punishment imposed on a subsequent offense is not done because there is a subsequent offense alone, but

as a consequence of the prior offense; therefore, because the prior offense was blotted out and its consequences removed by the full pardon, the pardoned prior conviction cannot be considered. *Edwards*, 78 Va. at 49 (1883). Also, at least one court has reasoned that because some states have expressly included pardoned offenses among those that may be considered for purposes of their habitual criminal act, and because their legislature had not, the court had to construe their legislature intended that pardoned offenses not be considered under their habitual felon statute. *Kelly*, 185 N.E. 453 (Ind. Sup. Ct. 1933).

Other states, which constitute a majority, hold that the pardon of a conviction does not preclude the underlying conviction from being considered as a prior offense under a statute increasing the punishment for a subsequent offense. *Id.*; *see State v. Cobb*, 403 N.W.2d 329 (Minn. Ct. App. 1987); *State v. Wiggins*, 360 S.W.2d 716 (Mo. Sup. Ct. 1962); *Murry v. Hand*, 356 P.2d 814 (Kan. Sup. Ct. 1961); *Shankle v. Woodruff*, 324 P. 2d 1017 (N.M. Sup. Ct. 1958); *Dean v. Skeen*, 70 S.E.2d 256 (W. Va. Sup. Ct. 1952); *People ex rel. Prisament v. Brophy*, 287 N.E.2d 468 (N.Y. Sup. Ct. 1941); *State v. Stern*, 297 N.W. 321, 322-23 (Minn. Sup. Ct. 1941); *People v. Biggs*, 71 P.2d 214 (Cal. Sup. Ct. 1937); *United States v. Salas*, 387 F.2d 121, 122 (2d Cir. 1967); *Groseclose v. Plummer*, 106 F.2d 311, 314 (9th Cir. 1939). One reason stated for this view is that "increased punishment decreed by the statute for any offender who commits a second error is not, however, further punishment for the prior offense. 'The punishment is for the new crime only, but is the heavier if he is an habitual criminal.' " *Brophy*, 287 N.E.2d at 469-70 (quoting *McDonald v. Commonwealth of Massachusetts*, 180 U.S. 311, 312, 45 L. Ed. 542 (1901)); *Carlesi v. People of State of New York*, 233 U.S. 51, 58, 58 L. Ed. 843 (1914); *see United States v. Salas*, 387 F.2d 121, 122 (2nd Cir. 1967). Another reason supporting this view is that the "ambit of the pardons statute must be confined to a restoration of civil rights; it cannot have the effect of eliminating consideration of a prior conviction in a subsequent judicial proceeding." 403 N.W.2d at 330. This logic raises serious concerns over the separation of powers of the judiciary and the executive branches of government.

In North Carolina a governor may issue two types of pardons: A pardon of innocence, a full pardon; and a pardon of forgiveness, a conditional pardon. Although N.C. CONST. art. III, § 5(6) provides the governor with the exclusive prerogative to issue pardons, G.S. 147-24 (1993) requires the governor to examine violations of a conditional pardon and to revoke the conditional pardon once the governor has

determined that the conditions of the pardon have been violated. *See State v. Lewis*, 226 N.C. 249, 37 S.E.2d 691 (1946). A conditional pardon can be revoked only by the governor and only after the governor has performed his administrative duty of evaluating any violation of the conditions of the pardon. Here by taking judicial notice of the pardon of forgiveness and by finding that defendant's prior conviction constituted an aggravating factor, the trial court infringed upon the prerogatives of the governor. The reasoning that an increased punishment for the present offense due to a prior pardoned conviction is not punishment for the prior pardoned offense is a legal fiction that conflicts with logic and the administrative duties of the governor.

We hold that a pardoned prior conviction may not be considered as an aggravating factor during sentencing absent revocation of the pardon by the governor. Accordingly, we conclude that the trial court erred in taking judicial notice of defendant's prior conviction for purposes of enhancing the sentence.

No error in trial; remanded for resentencing.

Judges MARTIN, John C., and SMITH concur.

JORDAN RENNER, M.D. v. BARBARA HAWK, PH.D, BARBARA RENNER, AND NICHOLAS RENNER, BY AND THROUGH HIS GUARDIAN AD LITEM, ROBERT LODDENGAARD

No. COA96-287

(Filed 4 March 1997)

1. Pleadings § 62 (NCI4th)— Rule 11 sanctions—motion filed after dismissal—reasonable time

The trial court properly ordered Rule 11 sanctions against plaintiff and plaintiff's counsel even though defendant moved for sanctions after plaintiff filed a voluntary dismissal. The North Carolina Rules of Civil Procedure do not contain explicit time limits for filing a motion for Rule 11 sanctions; however, a party should make Rule 11 motions in a reasonable time after an impropriety is discovered. In this case, the defendant's motion was filed within a reasonable time of detecting the alleged impropriety.

Am Jur 2d, Federal Courts § 656; Pleading § 339.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed. 556.

2. Pleadings § 63 (NCI4th)— findings—sufficiency of evidence—plaintiff's allegations

The trial court did not err when imposing sanctions under N.C.G.S. § 1A-1, Rule 11 for filing an action seeking copies of a child's mental health records for the unstated purpose of discovering whether the records contained information detrimental to a custody action by finding that plaintiff made no factual allegations as the basis for the action other than allegations regarding his concerns that defendant-psychologist's treatment might be detrimental to his son's mental health. Although plaintiff asserts that there was an additional allegation that he had joint legal custody of his son, there is no authority that a mere allegation of joint legal custody in and of itself constitutes a sufficient factual basis for a claim that a party has a legal right to a copy of his child's mental health records.

Am Jur 2d, Federal Courts § 656; Pleading § 339.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed. 556.

3. Pleadings § 63 (NCI4th)— Rule 11 sanctions—improper purpose—findings supported by evidence—conclusion supported by findings

The trial court's findings in orders imposing Rule 11 sanctions that the true purpose of plaintiff's action was to discover the contents of a pediatric psychologist's records prior to filing a motion to modify a custody order were supported by sufficient evidence in the record and those findings clearly support the conclusion that plaintiff filed the action for an improper purpose. An improper purpose may be inferred from filing suit with no factual basis for the purpose of fishing for evidence of liability.

Am Jur 2d, Pleading § 4.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed. 556.

4. Evidence and Witnesses § 161 (NCI4th)— Rule 11 sanctions—statements made by attorney as to purpose of suit—settlement negotiations—admissible

The trial court did not err when imposing Rule 11 sanctions by considering statements made by the attorney where the attorney contended that the statements were made during compromise negotiations. N.C.G.S. § 8C-1, Rule 408 does not require the exclusion of evidence that is otherwise discoverable or offered for another purpose merely because it is presented in the course of compromise negotiations. Assuming that all of the statements here were made in the course of compromise negotiations, the evidence was not offered to prove liability or the invalidity of the claim or its amount, but that the claim was brought for an improper purpose.

Am Jur 2d, Compromise and Settlement § 48; Evidence §§ 515, 516.

5. Evidence and Witnesses § 84 (NCI4th)— Rule 11 sanctions—refusal to meet with opposing party—relevant

The trial court correctly determined that plaintiff's refusal to meet with defendant-psychologist was relevant to a Rule 11 motion where plaintiff had filed a declaratory judgment action seeking the records of his child's treatment by a pediatric psychologist, he had alleged in his complaint that he was unable to determine the nature of the therapy being provided to his son, unable to adequately evaluate the therapy to determine whether it was harmful to his son and whether he should take steps to have it terminated, and that he was concerned that continuation of the therapy might be detrimental to his son's mental health. These claims appear to lack credibility if plaintiff indeed refused to meet with defendant to discuss her treatment of his son; such evidence is relevant to determining whether the action was filed for an improper purpose.

Am Jur 2d, Evidence §§ 307, 309-312.

Appeal by plaintiff and respondent from orders entered 8 November 1995 and 11 December 1995 by Judge David Q. LaBarre in Orange County Superior Court. Heard in the Court of Appeals 20 November 1996.

As part of a divorce judgment in 1990, plaintiff Dr. Jordan Renner and intervenor defendant Barbara Renner were granted joint custody

of their son, Nicholas Renner, now eleven years old. The divorce order provided that Nicholas would reside primarily with his mother and granted visitation rights to plaintiff. In June of 1990, Nicholas was evaluated by a pediatric psychologist, defendant Dr. Barbara Hawk. Defendant Hawk notified plaintiff of this evaluation and provided him with a copy of the resulting report. Four years later, in April 1994, Nicholas began therapy with defendant Hawk on a regular basis.

When plaintiff learned of the ongoing therapy he, by and through his attorney, respondent Patrice Solberg, sent a letter to defendant Hawk on 3 August 1994 requesting a release of Nicholas's mental health records. On 15 August 1994 defendant Hawk replied to respondent Solberg by letter, stating: "Because Nicholas, not either of his parents, is my client, those records are confidential and privileged and cannot be released to either father or mother." Defendant Hawk also noted that she never heard from plaintiff after sending him notice of the initial evaluation in 1990 and added:

> I am very concerned about Nicholas and am, as I have always been, most interested in meeting with Dr. Renner to discuss information and concerns from my initial evaluation and subsequent contacts with Nicholas. I would urge you to support Dr. Renner in contacting me so that he and I—and you as his counsel—could meet.

When plaintiff declined to meet with defendant Hawk, she provided him with a written summary of Nicholas's therapy records on 6 October 1994. Defendant Hawk enclosed with the summary a letter encouraging plaintiff to meet with her "in the interest of his son." On 23 November 1994, defendant Hawk wrote a letter to plaintiff, stating: "I would like very much to meet with you to discuss my concerns about Nicholas and to enlist your help in addressing those concerns."

Finally, on 2 December 1994, defendant Hawk's attorney, Carol J. Holcomb, wrote a letter to respondent Solberg explaining that in her opinion, defendant Hawk's therapy with Nicholas is privileged communication. She also asserted that defendant Hawk had fulfilled her duty to plaintiff "by providing a written summary of her work with Nicholas to him and by time and time again offering to meet with Dr. Renner to more fully inform him of his son's special needs and progress and to involve Dr. Renner in his son's treatment." Holcomb closed the letter by stating that defendant Hawk "renews her offer to meet with Dr. Renner to discuss Nicholas and her work with him."

Plaintiff never met with defendant Hawk. Instead, he responded by filing an action against defendant Hawk on 30 January 1995, seeking a declaratory judgment that he has a right to a copy of all records she generated in her therapy sessions with Nicholas. In his verified complaint, plaintiff cited the following reasons to support his claim:

> 15. Without a copy of said records, Plaintiff is unable to determine the nature of the "therapy" being provided to his son. He is further unable to adequately evaluate said "therapy" to determine whether it is harmful to his son and whether he should take steps to have said "therapy" terminated.
>
> 16. Plaintiff is concerned that continuation of said "therapy" may be detrimental to his son's mental health. Said detriment may be irreparable.

Plaintiff concurrently filed an application and motion for permanent injunction asking the court to order defendant to refrain from refusing to provide him with the requested records. He alleged that defendant's refusal to provide him with a copy of those records "may endanger the mental health of the Plaintiff's son and thereby constitute irreparable injury, loss and damage."

Defendant Hawk answered, specifically denying the allegations set forth above. As an affirmative defense, she asserted that the information in her files is confidential and privileged, pursuant to both N.C. Gen. Stat. § 8-53.3 and the Ethical Principles of Psychologists and Code of Conduct. In addition, she asserted that plaintiff "has consistently failed and refused to meet with Dr. Hawk, to speak with Dr. Hawk by telephone, or even to correspond with her regarding his specific concerns, if there be any, for his son, Nicholas Renner." Defendant Hawk also moved for appointment of a guardian ad litem for Nicholas.

On 17 March 1995 Nicholas's mother, Barbara Renner, filed a motion to intervene in the cause, which the court allowed. Barbara Renner also moved to join Nicholas as a necessary party, and the court ordered such joinder on 7 June 1995.

Respondent Solberg deposed defendant Hawk on 23 May 1995. Subsequent to this deposition, counsel for plaintiff and defendants communicated several times regarding the possibility of a settlement. On 27 June 1995, defendant's counsel, Carol Holcomb, served a notice of deposition on plaintiff, scheduled for 11 July 1995. On 10 July 1995, however, plaintiff moved to voluntarily dismiss the action without

prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

One month later, on 10 August 1995, defendant Hawk filed a motion for sanctions and attorneys fees against plaintiff pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Defendant Hawk alleged that plaintiff filed the action for an improper purpose because his motive was not to prevent harm to his son but rather to learn if his son had given defendant Hawk information that would harm plaintiff in an action for modification of custody. Defendant attached to her motion affidavits from Carol Holcomb, her counsel, Susan Lewis, counsel for Barbara Renner, and LeAnn Nease, counsel for Nicholas Renner. The affidavits stated that in various communications with respondent Solberg throughout the course of discovery, she implied that the purpose for filing this action was to discover any harmful information about plaintiff that might deter him from filing a motion for modification of custody.

After the motion for sanctions was heard on 25 September 1995, the trial court entered a show cause order, giving notice to respondent Solberg to appear and show cause why Rule 11 sanctions should not be imposed upon her. The trial court ordered sanctions against plaintiff on 8 November 1995. After the show cause hearing on 4 December 1995, the trial court also ordered sanctions against respondent Solberg. Plaintiff and respondent appeal the sanctions orders.

Karen Krajci Murphy for plaintiff appellant Jordan Renner and respondent appellant Patrice Solberg, and Patrice Solberg, pro se.

Northen, Blue, Rooks, Thibaut, Anderson & Woods, L.L.P., by Carol J. Holcomb, for defendant Barbara Hawk.

ARNOLD, Chief Judge.

[1] Plaintiff and his attorney, respondent Patrice Solberg, first argue that the trial court lost jurisdiction over the case once it was voluntarily dismissed, and therefore it was error subsequently to entertain a motion for sanctions. Appellants attempt to distinguish this case from others because of the fact that defendants filed the motion for sanctions *after* the voluntary dismissal was entered, rather than before the action was terminated. We find this distinction unimportant, and appellants' argument to the contrary unpersuasive.

Under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990) a plaintiff may take a voluntary dismissal of his case without prejudice by filing a notice of dismissal at any time before resting his case. The effect of such a voluntary dismissal is to terminate the action, and no suit is pending thereafter on which the court can enter a valid order. *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E.2d 282, 286 (1973). In *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992), the North Carolina Supreme Court clearly established, however, that a voluntary dismissal pursuant to Rule 41(a) "does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated." *See also Cooter and Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 L. Ed. 2d 359, 375-76 (1990); *Lassiter v. N.C. Farm Bureau Mut. Ins. Co.*, 106 N.C. App. 66, 70, 415 S.E.2d 212, 215, *disc. review denied*, 332 N.C. 148, 419 S.E.2d 573 (1992); *Higgins v. Patton*, 102 N.C. App. 301, 305, 401 S.E.2d 854, 856 (1991), *overruled on other grounds by Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992).

Plaintiff correctly submits that in *Bryson*, and the other cases cited above, the Rule 11 motion for sanctions was filed *before* the voluntary dismissal. He appears to argue that these cases establish continuing jurisdiction over only collateral issues that are *pending* at the time a voluntary dismissal is taken, not those that are filed *after* a voluntary dismissal. Such a narrow reading of these cases is unwarranted.

Defendant points to *Overcash v. Blue Cross and Blue Shield*, 94 N.C. App. 602, 381 S.E.2d 330 (1989) as controlling in this case. In *Overcash*, the defendant filed a Rule 11 motion and notice of appeal after the trial court granted partial summary judgment for plaintiff, awarded attorney's fees and costs, and plaintiff voluntarily dismissed his remaining claims. This Court held that the "termination of the action and defendant's filing of notice of appeal did not automatically deprive the court of jurisdiction to impose sanctions pursuant to Rule 11." *Id.* at 617, 381 S.E.2d at 340.

In addition, this Court recently ruled in *VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc.*, 124 N.C. App. 642, 478 S.E.2d 214 (1996), that a Rule 11 motion filed after a voluntary dismissal was viable, because such 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 . . . is

filed." *Id.* at —, 478 S.E.2d at 216 (citing *Bryson*, 330 N.C. at 664, 412 S.E.2d at 338). Neither *Overcash* nor *VSD Communications*, however, fully addresses the question of post-dismissal motions for sanctions, and we find this an appropriate occasion to clarify the issue.

Determining the propriety of post-dismissal sanctions motions may be assisted by analysis of the analogous Federal Rules of Civil Procedure. "The North Carolina Rules of Civil Procedure, including Rule 11, are, for the most part, verbatim recitations of the federal rules. Decisions under the federal rules are thus pertinent to our analysis." *Tittle v. Case*, 101 N.C. App. 346, 349, 399 S.E.2d 373, 375 (1991) (citations omitted), *overruled on other grounds by Bryson v. Sullivan*, 330 N.C. 644, 657, 412 S.E.2d 327, 334 (1992).

In *Cooter and Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990) the Supreme Court focused on the purposes and policies of both Rule 11 and Rule 41(a) and implied that whether a motion for sanctions is filed before or after voluntary dismissal is unimportant.

> Both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, and thus their policies, like their language, are completely compatible. . . . [A] voluntary dismissal does not eliminate the Rule 11 violation. Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. . . . If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully before serving and filing papers."

Id. at 397-98, 110 L. Ed. 2d at 377 (quoting Amendments to Federal Rules of Civil Procedure, 97 F.R.D. 165, 192 (1983) (Letter from Judge Walter Mansfield, Chairman, Advisory Committee on Civil Rules (Mar. 9, 1982))). *See also Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 604 (1st Cir. 1988) (noting that neither Rule 11 nor Rule 41 contains post-voluntary dismissal limitations); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir. 1987) (likening Rule 11 sanctions to contempt sanctions for purposes of post-voluntary dismissal jurisdiction), *cert. dismissed*, 485 U.S. 901, 99 L. Ed. 2d 229 (1988).

The Court in *Cooter* further noted that Rule 11 itself contains no time limits on filing motions: "District courts may, of course, 'adopt

local rules establishing timeliness standards,' for filing and deciding Rule 11 motions." *Cooter and Gell*, 496 U.S. at 398, 110 L. Ed. 2d at 377 (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 454, 71 L. Ed. 2d 325, 333 (1982)). The Court recognized, therefore, that absent a rule to the contrary, sanctions motions may appropriately be filed after a voluntary dismissal.

Neither Rule 11 nor Rule 41 of the North Carolina Rules of Civil Procedure contains explicit time limits for filing Rule 11 sanctions motions. We find the reasoning in *Cooter* persuasive and decline to impose any time limits contrary to the plain language of the rules. We agree, though, that "a party should make a Rule 11 motion within a reasonable time" after he discovers an alleged impropriety. *Muthig*, 838 F.2d at 604. Defendant asserts that the alleged impropriety became apparent not when the complaint was filed, but only during the course of discovery. We find that in this case defendant filed her Rule 11 sanctions motion within a reasonable time of detecting the alleged impropriety.

Plaintiff also contends that the doctrine of laches bars defendant from seeking sanctions after the voluntary dismissal was entered. This alternative time-based argument is unpersuasive, since we find that the Rule 11 sanctions motion was filed in a reasonable time.

Having determined that the trial court did not err in considering the motion for Rule 11 sanctions filed after the voluntary dismissal, we now address appellants' arguments assigning error to the sanctions orders themselves.

[2] Plaintiff first argues that the evidence was not sufficient to support several of the trial court's findings of fact in the 8 November 1995 order. A trial court's order imposing Rule 11 sanctions is reviewable *de novo* under an objective standard. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991). On *de novo* review, an appellate court must 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. *Id.*

Although we are without the benefit of a transcript from the 25 September 1995 sanctions hearing, we find sufficient evidence in the existing record to support the factual findings of which plaintiff complains. Plaintiff first takes issue with the trial court's finding of fact

that, other than the allegations in his complaint regarding his concerns that defendant's treatment may be detrimental to his son's mental health, plaintiff made no other factual allegation as the basis for filing his action. Plaintiff asserts that an additional allegation in his complaint—that he has joint legal custody of his son—"constituted a sufficient factual basis" for his complaint. We know of no authority, however, that a mere allegation of joint legal custody in and of itself constitutes a sufficient factual basis for a claim that a party has a legal right to a copy of his child's mental health records. Plaintiff's argument is unavailing.

We have reviewed plaintiff's remaining arguments based on an alleged insufficiency of the evidence and find them without merit.

[3] Plaintiff also takes issue with the trial court's finding of fact that plaintiff's suit was not well grounded in fact or warranted by existing law, and further asserts that the trial court erred in concluding that the action was interposed for an improper purpose.

The trial court found, however, that "the true purpose of the action was that Plaintiff sought to discover the contents of Defendant Hawk's records prior to filing a Motion to Modify the existing Custody Order in District Court[.]" An improper purpose may be inferred, as in this case, "from 'filing suit with no factual basis for the purpose of "fishing" for some evidence of liability.' " *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation omitted).

On *de novo* review, this Court must determine whether the trial court's conclusion is supported by the findings of fact. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. The findings of fact complained of, along with others in both sanctions orders, are supported by sufficient evidence in the record. We hold that those findings of fact clearly support the trial court's conclusion that plaintiff interposed the action for an improper purpose.

[4] Appellants also assert several evidentiary arguments. Respondent Solberg first contends that certain statements she made as counsel for plaintiff were in the course of compromise negotiations and were therefore inadmissible pursuant to Rule 408 of the North Carolina Rules of Evidence. We disagree.

Rule 408 provides that evidence of conduct or statements made in compromise negotiations is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 408 (1992). This rule does not, however, require the exclusion of evidence that is otherwise discoverable or offered for another pur-

pose, merely because it is presented in the course of compromise negotiations. *Id.*

Respondent Solberg complains specifically that the trial court erred in considering certain allegations made by Carol Holcomb, Susan Lewis, and LeAnn Nease in their affidavits, which were attached to defendant's motion for sanctions and attorney's fees. Generally, these allegations questioned plaintiff's motive for filing the original complaint against defendant.

Holcomb stated that in a phone conversation regarding potential settlement of the case, respondent Solberg said she filed the action to discover if there was any information about plaintiff in the records that might harm him in a suit for modification of custody. Lewis stated that she witnessed a discussion between respondent Solberg and Holcomb after defendant's deposition in which Solberg said that she wanted access to Dr. Hawk's medical records, and she did not think she could get them in district court.

Finally, Nease cited a letter to Solberg in which she communicated her understanding about an earlier conversation they had:

> "Because of the unusual nature of relief you seek for Dr. Renner, I asked you why this case had been filed. You told me that Jordan Renner planned to file a motion regarding a change in visitation but he did not want to file it until he had seen the information in Dr. Hawk's file because he did not want to 'file it in the dark[.']"

Nease stated that respondent Solberg never indicated to her that this understanding of the conversation was incorrect.

Assuming, *arguendo*, that all of the statements in question were made in the course of compromise negotiations, the evidence was not offered "to prove liability for or invalidity of the claim or its amount." G.S. § 8C-1, Rule 408. Clearly, defendant offered the evidence to show not that plaintiff's claim lacked validity, but that it was brought for an improper purpose. " 'Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule.' " *Id.* cmt. (quoting Advisory Committee's Note).

[5] Plaintiff argues that the trial court erred in determining that his refusal to meet with defendant was relevant to the Rule 11 motion. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). A trial court's rulings on relevance are given great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

In this case, evidence that plaintiff refused to consult with defendant about the state of his son's mental health is clearly relevant to determining the validity of his claims. Plaintiff alleged in his complaint that he is "unable to determine the nature of the 'therapy' being provided to his son"; that he is "unable to adequately evaluate said 'therapy' to determine whether it is harmful to his son and whether he should take steps to have said 'therapy' terminated"; and that he is "concerned that continuation of said 'therapy' may be detrimental to his son's mental health." If plaintiff indeed refused to meet with defendant to discuss her treatment of his son, these claims appear to lack credibility. We agree with the trial court that such evidence is relevant to determining whether the action was filed for an improper purpose.

For the reasons stated above, the sanctions orders against plaintiff and respondent Solberg are

Affirmed.

Judges EAGLES and MARTIN, Mark D., concur.

NATIONSBANK OF NORTH CAROLINA, N.A., PLAINTIFF v. AMERICAN DOUBLOON CORPORATION, WALTER ABRAMS, DONALD H. PARSONS, ROGER D. GOOD, AND RESOURCES PLANNING CORPORATION, DEFENDANTS

No. COA96-438

(Filed 4 March 1997)

1. Secured Transactions § 118 (NCI4th)— knitting machines—deficiency judgment—commercially reasonable sale—value of collateral.

The trial court did not err in an action arising from the sale of knitting machines used as collateral by failing to find as a matter of law that plaintiff was barred from obtaining a deficiency judgment where there was no support for defendant guarantors'

argument that plaintiff's actions bar all rights to a deficiency judgment or suggest an intent to retain the collateral in full satisfaction of the debt as a matter of law. Failure to give notice and/or to dispose of collateral in a commercially reasonable manner results in a presumption that the collateral was worth at least the amount of the debt and the amount that could have reasonably been obtained from a commercially reasonable sale of the collateral being credited to the debt. A consent judgment signed by the parties as to the value of property was a final judgment and was binding upon the parties.

Am Jur 2d, Secured Transactions §§ 638, 640, 641.

Uniform Commercial Code: burden of proof as to commercially reasonable disposition of collateral. 59 ALR3d 369.

What is "commercially reasonable" disposition of collateral required by UCC § 9-504(3). 7 ALR4th 308.

2. Secured Transactions § 133 (NCI4th)— knitting machines—collateral—delay in sale

The trial court did not err by not allowing defendant guarantors to argue that plaintiff's unexcused delay in selling collateral constituted an implied retention of the collateral pursuant to N.C.G.S. § 25-9-505(2) where there was no written notice of plaintiff's intent to retain the property in satisfaction of the debt, no conduct manifesting such intent, nor any unreasonable delay in disposal of the property.

Am Jur 2d, Secured Transactions §§ 713-729.

Construction and operation of UCC § 9-505(2) authorizing secured party in possession of collateral to retain it in satisfaction of obligation. 55 ALR3d 651.

3. Appeal and Error § 502 (NCI4th)— disposal of collateral—instructions—no prejudicial error

It was not reversible error for the trial court to instruct the jury that defendant guarantors had the burden of proving that plaintiff unreasonably delayed in disposing of the collateral. The defendant guarantors merely alleged error and failed to show that, absent the trial court's allegedly erroneous instruction, a different result would have obtained.

Am Jur 2d, Appellate Review §§ 705, 711, 713, 716.

4. Judgment § 274 (NCI4th)— collateral—private sale—commercial reasonableness—collateral estoppel

The trial court correctly excluded testimony about the commercial reasonableness of plaintiffs' retention of knitting machines used as collateral where the parties had entered into a consent judgment which was silent as to any finding that plaintiff should have sold the knitting machines at any time prior to the judgment and provided for the subsequent sale of the machines. The consent judgment was a final judgment as to the issue of the commercial reasonableness of the retention and a sale of the knitting machines up to the date of its entry. Plaintiff instituted a second action including the same parties when it filed a motion in the cause to determine the commercial reasonableness of the sale of the machines and the necessary elements of *res judicata* and/or collateral estoppel are present.

Am Jur 2d, Judgments §§ 539 et seq.

5. Evidence and Witnesses § 2158 (NCI4th)— expert opinion—value of collateral—president of guarantor corporation—lack of requisite skills

There was no abuse of discretion where the trial court excluded the expert opinion of defendant guarantor's president concerning the value of collateral where the witness did not demonstrate the requisite familiarity, skill, training, or education in order to allow him to offer an opinion as to the value of the collateral.

Am Jur 2d, Witnesses §§ 725, 735, 736, 996.

Appeal by defendants Resources Planning Corporation and Donald H. Parsons from order entered 12 September 1995 by Judge Robert P. Johnston in Catawba County Superior Court. Heard in the Court of Appeals 9 January 1997.

Blanchfield Cordle & Moore, P.A., by Robert B. Cordle and Mary K. Mandeville, for plaintiff appellee.

Wilson & Iseman, L.L.P., by G. Gray Wilson, for defendant appellants Resources Planning Corporation and Donald H. Parsons.

COZORT, Judge.

Defendants Resources Planning Corporation ("RPC") and Donald H. Parsons ("Parsons") were guarantors on a series of loans made by plaintiff NationsBank of North Carolina, N.A. ("NationsBank"), to defendant American Doubloon Corporation ("ADC"). In consideration of these loans, on 27 July 1988, ADC entered into a security agreement with plaintiff which granted plaintiff a security interest in all of ADC's equipment, including forty (40) Scott & Williams knitting machines.

After ADC defaulted on the loans, plaintiff instituted an action against ADC, Walter Abrams and Roger D. Good (principals of ADC who are not parties to this present action), and defendants RPC and Parsons, as guarantors of the defaulted loans (hereinafter "guarantors"). The complaint alleged default on a promissory note by ADC and resulting liability of defendant guarantors. On 23 August 1989, plaintiff obtained an entry of default and default judgment against ADC, without notice to defendant guarantors and repossessed the knitting machines. With plaintiff's consent, the knitting machines remained in the physical possession of Walter Abrams.

On 22 October 1991, plaintiff filed a motion for summary judgment against defendant guarantors on the issue of liability under the guaranty agreement. This motion was granted, and the trial court certified the matter as immediately appealable pursuant to Rule 54(b) of the Rules of Civil Procedure. Defendant guarantors appealed. The appeal was dismissed by this Court as interlocutory.

The parties reached an agreement as to the amount of the outstanding debt and entered into a consent judgment on 5 October 1992. Defendant guarantors reserved their right to appeal the trial court's grant of summary judgment on the issue of liability. The consent judgment granted defendant guarantors a credit of $30,000.00 for the value of the knitting machines and reduced their outstanding debt to plaintiff as guarantors from $303,635.99 to $273,635.99, plus costs and attorneys' fees. The judgment also provided that the knitting machines would be sold at a public sale to be held within thirty (30) days after the date of judgment. In the event that the knitting machines sold for more than $30,000.00, the excess would also be credited against the judgment. If the knitting machines sold for less than $30,000.00, plaintiff was entitled to keep that money with no credit against the judgment.

After the consent judgment was entered, defendant guarantors appealed the trial court's entry of summary judgment on the issue of liability. The attorneys for the parties informally agreed that plaintiff would not sell the knitting machines until after the final ruling on defendant guarantors' appeal.

On 19 April 1994, this Court filed an opinion affirming the decision of the trial court, *NationsBank of N.C. v. American Doubloon Corp.*, 114 N.C. App. 505, 444 S.E.2d 494 (1994) (unpublished). Defendant guarantors petitioned the North Carolina Supreme Court for review. This petition was denied by order filed 8 September 1994. *NationsBank v. American Doubloon Corp.*, 337 N.C. 695, 448 S.E.2d 530 (1994).

On 26 September 1994, plaintiff, through counsel, James M. Gaither, Jr., sold the knitting machines by private sale for $20,000.00, without notice to defendant guarantors. Defendant guarantors subsequently objected to their not receiving notice of the sale, and not having an opportunity to purchase the knitting machines. They did not then object to the fact that plaintiff had not sold the machines earlier.

Defendant guarantors made no payments on the consent judgment. Consequently, plaintiff sought to enforce the 5 October 1992 judgment in Florida and South Carolina, where both defendant guarantors have property which might have been used in satisfaction of the judgment. Defendant guarantors filed motions for relief from and defense to the consent judgment, contending that the consent judgment was not a final judgment because plaintiff had sold the knitting machines at a private sale instead of a public sale as provided in the consent judgment.

Upon discovering that a mistake had been made by selling the knitting machines at a private rather than public sale, plaintiff filed a motion in the cause, requesting that the court determine the market value of the knitting machines and if any further credit on the consent judgment was due to defendant guarantors. Defendant guarantors filed a motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, requesting that the court declare the entire judgment satisfied, that sanctions be imposed against plaintiff, and that the matter be tried to a jury verdict. Judge Charles C. Lamm, Jr., by order entered 29 June 1995, denied defendant guarantors' motion for sanctions. Moreover, the trial court allowed the motion for a jury trial as to the issue of the commercial reasonableness of the private sale of

the knitting machines and other relevant issues of fact. Mr. Gaither realized that he would be a necessary witness at any trial or hearing in the case, and plaintiff obtained substitute counsel.

This matter came on for hearing before Judge Robert P. Johnston and a duly empaneled jury during the 5 September 1995 Civil Session of Catawba County Superior Court. The jury found that plaintiff did not retain the knitting machines for an unreasonably long period of time after the 5 October 1992 consent judgment and that it had sold the knitting machines in a commercially reasonable manner. On 12 September 1995, Judge Johnston entered an order, in accordance with the jury's verdict, finding that defendant guarantors were not entitled to any credits or off-sets from the previous 5 October 1992 judgment and awarding expert fees for two of plaintiff's witnesses. Defendant guarantors appeal.

[1] On appeal, defendant guarantors first argue that the trial court erred in failing to find, as a matter of law, that plaintiff was barred from obtaining a deficiency judgment where plaintiff: (1) failed to sell the collateral for more than five years after repossession; (2) sold the collateral without notice to defendant guarantors; and (3) sold the collateral at a private sale in violation of a court order requiring a public sale. Defendant guarantors contend that the appropriate sanction for plaintiff's "egregious misconduct" is to bar plaintiff bank's request for a deficiency judgment. We disagree.

N.C. Gen. Stat. § 25-9-504(1) (1995) provides that "[a] secured party after default may sell, lease or otherwise dispose of any or all of the collateral . . . ." That section further provides that "[d]isposition of the collateral may be by public or private proceedings . . . . Sale or other disposition may be as a unit or in parcels and *at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable* . . . ." N.C. Gen. Stat. § 25-9-504(3) (emphasis supplied). A creditor, when suing for deficiency judgment, bears the burden of proving that the disposition of the collateral was conducted in a commercially reasonable manner—*i.e.*, reasonable notice and commercially reasonable disposition. *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721, 329 S.E.2d 728, 730 (1985).

Commercial reasonableness is a jury question and does not readily lend itself to summary judgment, as reasonable minds may differ over what is commercially reasonable. *Id.* at 722, 329 S.E.2d at 734. The jury as fact finder "must consider all the elements of the sale

together." *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 118, 245 S.E.2d 566, 569 (1978).

A creditor's lack of notice or failure to dispose of collateral as required by statute "raises a presumption that the collateral was worth at least the amount of the debt." *Church v. Mickler*, 55 N.C. App. 724, 728, 287 S.E.2d 131, 134 (1982). This presumption is rebuttable and may be overcome by the creditor by showing "that the collateral was sold at market value, and that the market value was less than the amount of the debt." *Id.*; *see also Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848 (1976). Further, a creditor's failure to conduct the sale in a commercially reasonable manner or to give the required notice of the sale is not an absolute bar to obtaining a deficiency judgment. "Rather, the debt will be credited with the amount that reasonably could have been obtained via a commercially reasonable sale of the collateral." *Church*, 55 N.C. App. at 728, 287 S.E.2d at 134. *See also Hodges*, 29 N.C. App. 193, 223 S.E.2d 848; N.C. Gen. Stat. § 25-9-507(1) (1995).

The facts herein indicate that after ADC defaulted on the loans in question, plaintiff repossessed the knitting machines, which had been used as collateral for the loans. Thereafter, a lease/purchase agreement dated 1 March 1990 between plaintiff as owner/lessor and AmeriTech (a successor corporation to ADC, owned and controlled by Walter Abrams) as buyer/lessee provided a $10.00 buyout at the end of a thirty-six (36) month term with monthly payments of $1,428.23. Defendant guarantors contend that this lease was a disposition of the collateral pursuant to § 25-9-504(1) of the General Statutes and insist that they were not given notice of this transaction. We note that, at the time the 5 October 1992 consent judgment was entered, defendant guarantors were aware of this transaction, and yet no mention of the lease/purchase agreement's disposition of the property was made in the judgment.

Upon the failure of AmeriTech to make full payment under the 1 March 1990 lease/purchase agreement, plaintiff recovered possession of the knitting machines and subsequently sold them, without notice to defendant guarantors, at a private sale for the sum of $20,000.00, inconsistent with the 5 October 1992 consent judgment's requirement of public sale.

This sequence of events, however, does not, in our view, bar plaintiff from obtaining a deficiency judgment. Well-settled law provides that the failure to give notice and/or to dispose of collateral in

a commercially reasonable manner results in: (1) a presumption that the collateral was worth at least the amount of the debt; and (2) the amount that could have reasonably been obtained from a commercially reasonable sale of the collateral being credited to the debt. *Church*, 55 N.C. App. at 728, 287 S.E.2d at 134; *Hodges*, 29 N.C. App. 193, 223 S.E.2d 848; N.C. Gen. Stat. § 25-9-507(1). There is no support for defendant guarantors' argument that plaintiff's actions bar all rights to a deficiency judgment, or suggest an intent to retain the collateral in full satisfaction of the debt as a matter of law under § 25-9-505. Accordingly, this argument fails.

Defendant guarantors argue, in the alternative, that if the appropriate remedy for plaintiff's misconduct is a presumption that the value of the collateral equals the amount of the debt, the secured creditor may overcome the presumption only by evidence that the value of the collateral was less than the amount of the debt as of the date of *repossession*. This argument also fails.

Defendant guarantors cite an Idaho case, *Mack Financial Corp. v. Scott*, 606 P.2d 993 (Idaho 1980), which we do not find controlling in the instant case, and the North Carolina case, *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E.2d 848, which in no way indicates that the fair market value of the collateral should be assessed as of the time of *repossession*. In fact, *Hodges* makes no mention of the time of valuation of the property. Moreover, there was a consent judgment entered on 5 October 1992, granting defendant guarantors a credit of $30,000.00 for the value of the knitting machines. This consent judgment being a final judgment, having disposed of the issue of the value of the property, is binding upon the parties herein.

[2] Defendant guarantors next argue that the trial court erred by failing to allow them to argue that plaintiff's "unexcused delay" in selling the collateral constituted an implied retention of the collateral under N.C. Gen. Stat. § 25-9-505(2) in satisfaction of the debt. We cannot agree.

N.C. Gen. Stat. § 25-9-505 (1995) provides in pertinent part:

> (2) 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.

Defendant guarantors call our attention to the three views regarding whether a written notice of intention to retain collateral in satisfaction of a debt is required:

(1) [T]he written notice required by the Code is mandatory;

(2) Retention in satisfaction of the debt can be shown by conduct manifesting such intention; and

(3) Retention in satisfaction of the debt can be established by an unreasonably long delay in disposing of the collateral.

9A, Ronald A. Anderson, *Anderson on the Uniform Commercial Code*, 9-505:29 (3d ed. 1994). North Carolina courts have not yet taken a position on this issue, and we find no need to do so on the unique facts presented herein.

In the instant case, the facts show that plaintiff made an effort as early as two and one-half (2 1/2) months following repossession of the knitting machines to sell the machines through a lease/purchase agreement with AmeriTech, the successor corporation to ADC. Thereafter, plaintiff entered into a consent judgment with defendant guarantors agreeing to sell the knitting machines within thirty (30) days after the entry of judgment. Subsequently, an informal agreement was made to delay the sale of the knitting machines until after the appeals process was complete, as defendant guarantors were contesting the validity of their liability. Under these facts, we find no written notice of plaintiff's intent to retain the property in satisfaction of the debt, no conduct manifesting such intent, nor any unreasonable delay in disposal of the property. We overrule defendant guarantors' argument.

[3] Defendant guarantors also argue that the trial court erred in instructing the jury that they had the burden of proving that plaintiff unreasonably delayed in disposing of the collateral. We find no reversible error. It is not enough for defendant guarantors to merely allege error, they must also show that absent the trial court's allegedly erroneous instruction, a different result would have obtained. *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986) (citing N.C. Gen. Stat. § 1A-1, Rule 61); *Medford v. Davis*, 62 N.C. App. 308, 302 S.E.2d 838, *disc. review denied*, 309 N.C. 461, 301 S.E.2d 365 (1983)). As defendant guarantors fail to make such a showing and our review of the record reveals no likely change in results by virtue of the alleged error, this assignment of error is overruled.

[4] Defendant guarantors next argue that the trial court erred by excluding evidence that plaintiff's failure to sell the collateral from the time of repossession of the collateral (23 August 1988) until the entry of the consent judgment finding defendant guarantors liable on the promissory note (5 October 1992) was commercially unreasonable. Specifically, defendant guarantors take issue with the trial court's use of the doctrines of res judicata and collateral estoppel to enter an order prohibiting them from presenting

> any evidence to the jury regarding any delay in selling the knitting machines prior to the entry of Judgment, or any failure to repair the machines prior to the entry of the Judgment, and arguing to the jury that such delay or failure was commercially unreasonable.

We overrule this argument.

Res judicata, or claim preclusion, prevents a party, or one in privity with that party, from bringing a suit twice on the same claim or cause of action when a final judgment on the merits has been entered in the first suit. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413-14, 474 S.E.2d 127, 128 (1996) (citing *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428-29, 349 S.E.2d 552, 556-57 (1986)). Collateral estoppel, or issue preclusion, " 'prevents [the] relitigation of issues actually litigated and necessary to the outcome of the prior action between the parties or their privies.' " *Id.* at 414, 474 S.E.2d at 128 (quoting *McGinnis & Assoc.*, 318 N.C. at 428, 349 S.E.2d at 557). Consequently, collateral estoppel may be raised in a subsequent action although that action may involve a claim or cause of action different from the first. *Tar Landing Villas v. Town of Atlantic Beach*, 64 N.C. App. 239, 242, 307 S.E.2d 181, 184 (1983).

In the case below, the parties herein entered into a consent judgment which is silent as to any finding that plaintiff should have sold the knitting machines at any time prior to the entry of the judgment. In fact, the judgment expressly provided that the knitting machines would be sold within thirty (30) days after entry of judgment. Plaintiff later sold the collateral at a private sale. Thereafter, plaintiff filed a motion in the cause to determine the commercial reasonableness of the sale.

We find any testimony about the commercial reasonableness of plaintiff's retention of the collateral up to the time of the entry of the consent judgment to be barred by the doctrines of res judicata and

collateral estoppel. The consent judgment, to which defendant guarantors were parties, was a final judgment as to the issue of the commercial reasonableness of the retention and sale of the knitting machines up to the date of its entry. Further, when plaintiff filed a motion in the cause to determine the reasonableness of the subsequent private sale of the knitting machines, a second action including the same parties was instituted. As such, the necessary elements for the doctrines of res judicata and/or collateral estoppel are present, and we find no error in their application by the trial court.

[5] Defendant guarantors next argue that the trial court erred in excluding the expert opinion of their president concerning the value of the collateral. Rule 702 of the North Carolina Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.R. Evid. 702. The determination of whether a witness has the requisite level of skill to qualify as an expert witness is ordinarily within the exclusive province of the trial judge, and a finding by the trial judge that a witness does not possess the requisite skill will not be reversed on appeal unless there is no evidence to support it. *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989).

In the instant case, the facts tend to show that defendant RPC's President, Allan Kidston, was not a professional appraiser. In fact, his educational background was in Biology and Animal Sciences. Mr. Kidston's only expertise in appraisal was the "appraisal" of the knitting machines at issue and thirty-eight (38) other knitting machines also located at ADC. His determination of the value of the knitting machines was based on a 1985 letter from Catawba Valley Machinery Company, which indicated the value of the knitting machines *if* modified in a certain way and *if* they were able to operate in a production capacity. Mr. Kidston did not demonstrate the requisite familiarity, skill, training, or education in order to allow him to offer an opinion as to the value of the knitting machines. As such, we find no abuse of discretion in the trial court's decision to exclude the opinion of Mr. Kidston, and defendant guarantors' arguments to the contrary fail.

We have reviewed defendant's remaining assignments of error and find no error.

No error.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. CHE USEF FLETCHER, DEFENDANT

No. COA96-330

(Filed 4 March 1997)

1. Indigent Persons § 27 (NCI4th)— state-funded investigator—prohibition of surveillance—no abuse of discretion

The trial court did not abuse its discretion in prohibiting a state-funded private investigator for the indigent defendant from conducting surveillance of an alleged rape and sexual assault victim to establish evidence that the victim was a regular user of drugs and a prostitute who performed sexual acts in exchange for drugs or money since there was no showing that the evidence sought by defendant was obtainable only through surveillance, and since evidence of prostitution does not necessarily counter the victim's allegations.

Am Jur 2d, Criminal Law § 771.

Right of indigent defendant in state criminal case to assistance of investigators. 81 ALR4th 259.

2. Indigent Persons § 27 (NCI4th)— state-funded investigator—prohibition of surveillance—equal protection

The trial court's order prohibiting defendant's state-funded investigator from conducting surveillance of an alleged rape and sexual assault victim to find evidence that she was a prostitute did not violate defendant's right to equal protection of the law.

Am Jur 2d, Criminal Law § 771.

Right of indigent defendant in state criminal case to assistance of investigators. 81 ALR4th 259.

3. Criminal Law § 478 (NCI4th Rev.)— representation by several attorneys—comment by prosecutor—curative instruction

The trial court cured any error related to the prosecutor's improper reference during cross-examination of defendant to the fact that defendant had been represented by several attorneys with a curative instruction given to the jury after defendant's counsel objected to the prosecutor's statement.

Am Jur 2d, Trial §§ 499, 500.

4. Assault and Battery § 82 (NCI4th)— transferred intent—discharge of firearm into occupied residence

The trial court did not err by instructing the jury that the intent to shoot a person is transferrable in order to satisfy the intent element of discharging a firearm into the occupied property of another where the evidence tended to show that defendant intended to shoot a person but instead shot into an occupied residence.

Am Jur 2d, Criminal Law § 131.

5. Criminal Law § 849 (NCI4th Rev.)—instruction—defendant's testimony—scrutiny by jury

There was no plain error committed by the trial court where the court instructed the jury that it should scrutinize defendant's testimony carefully based on his interest in the outcome of the case.

Am Jur 2d, Trial § 1423.

6. Criminal Law § 1110 (NCI4th Rev.)— sentencing—additional years—one prior misdemeanor—no abuse of discretion

The trial court did not abuse its discretion by sentencing defendant to fourteen (14) additional years based solely on one prior misdemeanor conviction where the trial court found one mitigating factor—good character and reputation in the community—and one aggravating factor—a prior conviction for an offense punishable by more than sixty (60) days. Absent a finding of abuse of discretion, an appellate court will not disturb the trial judge's weighing of aggravating and mitigating factors.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from order entered 8 May 1995 by Judge Orlando F. Hudson and judgment and commitments entered 1 June 1995 by Judge Anthony M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 9 January 1997.

Attorney General Michael F. Easley, by Associate Attorney General Jonathan P. Babb, for the State.

Jay H. Ferguson for defendant appellant.

COZORT, Judge.

Defendant was convicted of first degree rape, two counts of first degree sexual offense, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property. His primary arguments on appeal are (1) that the trial court erred by entering an order prohibiting defendant's state-funded private investigator from conducting surveillance of the State's key witness to find evidence that she was a prostitute; and (2) that the trial court erred by instructing the jury that intent to shoot a person is transferrable to satisfy the intent element in the offense of discharging a firearm into occupied property. We find no error. The facts follow.

The State presented evidence which tended to show that on 30 September 1993, the alleged victim (hereinafter referred to as "witness"), accepted a ride home from defendant, Che Usef Fletcher. Instead of driving the witness home, however, defendant drove her to a secluded gravel road. During the drive, defendant held the witness at gun point, forced her to lie down in the car, and instructed her to remove her clothes. When the witness attempted to escape, defendant put the gun to her side and threatened to shoot her.

After reaching a secluded area, defendant ordered the witness to finish removing her clothes. He placed a gun in her mouth and made her suck on the barrel of the gun. He also made the witness perform fellatio on him. While the witness performed fellatio on defendant, defendant rubbed his gun against her breasts and threatened to shoot off her breasts. Defendant penetrated the witness both vaginally and anally.

After penetrating the witness anally, defendant told her that he was going to kill her. Defendant instructed the witness to lie down outside of the car so that he could shoot her in the back of the head. Upon exiting defendant's car and seeing defendant loading his gun,

the witness began to run. As she ran, defendant fired multiple shots, one of which entered the witness's back. She fell to the ground, got up, and continued to run. The witness ran to a house. Finding no one there, she ran to the next house.

The occupant of the second house testified that he had been sleeping when he heard shots being fired and a noise in his bathroom. Upon investigating, he saw a naked young woman, later identified as the witness, running around the corner of his house, and trying to get into his home through the sliding glass door. The witness told the occupant that someone had shot and raped her. The occupant called 911 and the police arrived three or four minutes later. The occupant told the police officers that he thought a bullet had come through his home during the shooting. When the officers investigated the perimeter of the house, they found bullet holes in the north side of the residence.

Defendant presented evidence tending to show that he and the witness engaged in consensual intercourse. Defendant testified that he gave the witness a ride on 30 September 1993, after she approached him while he was stopped at an intersection. Defendant stated that he believed the witness to be a prostitute because that intersection had a reputation for being an area for prostitution and because of the provocative look that the witness gave him when she approached his vehicle.

After getting into defendant's car, the witness began a conversation, during which she stated that she would "do everything for $25," and in the event that defendant did not have cash, she would accept crack cocaine as payment instead. Defendant testified that the witness began to give details of her activities with a previous "trick" that evening. The witness directed him to park at the end of a dead end road so that they could engage in sexual activity.

Defendant testified that the witness asked him if he wanted her to perform fellatio on him. Defendant states that he and the witness engaged in consensual vaginal intercourse. He denied that they ever had anal intercourse. After having intercourse, the witness ingested Valium and demanded $25. Medical records showed the presence of cocaine and Valium in the witness's blood on the night in question. Upon the witness's demand for payment, defendant told her that he did not have $25, nor any crack cocaine. The witness became upset and threatened defendant, telling him that she would not leave the car until he paid her. Because defendant knew that he did not have

any means to pay the witness and was concerned about being out too late, defendant began to tussle with the witness in an effort to get her out of the car. She would not budge. Finally, defendant retrieved his handgun from under the seat of his car in order to frighten her into getting out of the car. The witness reacted by grabbing defendant by the collar and dragging him toward the ditch on the side of the road. While standing on the edge of a ditch, defendant fired the gun into the air. Upon losing his balance, defendant continued to fire the gun. Defendant testified he accidentally fired into a house. He did not shoot directly at the witness; rather, he shot in the air to frighten her. Defendant testified that he got back into his vehicle, threw the gun onto the seat of his car and drove away.

The jury found defendant guilty of first degree rape, two counts of first degree sexual offense, discharging a firearm into occupied property, and assault with a deadly weapon with intent to kill inflicting serious injury. On 1 June 1995, Judge Anthony M. Brannon entered judgment and commitments sentencing defendant to three concurrent life terms, a three-year term to run concurrently, and a twenty-year term to run consecutively. Defendant appeals.

[1] On appeal, defendant first argues that the trial court erred in prohibiting him from conducting surveillance of the witness to establish evidence of a pattern of behavior related to defendant's evidence. We do not agree.

N.C. Gen. Stat. § 7A-450(b) (1995) provides:

> Whenever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation.

Further, N.C. Gen. Stat. § 7A-454 (1995) provides:

> The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State.

Together, these two sections require that a private investigator be provided upon a showing by the defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help more likely than not the

defendant will not receive a fair trial. *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). Caution is to be exercised in the appointment of an investigator, and an investigator should be provided only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982). "Mere hope or suspicion that favorable evidence is available is not enough" under the state or federal constitutions to require that a private investigator be provided to an indigent defendant. *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987) (citing *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Finally, the issue of whether a private investigator should be appointed at state expense to assist an indigent defendant rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Gardner*, 311 N.C. 489, 319 S.E.2d 591.

In the instant case, defendant made two *ex parte* motions for funds to hire or pay for a private investigator. In these motions, defendant indicated that the purpose of the investigator was to conduct surveillance of the witness to find evidence that she was a prostitute. The second motion noted that information had been obtained from various unnamed sources—one of which was a Durham Police Officer—which indicated that the witness was "a regular user of drugs, including cocaine," and "a prostitute who performed sexual acts in exchange for cocaine or money." Defendant alleged in both motions that this information would be admissible under Rule 412(b)(3) of the North Carolina Rules of Evidence. Further, defendant alleged that the information that was to be obtained in reference to the prosecuting witness was "crucial for the defense because the defendant will testify at the trial of this action that the sexual acts were consensual, that the prosecuting witness is a prostitute who agreed to perform various sexual acts in return for the payment of money or cocaine, and that the prosecuting witness only alleged that the sex acts were nonconsensual when the defendant informed the prosecuting witness that he did not have any money or cocaine." The trial court granted both of defendant's motions for funds for a private investigator; however, he prohibited defendant from using the investigator to conduct surveillance of the witness.

In analyzing the facts as presented to the trial court, we find no clear showing that the evidence which defendant sought in regard to

the witness being a prostitute was obtainable only through her surveillance. Significantly, it was only the surveillance of the witness that was prohibited by the trial court, not the obtaining of other evidence admissible under Rule 412(b)(3). Moreover, defendant's argument seems to ignore the fact that prostitutes may be victims of sexual offenses. Evidence of prostitution does not necessarily counter the allegations of the witness. Thus, while there are certainly many circumstances under which surveillance of witnesses would be appropriate, we cannot say that the trial court abused its discretion in prohibiting the surveillance under the facts of this case.

[2] We likewise reject defendant's argument that the surveillance prohibition amounted to a denial of equal protection of the law. The Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution guarantee fundamental fairness and equal protection under the law. This right encompasses proper representation of a defendant in the judicial arena. *See Tatum*, 291 N.C. 73, 229 S.E.2d 562. The trial court below authorized the retention and payment of a state-funded private investigator for the defendant, pursuant to §§ 7A-450(b) and 7A-454. We do not find the prohibition of the surveillance of the witness to impose an arbitrary barrier, nor a violation of defendant's right to equal protection of the law. Rather, as we stated earlier, we find no abuse of the trial court's discretion, under the facts of this case.

[3] Defendant next argues that a statement made by the prosecutor, referencing the fact that defendant had been represented by several attorneys, was unfairly prejudicial because it implied that no one wanted to represent defendant because he was guilty. We find no error.

In his cross-examination of defendant, the prosecutor stated: "And now, nearly two years later and several lawyers later you expect this jury . . . ." Defense counsel objected, and the trial court sustained the objection. Defense counsel asked for a curative instruction to the jury, and the trial court gave proper instructions. When defense counsel was asked if he had any further requests by the trial court, he answered "no."

When defense counsel objects, and the objection is sustained, and curative instructions are given to the jury, defendant has no grounds for exception on appeal. "Jurors are presumed to follow a trial judge's instructions." *State v. Taylor*, 340 N.C. 52, 64, 455 S.E.2d 859, 866 (1995). Assuming that the comment was on defendant's guilt,

"the court cured any error by its action in sustaining the objection and giving the curative instruction." *State v. Bowie*, 340 N.C. 199, 209, 456 S.E.2d 771, 776, *cert. denied*, —— U.S. ——, 133 L. Ed. 2d 435 (1995).

[4] Defendant next contends that the trial court erred in instructing the jury that the intent to shoot a person is transferrable to the offense of discharging a firearm into occupied property. We disagree.

North Carolina recognizes the doctrine of transferred intent, which provides that if a defendant intends to shoot a particular person—the intended victim—but actually shoots another person, the legal effect is the same as if the defendant had shot and hit the intended victim with that particular bullet. *State v. Abraham*, 338 N.C. 315, 332, 451 S.E.2d 131, 139 (1994) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). In the case below, the trial court utilized the doctrine to transfer the intent to shoot a particular person to the offense of discharging a firearm into the occupied property of another. We find no North Carolina cases exploring the trial court's instruction that the intent to shoot a person is transferrable in order to satisfy the intent element of discharging a firearm into occupied property. However, we find guidance in a common sense analysis of other cases.

The North Carolina Supreme Court has defined the crime of discharging a firearm into occupied property:

> [A] person is guilty of [discharging a firearm into occupied property] if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

State v. Williams, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973). Reasonable grounds to believe that a building might be occupied can certainly be found where a defendant has shot into a residence during the evening hours, as homeowners are most often at home during these hours. Discharging a weapon into occupied property is a general intent crime. In fact, our Supreme Court, in *State v. Jones*, stated: "Discharging a firearm into a vehicle [or other occupied property] does not require that the State prove any specific intent but only that the defendant perform the act which is forbidden by statute. It is a general intent crime." 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994)

(citing *State v. Wheeler*, 321 N.C. 725, 365 S.E.2d 609 (1988)), *cert. denied*, —— U.S. ——, 132 L. Ed. 2d 873 (1995). Further, the offense of discharging a weapon into occupied property, like assault, is an offense against the person, and not against property. The Supreme Court stated in *State v. Williams*, "This statute [(N.C. Gen. Stat. § 14-34.1)] was enacted for the protection of occupants of the premises, vehicles, and other property described in the statute." 21 N.C. App. 525, 526, 204 S.E.2d 864, 865 (1974). As such, we uphold the trial court's utilizing the doctrine of transferred intent to satisfy the intent element of discharging a firearm into occupied property, where the evidence tends to show that defendant intended to shoot a person, but instead shot into an occupied residence. We find no error in the trial court's instruction.

[5] Defendant also contends the trial court committed plain error in instructing the jury that it should scrutinize defendant's testimony carefully based on his interest in the outcome of the case. We find no error.

At trial, if a defendant fails to properly object to a jury instruction, he may still seek redress upon appellate review. In that instance, the defendant must show that absent such an error in instruction, a different outcome would have been probable. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

In the instant case, the trial court gave the following pertinent instruction:

> You, the jury, should scrutinize his testimony carefully in the light of his interest in the outcome of the prosecution. But if after such scrutiny you, the jury, believe the defendant as a witness has told you the truth, you should then give his testimony the same weight you give to the testimony of any other credible witness.

Defendant failed to object to this instruction and now alleges plain error on appeal.

The instruction in the present case is strikingly similar to the instruction found in *State v. Dunn*, 20 N.C. App. 143, 200 S.E.2d 822 (1973), in which this Court noted:

> On his final assignment of error, defendant contends the court committed error by instructing the jury to scrutinize carefully the defendant's testimony but after considering the influence of defendant's interest in the result, if they found defendant to be

> telling the truth, then to give his testimony the same weight as any truthful witness. This instruction has been approved many times and we find the assignment without merit.

Id. at 145-46, 200 S.E.2d at 824. Defendant's attempt to distinguish the instruction in the instant case from that of the one analyzed in *Dunn* fails. We find no error.

[6] Finally, defendant argues the trial court erred by sentencing him to fourteen (14) additional years based solely on one prior misdemeanor conviction. This argument is unpersuasive.

Defendant was sentenced under the Fair Sentencing Act, which vests the trial court with discretion in the sentencing of a defendant. Under the Fair Sentencing Act, the trial judge is permitted wide latitude "in arriving at the truth as to the existence of aggravating and mitigating factors." *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 697 (1983). The trial court must, however, "justify a sentence which deviates from a presumptive term to the extent that [it] must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the [Fair Sentencing] Act." *Id.* at 596-97, 300 S.E.2d at 697. A trial judge is not required to justify the weight attached to any one factor. *Id.* at 597, 300 S.E.2d at 697. The trial court may properly make the determination that one factor in aggravation outweighs one or more than one factor in mitigation. *Id.* Absent a finding of abuse of discretion, an appellate court will not disturb the trial judge's weighing of aggravating and mitigating factors. *State v. Parker*, 315 N.C. 249, 258-59, 337 S.E.2d 497, 503 (1985).

In this case, the trial court found one mitigating factor—good character and reputation in the community—and one aggravating factor—a prior conviction for an offense punishable by more than sixty (60) days. As is permitted, the court found that after weighing the factors, the aggravating factor outweighed the mitigating factor. We find no abuse of discretion, and the sentence will not be disturbed on appeal.

In summary, we find the defendant had a fair trial, free from prejudicial error.

No error.

Judges JOHN and McGEE concur.

JOSEPH McKINLEY BRYAN TAYLOR, INDIVIDUALLY, AND AS GUARDIAN AD LITEM OF JOSEPH McKINLEY BRYAN TAYLOR, JR., AND MARTHA CAROLINE McKELLAR TAYLOR, MINORS; AND MARY PRICE TAYLOR, INDIVIDUALLY, PLAINTIFFS v. NATIONSBANK CORPORATION, FORMERLY N.C.N.B. NATIONAL BANK OF NORTH CAROLINA; E.S. MELVIN; AND CAROLE W. FEE BRUCE, TRUSTEES, DEFENDANTS

No. COA96-919

(Filed 4 March 1997)

1. Trusts and Trustees § 272 (NCI4th)— receipt of cash bequests—trust beneficiaries—standing to bring action

Plaintiffs' mere receipt of cash bequests from a trustee did not terminate their status as beneficiaries where plaintiffs were named as beneficiaries in the trust documents and they asked to view the trust documents because they questioned the terms of the trust from which their bequests came.

Am Jur 2d, Trusts §§ 672 et seq.

2. Trusts and Trustees § 272 (NCI4th)— trust beneficiaries—acceptance of bequests—action to view documents—no estoppel

Plaintiff trust beneficiaries were not estopped from asserting that they are entitled to view the trust documents by their acceptance of cash bequests from the trustee.

Am Jur 2d, Trusts §§ 672 et seq.

3. Trusts and Trustees §§ 195, 242 (NCI4th)—trust beneficiaries—right to view trust documents

Despite the settlor's instruction to the trustees that the terms of the trust were to remain confidential, plaintiff trust beneficiaries were entitled to view the trust instrument from which their interest is derived absent an explicit provision in the trust instrument to the contrary. However, this right to view trust instruments does not include trust documents that are no longer operative due to revocation. N.C.G.S. § 36A-78.

Am Jur 2d, Trusts §§ 276 et seq., 339 et seq.

Defendants appeal and plaintiffs cross-appeal from judgment entered 3 June 1996 by Judge Julius A. Rousseau, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 14 January 1997.

Joseph McKinley Bryan died on 26 April 1995 leaving a will dated 29 June 1990. Defendants NationsBank Corporation, E.S. Melvin, and Carole W. Fee Bruce are named as executors in Bryan's will. Defendants are also trustees of a revocable trust created by Bryan on 29 June 1990. Bryan's will pours over the residue of the estate into the trust.

Plaintiffs Joseph McKinley Bryan Taylor and Mary Price Taylor are grandchildren of Bryan (adult plaintiffs). Plaintiffs Joseph McKinley Bryan Taylor, Jr., and Martha Caroline McKellar Taylor are great-grandchildren of Bryan and children of plaintiff Joseph McKinley Bryan Taylor (minor plaintiffs).

In Bryan's "Second Restated and Amended Irrevocable Trust Agreement" he made a bequest of $500,000.00 to each grandchild who survived him. This trust agreement also provided for a specific monetary bequest in the sum of $100,000.00 to each of his great-grandchildren. Furthermore, the trust agreement provided that the residuary of his estate was to be used to fund a charitable nonprofit organization, the Joseph M. Bryan Foundation. The Directors of the Foundation are defendants Carole W. Fee Bruce, E. S. Melvin, Michael W. Haley, Shirley Frye and H. Michael Weaver.

On 8 December 1992 Bryan amended the trust agreement, "First Amendment to Second Restated and Amended Revocable Trust Agreement." This amendment reduced the monetary bequests to Bryan's grandchildren to $100,000.00 each. Bryan had instructed his trustees that "his Trust Agreement should remain confidential," and his trustees believe themselves to be "morally and legally obligated not to disclose the contents of his Trust Agreement."

By letter dated 16 May 1995 the trustees advised each grandchild of the amount of the bequest and the reasons why the bequest was limited to $100,000.00. Each adult plaintiff received by mail from the trustee a check in the amount of $100,000.00 accompanied by a letter and release. However, the adult plaintiffs cashed the checks and declined to sign the releases. Defendants also wrote to the parents of the minor plaintiffs, stating that Bryan's trust provided for a monetary legacy to each of his living great-grandchildren. Defendants stated that the legacies were to be in separate trusts until the great-grandchildren reached the age of 21, and that defendants were also the trustees of these separate trusts.

There have been at least five versions of the trust: (1) 10 September 1985; (2) 12 February 1988; (3) 29 August 1988; (4) 29 June

1990; and (5) 8 December 1992. The 10 September 1985, 12 February 1988, and 29 August 1988 versions of the trust were revoked by the settlor before his death. Only the 29 June 1990 and the 8 December 1992 versions were in effect at the settlor's death.

On 14 December 1995 plaintiffs filed a declaratory judgment requiring defendants to produce a trust instrument signed on 29 June 1990 by Bryan, together with all versions and amendments of the trust both prior to and since its execution, as well as all other documents relating to the trust. On 16 January 1996 defendants filed a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6). On 8 March 1996 Judge Melzer A. Morgan, Jr. of the Guilford County Superior Court denied defendants' motion.

On 29 March 1996 defendants filed a motion for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c). On 1 April 1996 plaintiffs filed a cross-motion for judgment on the pleadings. On 3 June 1996 Judge Julius A. Rousseau converted the motions to motions for summary judgment and denied defendants' motion for summary judgment while partially granting plaintiffs' motion for summary judgment. Defendants were ordered to produce for plaintiffs' inspection only the trust document entitled "Second Restated and Amended Revocable Trust Agreement," dated 29 June 1990, and the trust document entitled "First Amendment to Second Restated and Amended Revocable Trust Agreement," dated 8 December 1992. Defendants appeal and plaintiffs cross-appeal.

Smith, Follin & James, by Norman B. Smith and Seth R. Cohen, and Prickett, Jones, Elliott, Kristol & Schnee, by William Prickett and Heather D. Jefferson, for plaintiff-appellants.

Smith, Helms, Mulliss & Moore, L.L.P., by James G. Exum, Jr., Larry B. Sitton and Larissa J. Erkman, for defendant-appellants.

EAGLES, Judge.

Plaintiffs argue that defendants' failure to verify their answer and motion for judgment on the pleadings is fatal to their appeal. However, plaintiffs failed to raise any objection at trial to the absence of verification and failed to assign error in the record on appeal. Accordingly, this issue is not properly preserved for appellate review. N.C.R. App. P. 10(a), (b)(1).

Plaintiffs assign error to the trial court's conversion, *ex mero motu*, of the parties' motions for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure to motions for summary judgment. However, plaintiffs bring forward no argument or authority in their briefs in support of this assignment of error. Accordingly, this assignment of error is deemed abandoned pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 28(a).

[1] The first issue before us is whether the plaintiffs were beneficiaries under the trust agreement at the time they filed their complaint. Defendants contend that by accepting the specific cash bequests prior to filing their complaint, adult plaintiffs no longer had any continuing present or future interest in the corpus of the trust, and therefore, were no longer owed any duties as trust beneficiaries. Also, defendants contend that legal title in the minor plaintiffs' specific cash bequests passed from the trust prior to the filing of the complaint and vested in separate trusts, and therefore, the minor plaintiffs now have only a continuing interest in the separate trusts and not an interest in the trust in dispute. Accordingly, defendants urge that plaintiffs do not have the status of trust beneficiaries.

No decisions or statutes in North Carolina have defined "beneficiary." Although North Carolina has not adopted the Uniform Probate Code as such, it has relied on it as persuasive authority in *In re Estate of Francis*, 327 N.C. 101, 108, 394 S.E.2d 150, 155 (1990). Uniform Probate Code, U.L.A. § 1-201(3) (1996), defines a trust beneficiary as including "a person who has present or future interest, vested or contingent" in the trust property. *See* Restatement (Second) of Trusts, § 3 (1959) (a beneficiary is a person for whose benefit property is held in trust). This definition of beneficiary does not deal with the status of beneficiaries who have already received their bequests. Understandably, only a beneficiary may profit from a trust. Moreover, once beneficiaries receive their undisputed interest in the trust, their interest in the trust terminates. However, here it is undisputed that plaintiffs were each named beneficiaries in the trust documents. Furthermore, plaintiffs seek to view trust documents because they question the terms of the trust from which their specific bequests came. Therefore, they are by no means like mere strangers to the trust as defendants suggest. We hold that plaintiffs' mere receipt of cash bequests from a trustee does not terminate their status as beneficiaries where, as here, the plaintiffs were named as beneficiaries in the trust documents and they ask to view the trust docu-

ments because they question the terms of the trust from which their bequest came.

We now consider whether plaintiffs as beneficiaries were entitled to view the "Second Restated and Amended Revocable Trust Agreement," dated 29 June 1990, and the "First Amendment to Second Restated and Amended Revocable Trust Agreement," dated 8 December 1992.

[2] Defendants contend that plaintiffs are estopped from asserting that they are entitled to view the trust documents on the grounds that " 'a party will not be allowed to accept benefits which arise from certain terms of the contract and at the same time deny the effect of other terms of the same agreement.' " *See Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854, 859 (1991) (*quoting Capital Outdoor Advertising, Inc. v. Harper*, 7 N.C. App. 501, 505, 172 S.E.2d 793, 795 (1970)). Defendants' argument overlooks that defendants have the duties and obligations of a trustee. This Court has found that transactions between trustees and beneficiaries of a trust are "presumed fraudulent" and therefore "are voidable by the beneficiary unless the trustee can show by the greater weight of the evidence that the transaction was 'open, fair and honest,' " and "that the beneficiary had a full and complete understanding of the transaction . . . ." *Johnson v. Brown*, 71 N.C. App. 660, 668, 323 S.E.2d 389, 394-95 (1984). Furthermore, defendants do not point to any terms of the trust that restrict the beneficiaries' rights to view the trust instrument. Here it would be a manifest unfairness to allow the trustees to invoke the doctrine of estoppel against the beneficiaries.

[3] Defendants contend that the settlor created a private living trust, the terms of which he instructed his trustees were to be held confidential. Therefore, defendants urge they are legally bound to not disclose the terms of the trust agreement. Plaintiffs counter that as beneficiaries they have an absolute right to receive complete and accurate information with regard to the trust, including the right to examine all trust documents.

No decisions in North Carolina have conferred an absolute right to view trust documents on a trust beneficiary. Other jurisdictions have determined that a trustee has a duty of full disclosure of all material facts for the protection of a beneficiary's present and future interests in the trust. *See* Lee, *North Carolina Law of Trusts* § 30 (6th ed. 1977); *In re Murray's Will*, 88 N.Y.S.2d 579, 581 (Sur. Ct, Orange County 1949); *Branch v. White*, 239 A.2d 665, 671 (N.J. Super.), *cert.*

denied, 242 A.2d 13 (N.J. 1968); *Karpf v. Karpf*, 481 N.W.2d 891, 896-97 (Neb. Sup. Ct. 1992); *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 750 (D.C. Cir. 1990); *Fidelity Bank v. Com. Marine & General Assur. Co.*, 592 F. Supp. 513, 528-29 (E.D. Pa. 1984); *In re Estate of Rosenblum*, 328 A.2d 158 (Pa. 1974)); *Budgen v. Tylee*, 21 Beav. 545 (1856). While none of these authorities deal specifically with a right of the beneficiary to view the trust instrument itself, several of them rely on the Restatement (Second) of Trusts and other persuasive authorities. Although the North Carolina Supreme Court recently frowned on our use of the Restatement (Second) of Torts as authority in *Hedrick v. Rains*, 344 N.C. 729, 477 S.E.2d 171 (1996), we note that the Supreme Court has recognized the Restatement (Second) of Trusts as persuasive authority. *See Fortune v. First Union National Bank*, 323 N.C. 146, 148, 371 S.E.2d 483, 484 (1988); *Citizens National Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836, 842 (1972); *Campbell v. Jordan*, 274 N.C. 233, 242, 162 S.E.2d 545, 551 (1968); *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 254, 113 S.E.2d 689, 708 (1960).

Section 173 of the Restatement (Second) of Trusts makes clear that a trustee must always provide beneficiaries complete and accurate information and documentation regarding the trust:

> The trustee is under a duty to the beneficiary to give him upon his request at a reasonable time complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

Restatement (Second) of Trusts § 173. Section 173 also clearly provides authority for the position that beneficiaries are entitled to view trust documents relating to their interest in the trust. *See also* George G. Bogert & George T. Bogert, *The Laws of Trusts and Trustees* § 961, at 2-4 (rev. 2d ed. 1983) (beneficiary entitled to see trust documents where demand is reasonable and would benefit beneficiary; duty of trustee to give relevant information about the terms of the trust when requested by beneficiary); Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 173, at 462-465 (4th ed. 1987) (trustee under duty to give beneficiaries information and other documents relating to trust at their request).

The authorities cited above do not appear to limit a beneficiary's inquiry to the particular clause of the trust instrument from which

their specific bequest is derived. Instead, it is only the terms of the trust that limit the trustee's duty to disclose information about the trust. In this regard, G.S. 36A-78 (1995) provides that the settlor may,

> by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally . . . add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Article.

Here there was no provision in the trust instruments limiting the trustees' duty to disclose to the beneficiaries the terms of the trust agreement.

Defendants contend that they have satisfied their duty to disclose by revealing the specific clause granting plaintiffs' bequest. Plaintiffs urge that they are entitled to view all documents relating to the trust including prior revoked drafts of the trust. Comment c of § 173 of the Restatement (Second) of Trusts provides the following relevant insight:

> c. Terms of the Trust.
>
> Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.

Here the prior revoked documents are not "reasonably necessary" to enforce the plaintiffs' rights or to "redress a breach of trust" for two reasons. First, the revoked documents are by their nature inoperative, and therefore, plaintiffs have no interest in them. Second, only the "Second Restated and Amended Revocable Trust Agreement," dated 29 June 1990 and the "First Amendment to Second Restated and Amended Revocable Trust Agreement," dated 8 December 1992, contained their specific bequests. To allow plaintiffs to view earlier inoperative trust documents would go beyond plaintiffs' interest and be immaterial to their specific bequests.

We hold that absent an explicit provision in the trust to the contrary, plaintiffs as trust beneficiaries are entitled to view the trust instrument from which their interest is derived. This right to view trust instruments does not include trust documents that are no longer operative due to revocation. The wishes of the settlor to keep certain

terms of the trust secret is understandable; however, absent an explicit provision in the trust instrument to the contrary, the trustee has a duty to reveal the terms of the trust to the beneficiaries. Justice Cardozo's words concerning a fiduciary's duty still ring true today:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Trust Co. v. Johnston, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967) (*quoting Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928)). Accordingly, we affirm.

Affirmed.

Judges GREENE and MARTIN, John C., concur.

RITA L. SHAW, APPELLANT v. BRUCE B. CAMERON III, APPELLEE

No. COA95-341

(Filed 4 March 1997)

Discovery and Depositions § 8 (NCI4th); Divorce and Separation § 400 (NCI4th)— child support—discovery requests—improper limitation by court

The trial court in a child support action erred by ordering that defendant father respond to discovery requests only as to property owned individually by the defendant and subject to his exclusive control and by limiting defendant's responses regarding his inheritance or trust interests to those items subject to his ownership and control since the value and nature of defendant's interest in any partnerships or corporations and the terms of any trust of which he may be the beneficiary, as well as the amount of

income, including nontaxable, deferred or declined income flowing therefrom, would be relevant in this proceeding; any judgment rendered against defendant setting an amount of child support would be dependent in significant part upon the amount of his income and the nature of his estate whether owned or controlled exclusively by defendant or jointly with others; and the terms of business associations or trusts in which defendant possesses an interest might lead to admissible evidence regarding defendant's financial circumstances and resultant ability to pay child support even if his father currently controls the trust.

Am Jur 2d, Depositions and Discovery § 40; Divorce and Separation § 1041.

Spouse's right to discovery of closely held corporation records during divorce proceeding. 38 ALR4th 145.

Protective orders limiting dissemination of financial information obtained by deposition or discovery in state civil actions. 43 ALR4th 121.

Appeal by plaintiff from order entered 11 July 1994 and judgment entered 24 October 1994 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 13 May 1996.

John K. Burns for plaintiff-appellant.

Stevens, McGhee, Morgan, Lennon & O'Quinn, by Robert A. O'Quinn, for defendant-appellee.

JOHN, Judge.

Plaintiff assigns error to the trial court's 11 July 1994 order restricting discovery and to the court's 24 October 1994 judgment limiting child support paid by defendant to that amount computed utilizing the North Carolina Child Support Guidelines (the Guidelines). We hold the trial court erred in its 11 July 1994 discovery order.

Pertinent factual and procedural background is as follows: plaintiff and defendant lived together at defendant's home in Wilmington from October 1992 until late January or early February 1993; however, they never married. The parties' son, Riley Jackson Cameron (Riley), was born 11 September 1993.

Plaintiff instituted suit for child support 6 October 1993 and defendant answered, denying paternity. Plaintiff's subsequent motion

to amend her complaint to include a claim for custody was granted by the trial court. In December 1993, following receipt of blood-grouping test results establishing defendant's paternity of Riley, the parties entered into a consent agreement requiring defendant to pay child support in the amount of $600 per month pending a support award by the court.

Plaintiff submitted a "First Set of Interrogatories to Defendant" and "First Request to Defendant for Production of Documents," and received responses containing objections to much of the information sought. Plaintiff thereupon filed a motion to compel 8 June 1994. Defendant countered by seeking a protective order regarding certain financial matters and filing a stipulation that he would "not raise 'inability to pay reasonable child support' as a defense." In an order filed 11 July 1994, the trial court allowed plaintiff's motion to compel in part, but strictly limited the scope of discoverable information.

At trial in October 1994, evidence was introduced tending to show plaintiff was thirty-seven years-old, had obtained her GED and worked in the past as a nightclub dancer, but that she had not been employed for several years prior to trial. She lived in a mobile home in Davie County with one year-old Riley and three year-old Robbie, her son from a previous relationship. Plaintiff received income in the form of AFDC, food stamps, HUD rent subsidies, and occasional child support from Robbie's father.

The evidence also tended to show that defendant, thirty-eight years old at the time of trial, had obtained a tenth-grade education. He had not been employed since at least 1988, save for part-time work as a musician in a band for which he received approximately $500 annually. All defendant's living expenses were paid from proceeds of the Bruce B. Cameron, III, trust (the trust) established for defendant's benefit by his father. Defendant received an allowance of $300 per week from the trust, but sometime prior to October 1994 had received $650 per week. The 1994 proceeds of the trust, including interest and stock dividends totalling $29,294.54 through September 1994 and "non-recurring distributions from limited partnerships" in the amount of $38,251.72, were projected to total $67,546.

Testimony by the accountant employed by defendant's father indicated she was responsible for management of the trust records. All defendant's bills were directed to her for payment at the office of defendant's father, including defendant's monthly medical insurance premiums in the amount of $436.71, child support of $600.00 per

month for defendant's son by his first marriage, and $65.00 per week in preschool expenses for defendant's daughter living in the Wilmington home. The accountant testified defendant was possessed of no authority to direct payment of monies from the trust account nor to render decisions concerning assets of the trust. Moreover, the amount of defendant's allowance from the trust was determined by defendant's father and defendant had no control over that decision.

Further testimony showed defendant owned a five bedroom home which his father had purchased for him while retaining a promissory note in the amount of $150,006.50 executed by defendant. Although the note specified 3 September 1995 as the date upon which it was due and payable, defendant stated that he "[didn't] think there [was] a specific date on it." A full-time housekeeper employed by defendant discharged duties including cooking, cleaning, and helping care for defendant's three year-old daughter by his second wife, from whom he was separated. The housekeeper, who earned $15,472 between January and September 1994, was paid from the trust.

The court entered judgment 24 October 1994 granting plaintiff primary custody, but denying plaintiff's request for an upward deviation from the Guidelines and defendant's request for a deviation reducing the Guideline amount. Plaintiff consequently was awarded child support in the amount of $644 per month, which amount was calculated using defendant's 1994 projected trust income as his gross income. Plaintiff was also granted $1,500 in counsel fees. She filed notice of appeal 9 November 1994.

Plaintiff first contends the trial court erred in its 11 July 1994 order addressing her motion to compel discovery. Specifically, plaintiff challenges those portions of the court's order directing that defendant respond to discovery requests "only as to property owned individually by the Defendant and subject to his' exclusive control" and limiting defendant's responses regarding his inheritance or trust interests to those items "subject to his exclusive ownership and control."

To cite one example, plaintiff served the following interrogatory on defendant:

> Do you have, or have you had in the last 18 months, an ownership or beneficial interest in any entity, including but not limited to partnerships, limited partnerships, corporations, associations, joint ventures, trusts and sole proprietorships? If so, describe

> each such entity with particularity, including but not limited to its name; its address; your legal or equitable relationship to or interest in the entity; the fair market value of your interest in the entity; and your 1993 income from the entity.

In consequence of the court's restrictions, defendant's answer to this interrogatory and others similar in nature was "none," notwithstanding data on his 1993 tax returns reflecting an interest in at least two partnerships, Cameron Co. Ltd. Partnership and Cameron Properties, and one closely held corporation, Bayshore Estates. The sole information concerning defendant's assets and income obtainable by plaintiff within the limitations set by the court was that contained in defendant's 1992 and 1993 income tax returns.

As a result of the court's order, plaintiff asserts, she was

> denied any reasonable opportunity to gather evidence as to the defendant's non-taxable income, as to the nature and value of the defendant's interest in the partnerships, as to the identity and value of the defendant's interest in real estate that he did not solely own, as to the terms of the trust generating the $67,546 income in 1994, and as to the nature and extent of tax-sheltered investments not solely owned and controlled by the defendant.

Generally, "orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480, *disc. review denied*, 293 N.C. 589, 239 S.E.2d 264 (1977). However, under the circumstances *sub judice*, we are compelled to conclude the trial court's 11 July 1994 order constituted an abuse of discretion.

N.C.R. Civ. P. 26(b)(1) allows discovery of "any matter . . . which is relevant to the subject matter involved in the pending action." N.C.G.S. § 1A-1, Rule 26 (1990). The rule additionally provides:

> It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.

The "ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the *ability* of the father [mother] to meet the needs." *Pittman v. Pittman*, 114 N.C. App. 808, 810, 443 S.E.2d 96, 97 (1994) (emphasis

added). Indeed, the statute governing child support actions provides that:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the *estates*, earnings, conditions, [and] accustomed standard of living of the child and the parties . . . .

N.C.G.S. § 50-13.4(c) (1995) (emphasis added). Further,

> a [parent's] duty of support today does not end with the furnishing of mere necessities if he is able to afford more. In addition to the actual needs of the child, a [parent] has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.

Williams v. Williams, 261 N.C. 48, 57, 134 S.E.2d 227, 234 (1964).

Prospective child support is currently determined in most cases under the Guidelines, *Taylor v. Taylor*, 118 N.C. App. 356, 362, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996), and, absent a request for variance,

> support set consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education, and maintenance.

Browne v. Browne, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991). The Guidelines utilize the "gross income" of each parent in calculating the amount of a child support obligor's payments thereunder. *North Carolina Child Support Guidelines*, AOC-A-162 (8/91 and 10/94 revisions). Gross income under the Guidelines is defined as "income from any source," including "income from . . . dividends, . . . interest, trust income, . . . [and] gifts." *Id.* Further, in a separate provision, the Guidelines specifically discuss inclusion of income from the "joint ownership of a partnership or closely held corporation." *Id.* Finally, "non-recurring, one-time payments" are "includable as income," however they "should be distinguished from ongoing income." *Id.*; *see, e.g.*, *Helbling v. Helbling*, 541 N.W.2d 443, 447 (N.D. 1995) (regarding non-recurring payments: "Our law and the public policy inherent in the guidelines dictate that children should share in the child support obligor's good fortune.").

In view of the foregoing principles, the value and nature of defendant's interest in any partnerships or corporations and the

terms of any trust of which he might be the beneficiary, as well as the amount of income, including non-taxable, deferred or declined income, flowing therefrom, would all bear relevance to the instant proceeding. Any judgment rendered against defendant setting an amount of child support would be dependent in significant part upon the amount of his income and the nature of his *estate*—whether exclusively owned or controlled by defendant, or jointly with others.

The terms of business associations and trusts in which defendant might possess an interest also would appear to be discoverable, if only under the rubric of being "reasonably calculated to lead to the discovery of admissible evidence" regarding defendant's financial circumstance and resultant ability to pay child support. *See* N.C.R. Civ. P. 26(b)(1). While testimony was introduced that defendant's father exercised sole control over the trust, this was not necessarily conclusive and, without access to the trust instrument, plaintiff lacked any means to challenge the testimony through cross-examination or otherwise. Moreover, current control by defendant's father of the trust would not necessarily preclude relevancy of the terms thereof to the instant case. Examination of the trust instrument, for example, could reveal any present or future authority of defendant to liquidate trust assets, as well as indicate the point at which he might be entitled to access the principal.

We note that in response to plaintiff's motion to compel discovery, defendant filed a stipulation that he would not raise inability to pay as a defense, implying such stipulation should operate to relieve him from full disclosure of his financial condition. However, under the Guidelines, a full examination of all financial resources is necessary for the trial court to determine the presumptive award. Indeed, when the parties' annual combined income exceeds the upper limit covered by the Guidelines (presently $150,000), in order

> to determine the relative abilities of the parties to provide support, the court "must hear evidence and make findings of fact on the parents' income[s], estates (e.g. savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses."

Taylor, 118 N.C. App. at 362-63, 455 S.E.2d at 447 (citation omitted).

Based on the foregoing, we reverse the trial court's 11 July 1994 order on plaintiff's motion to compel and remand for reconsideration

and entry of a new order in light of our decision herein. *See Powers v. Parisher*, 104 N.C. App. 400, 411, 409 S.E.2d 725, 731 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 286, 417 S.E.2d 254 (1992). Should the court deem it appropriate in its discretion, it may direct the requested information to be produced under seal for *in camera* determination by the court of relevancy or potential for leading to discovery of admissible evidence. Any material which the court determines not discoverable might then be preserved under seal for review on appeal should further consideration by this Court become necessary.

In that the trial court may alter its ruling on plaintiff's motion to compel in light of our opinion herein, which modified order might in turn affect the court's subsequent decisions on deviation from the guidelines and calculation of the amount of child support to be paid by defendant, we also vacate that portion of the court's October 1994 judgment setting an amount of child support and declining to deviate from the Guidelines. We observe that the parties' consent order for temporary child support "pending further orders of [the trial] court" would thereby be reinstated.

While additional evidence beyond that previously considered may not ultimately be produced, because of the criticality of income amounts to a child support award, full opportunity for discovery of defendant's estate should be allowed in the interest of the child's welfare. However, in that the amount of child support remains to be resolved pending resolution of plaintiff's motion to compel, we decline to address plaintiff's further contention that the trial court erred by failing to grant an upward deviation from the Guidelines.

Finally, we vacate the trial court's award of counsel fees subject to subsequent entry of an award upon proper findings at the conclusion of further proceedings. As the errors assigned by plaintiff to the court's setting of the award at but one-half the fees she incurred will likely not recur on remand, we likewise do not discuss those contentions.

Reversed and remanded.

Chief Judge ARNOLD and Judge McGEE concur.

STATE OF NORTH CAROLINA v. ARTHUR EDWARD BALDWIN

No. COA96-419

(Filed 4 March 1997)

1. **Evidence and Witnesses § 1294 (NCI4th)— cross-examination—police officer—prior case—deceit used to obtain confession**

The trial court erred in a first-degree murder prosecution (life sentence) of a sixteen-year-old defendant by denying defendant the opportunity to cross-examine a police detective as to specific acts in a prior investigation where defendant sought to reveal that the detective had deceived at least one other person in an effort to obtain a confession for committing a crime. The probative value of this evidence was important in light of the very weak case the State had if the confession was rejected. N.C.G.S. 8C-1, Rule 608(b).

Am Jur 2d, Evidence §§ 307, 310, 743.

2. **Evidence and Witnesses § 267 (NCI4th)— expert testimony—psychiatrist—defendant's mental condition—not general character evidence**

It was error in the first-degree murder prosecution (life sentence) of a sixteen-year-old for the trial court to exclude expert testimony from a psychiatrist on the grounds that it was prohibited character evidence where the psychiatrist would have offered testimony that defendant's psychological characteristics would made him more prone to making a false confession in police interrogation. The defendant did not seek to have the psychiatrist provide a generalized description of the defendant's disposition; rather, his expert testimony would have related to psychological factors affecting the defendant's mental condition.

Am Jur 2d, Evidence §§ 363, 368, 380.

Appeal by defendant from judgment entered 19 December 1995 in Forsyth County Superior Court by Judge William Z. Wood, Jr. Heard in the Court of Appeals 28 January 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Jeffrey P. Gray, for the State.

J. Clark Fischer for defendant-appellant.

GREENE, Judge.

Arthur Edward Baldwin (defendant) was convicted of first degree felony murder by a jury in the December 1995 Criminal Session of the Forsyth County Superior Court. Defendant appeals from a mandatory sentence of life imprisonment.

The defendant was born on 29 June 1978 and was fifteen years old on 28 June 1994, the day Debbie Dawn Burnette (Burnette) was murdered. On 10 July 1994 the defendant was charged in a juvenile petition with the murder of Burnette. On 26 August 1994 a district court judge found probable cause and transferred the case to the superior court. On 23 February 1995 the defendant moved to suppress a statement he provided to Winston-Salem detective R.L. Barren (Barren) in which he confessed to holding a shotgun that accidentally discharged killing Burnette during a staged robbery at the Knight's Inn on the early morning of 28 June 1994. On 25 October 1995 the trial court denied the motion to suppress after concluding that the statement was "knowingly, freely and voluntarily made without any threats or promises and free of any coercion."

At the trial the State presented evidence that on 28 June 1994 (in the early morning hours) two black men, one wearing a hood, entered a room at the Knight's Inn where Burnette was living. The man wearing the hood pointed the gun at Burnette and asked for her "shit." While the gun was pointed at Burnette it discharged, killing her. The witness, a friend of Burnette who was in the room with her at the time of the murder, could not identify the two black men. Another witness for the State testified that, in early July 1994, she heard the defendant say that he had killed the white lady at the Knight's Inn. After making the statement, which was made when he was "getting high," the defendant then said that he was "just kidding."

The State also offered the testimony of Barren who testified that, after taking the defendant into custody, he gave the defendant "a broad scenario" as to what may have occurred at the time of the murder. The defendant was told that it may assist him during the course of this investigation if he made a truthful and honest statement in reference to the events that occurred. The defendant did not appear to be impaired or intoxicated and he was not threatened or promised anything. Barren admitted that there were no fingerprints or other physical evidence linking the defendant to the murder of Burnette. He stated that he was "familiar with a number of different investigative techniques to use in terms of interrogating a criminal suspect,"

but that it was never his "purpose to trick anyone to tell [him] something about an incident that they have no knowledge of."

The defendant testified and denied that he had killed Burnette. He told the jury that he was at another location at the time of the murder and learned of the incident from a news report. He further testified that he was arrested on 10 July 1994 and was at the time of his interrogation by Barren still under the influence of alcohol and marijuana which he had used the night before. According to the defendant the following communication occurred between him and Barren:

> A. He asked me where I was the morning of the 28th and then I told him I was at Shannon and Jennifer's house and then [Barren] looked at me and said, "I'll ask you one more time. Where were you on the morning of the 28th?" I told him again where I was and then [he] laughed at me and said he knew where I was and he knew I wasn't there and he told me that [he knew] I had shot [Burnette] . . . and I told him I didn't and I told him over and over that I didn't do it and where I was and he didn't believe me.
>
> Q. And when you told him this, did he say anything to you?
>
> A. He told me that I was facing life in prison and there was no need of me lying to him because he already has the scoop and he said some people . . . told him what happened and he knows about it and *he said he had my fingerprints and he said an eye witness* (emphasis added).

The defendant offered several alibi witnesses. Betty Jones testified that the defendant was living with her at the time of the murder and that on the early morning (4:00 A.M.) of 28 June 1994 she was awakened by the sound of a gunshot from the direction of the adjacent Knight's Inn. She got out of bed and checked the others in her house and observed the defendant watching television.

During the trial the defendant requested permission from the trial court to examine Barren about his conduct in the interrogation of Parris Kennerson (Kennerson), a suspect in a 1992 murder investigation. Specifically, the defendant sought to examine Barren regarding whether he had falsely misled Kennerson to believe that there were "hair and fingerprints" found on the victim's body. The defendant contended that this examination was proper under Rule 608(b) of the Rules of Evidence and should be considered by the jury in its evaluation of the truthfulness of Barren's testimony relating to whether the defendant's confession was coerced. The trial court sustained the

State's objection to this testimony on the grounds that it was too "remote" to be admissible under Rule 608(b) and alternatively on the grounds that "its prejudicial effect . . . grossly outweighs any probative effect" under North Carolina Rules of Evidence, Rule 403. N.C.G.S. § 8C-1, Rule 403 (1986). The defendant was permitted to make a tender of proof for the record.

Outside the presence of the jury the defendant examined Barren with regard to his interrogation of Kennerson in 1992. Barren stated that he asked Kennerson to "explain how his hair and fingerprints were found on" the deceased's body and told him that he "could prove that [Kennerson] had . . . killed" the decedent. He further testified that he did not have any "fingerprints or any item of physical evidence linking" Kennerson to the crime and that he could not "have proved [at the time of the interrogation] that [Kennerson] was the one who committed the killing."

The defendant also attempted to introduce expert psychiatric testimony from Dr. Gary Hoover (Dr. Hoover) of the defendant's psychological characteristics that would make him more prone to "making a false confession in police interrogation." The trial court sustained the State's objection to this evidence on the grounds that the evidence was inadmissible because it constituted "expert testimony on character or a trait of character under Rule 405." The defendant was permitted to make an offer of proof for the record. Dr. Hoover would have testified that the defendant "as a matter of personality make-up . . . fits the criteria . . . with regard to coping mechanisms in response to pressure under stress" which would make him likely "to fabricate stories . . . to reduce the stress demands" of confrontation with authority.

The issues are whether the trial court erred: (I) in not permitting the cross-examination of Barren as to the alleged specific acts of dishonesty during a previous interrogation of Kennerson in a 1992 murder investigation; and (II) in excluding Dr. Hoover's testimony on the grounds that it was prohibited character evidence.

I

[1] The standard for the *admissibility* of a confession is "whether it was given voluntarily and understandingly." *State v. Chapman*, 343 N.C. 495, 500, 471 S.E.2d 354, 356 (1996). In other words, if the confession is not given voluntarily and understandingly, it cannot be presented into evidence and must be suppressed. The use of trickery or

deceit by the police in the securing of a confession, although not commendable, does not standing alone render the confession inadmissible. *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983). "The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession." *Id.* The question of admissibility of the confession is for the trial judge. *State v. Moore*, 321 N.C. 327, 339, 364 S.E.2d 648, 654 (1988); N.C.G.S. § 8C-1, Rule 104(e) (1992).

Once the trial court determines that the confession is admissible, its weight and credibility are for the jury and the defendant retains the right to present evidence relevant to these issues. N.C.G.S. § 8C-1, Rule 104(e); *Moore*, 321 N.C. at 339, 364 S.E.2d at 654. "Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury." *State v. Barber*, 268 N.C. 509, 511, 151 S.E.2d 51, 53 (1966). Thus "even if the court determines that [the] confession was not coerced, the defendant may introduce evidence of coercion, since this is relevant to the weight of the evidence." N.C.G.S. § 8C-1, Rule 104(e).

In this case the defendant does not contest the admissibility of the confession. He does, however, argue the evidence, sought to be elicited on the cross-examination of Barren, that Barren had previously lied to another murder suspect "under circumstances strikingly similar" to the defendant's interrogation "was directly relevant to the key issue of whether [the defendant's] confession was coerced by Barren and hence unreliable." We agree.

Rule 608(b) specifically allows the cross-examination of a witness with respect to specific conduct of the witness that indicates his character for truthfulness or untruthfulness if the conduct in question "is in fact probative of the truthfulness or untruthfulness and is not too remote in time" and if "the conduct . . . did not result in a conviction," *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986); N.C.G.S. § 8C-1, Rule 608(b) (1992), and provided further that the "probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness." *Morgan*, 315 N.C. at 634, 340 S.E.2d at 90; N.C.G.S. § 8C-1, Rule 403. The focus "is upon whether the conduct sought to be inquired into is of the type which is indicative of the actor's character for truthfulness or untruthfulness." *Morgan*, 315 N.C. at 634, 340 S.E.2d at 90.

Evidence that a witness has attempted to deceive others is among the types of conduct "most widely accepted" as being indicative of one's character for truthfulness or untruthfulness. *Morgan*, 315 N.C. at 635, 340 S.E.2d at 90.

In this case the defendant sought, in his cross-examination of Barren, to reveal to the jury that Barren had in May of 1992 deceived a person he was investigating in an effort to obtain a confession of that crime. This evidence is probative of Barren's character for untruthfulness and is not too remote, having occurred only two years prior to Barren's interrogation of the defendant, *see State v. Roberson*, 93 N.C. App. 83, 85, 376 S.E.2d 486, 487 (1989) (five-year lapse was not too remote for other crimes in context of Rule 404(b)), and there is no evidence that Barren was convicted of any crime for that 1992 deception.

Furthermore, we do not believe the risk of unfair prejudice to the State is outweighed by the probative value of this evidence. The defendant's position in the trial court was that the confession was coerced by Barren. The defendant testified that Barren told him that "he had my fingerprints and . . . an eye witness." Barren testified that he had neither. Whether Barren lied to the defendant, a sixteen-year-old young man, was an issue for the jury to evaluate in determining the weight and credibility of the confession. Whether Barren had lied to other persons from whom he sought to obtain a confession was most relevant and probative on the question of whether Barren had lied to this defendant in securing his confession. The probative value of this evidence becomes even more important in light of the very weak case the State has against this defendant if the confession is rejected by the jury. The trial court, therefore, erred in denying the defendant the opportunity to examine Barren with respect to the 1992 Kennerson investigation as this evidence was admissible under both Rule 608(b) and Rule 403.

Finally because "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial," the defendant has been prejudiced by the error and the defendant is entitled to a new trial. N.C.G.S. § 15A-1443(a) (1988).

II

[2] In North Carolina "[e]xpert testimony on character . . . is not admissible as circumstantial evidence of behavior." N.C.G.S. § 8C-1,

Rule 405(a) (1992). "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness"; it is a "person's tendency to act prudently in all the varying situations of life—business, at home, in handling automobiles and in walking across the street." Kenneth S. Broun et al., *McCormick on Evidence* § 195 (Edward W. Cleary ed., 3d ed. 1984). Evidence in the form of expert testimony as to conditions affecting a person's mental condition is not character evidence. *State v. Kennedy*, 320 N.C. 20, 31, 357 S.E.2d 359, 366 (1987) (expert testimony regarding the mental and emotional state of victim is not character evidence); *State v. Heath*, 316 N.C. 337, 341, 341 S.E.2d 565, 568 (1986) (suggesting that testimony from expert with respect to mental condition of victim would not be character evidence); *see State v. Strickland*, 96 N.C. App. 642, 646-48, 387 S.E.2d 62, 63-66 (1990) (allowing expert to testify that victim suffered from Post Traumatic Stress Disorder); *cf. United States v. Roark*, 753 F.2d 991, 994 (1991) (admitting expert testimony as to defendant's susceptibility to coercion).

In this case Dr. Hoover did not seek to provide a "generalized description" of the defendant's "disposition." His testimony instead related to psychological factors affecting the defendant's mental condition and the trial court erred in excluding the testimony on the grounds that it was prohibited character evidence.

As the defendant is entitled to a new trial under Issue I, we do not address whether Dr. Hoover's testimony is otherwise admissible. *See Heath*, 316 N.C. at 340, 316 S.E.2d at 567-68 (holding that expert may not testify as to the credibility of witness); *see also State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282 (1990) (setting out relevant rules for admissibility of expert testimony).

New trial.

Judges EAGLES and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. SINCERE JONATHAN WILLIS

No. COA96-222

(Filed 4 March 1997)

1. Searches and Seizures § 80 (NCI4th)— departure from drug house—evasive actions—investigatory stop—reasonable suspicion

The trial court did not err in concluding that police officers had reasonable suspicion to make an investigatory stop of defendant after defendant left a suspected drug house just before a search warrant was executed where defendant took evasive action when he knew he was being followed. When an individual's presence at a suspected drug area is coupled with evasive actions, police may form from those actions the quantum of reasonable suspicion necessary to conduct an investigatory stop.

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

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

2. Searches and Seizures § 80 (NCI4th)— cocaine—investigatory stop—pat down—exigent circumstances

The trial court did not err in allowing the introduction of crack cocaine seized during an investigatory stop of defendant where the arresting officers suspected defendant was associated with drug trafficking. It is entirely understandable that police officers justifiably feared for their personal safety when their common-sense association of drugs and guns is combined with defendant's exit from a suspected drug house just prior to police execution of a search warrant; defendant's furtive, evasive behavior; defendant's nervous demeanor; and the sudden lunge of defendant's hand into the interior of his jacket during the pat-down by one of the officers. It is of no consequence that the jacket pocket did not contain a weapon; in the highly charged atmosphere resulting from defendant's sudden act, the detective moved in an immediate fashion to protect himself and other officers. The detective's search was limited to the jacket pocket and was proportionate to the exigent circumstances which occurred.

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

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

3. Appeal and Error § 147 (NCI4th)— preservation of objection—subsequent testimony

Defendant did not properly preserve for appeal his objection to an arresting police officer's opinion testimony where another police officer subsequently provided the same testimony without objection.

Am Jur 2d, Appellate Review §§ 614 et seq.

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial. 76 ALR Fed. 619.

Appeal by defendant from judgment entered 29 August 1995 by Judge Knox V. Jenkins in Wake County Superior Court. Heard in the Court of Appeals 29 October 1996.

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

Samuel L. Bridges for defendant appellant.

SMITH, Judge.

Defendant appeals his conviction for trafficking in cocaine by possession. Defendant assigns error to the trial court's failure to grant his pretrial motion to suppress evidence, and to the trial court's allowance of certain testimony at trial. Finding no error in the proceedings below, we affirm.

The relevant facts are as follows. On 16 December 1994, Detective Ray G. Moss of the Raleigh Police Department applied for, and obtained, a search warrant for a residence located at 206 Peartree Lane in Raleigh, North Carolina. According to the search warrant application, a confidential informant had informed Detective Moss that he had seen cocaine at the 206 Peartree Lane residence within the seventy-two-hour period preceding the warrant application. This confidential informant told police that a person known as "Bugsy" was selling drugs out of the 206 Peartree Lane residence (hereinafter, the "premises").

While Detective Moss applied for the warrant, other Raleigh police officers began conducting surveillance of the premises. After roughly an hour's surveillance, and just prior to the execution of the warrant, the investigating officers noticed defendant leaving the premises. At this point, the surveilling officers were not sure what "Bugsy" looked like. Concerned that defendant (whom the police did not recognize) might be involved with the alleged drug activity taking place inside the premises, or that he might be "Bugsy" himself, Detective Kent Sholar began to follow him in his unmarked police car.

It soon became apparent to defendant that he was being followed by Sholar, and so, defendant took evasive action by cutting through a nearby hospital parking lot. While defendant was crossing the hospital lot, Officer Buddy Gabe Young, a uniformed officer, arrived on the scene. Detective Sholar gave Officer Young a description of defendant, and asked Officer Young to stop defendant and ask him for his identification. Because Detective Sholar was in plain clothes, he thought the wiser course was to allow a uniformed officer to approach defendant for the purpose of an investigative stop. Once in position, and without any backup officers immediately present, Officer Young exited his vehicle and walked over to defendant.

Officer Young identified himself and started to converse with defendant. Defendant then asked Officer Young why he was being stopped. Officer Young replied that he was conducting an investigative stop, and asked defendant for identification and for consent to a pat down for drugs and weapons. Defendant consented to the pat down. In the course of the pat down, Officer Young began to pat down the exterior, and then the interior, of the leather jacket defendant was wearing. Then, just as Officer Young began to check the interior pocket of defendant's leather jacket, defendant "lunged into the jacket with his hand." As Officer Young describes it, "both [of defendant's hands] came up," defendant's right hand "went in [to his jacket pocket] really fast," and defendant's actions "really worried me."

Officer Young, thinking defendant might be reaching for a weapon, and fearing for his personal safety, immediately "locked [his] hands around [defendant's] jacket, [effectively locking defendant's] hand inside his pocket." As Officer Young attempted to restrain defendant, Detective Sholar arrived and began to assist in controlling the rapidly developing situation. Officer Young testified that, "[a]t th[is] point [he] was worried about what was in [defendant's]

pocket." Officer Young testified "[he] didn't know if there was a knife, a gun, or what was in there."

As Officer Young grabbed defendant's hand and tried to keep him from removing it from his pocket, he "locked [his] hands around the jacket, [with defendant's] hand inside his pocket . . . lock[ing] everything in." Simultaneously, Detective Sholar tried to control the left side of defendant's body, in an attempt "to keep [defendant's] hand in his pocket, because [he and Officer Young] didn't want him to bring [his hand] out if he had anything in it. . . . I was thinking [defendant had] a gun."

Once Detective Sholar and Officer Young "managed to get [defendant's] hand out of his pocket," they put defendant's hands behind him, and reached into defendant's interior jacket pocket and emptied it. Detective Sholar's search into defendant's jacket pocket revealed several plastic baggies appearing to contain crack cocaine. At this point, the crack cocaine was taken into police possession and defendant was arrested.

Subsequently, defendant was tried and convicted of trafficking in cocaine by possession of more than 28 grams and less than 200 grams. The crack cocaine seized from defendant during the above-described events was introduced in evidence by the State at trial.

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[1] Our review of a motion to suppress is limited to a determination of whether the trial court's findings of fact are supported by competent evidence, and whether those findings are in turn supported by legally correct conclusions of law. *State v. Smith*, 118 N.C. App. 106, 111, 454 S.E.2d 680, 683, *cert. denied*, 340 N.C. 362, 458 S.E.2d 196 (1995). Defendant argues the search of his person violated the Fourth and Fourteenth Amendments to the United States Constitution and analogous provisions of the North Carolina State Constitution.

In response to these constitutional arguments the trial court made the following pertinent findings of fact and conclusions of law in its order denying defendant's motion to suppress.

FINDINGS OF FACT

* * * *

8. The detective following the defendant asked a uniform [*sic*] officer to stop and identify the defendant.

9. The defendant acted very nervously and when the uniform officer began to pat the defendant down for weapons, the defend-

ant put his hand inside his coat pocket. At that point, both officers, based on prior experience linking [the] drug trade and weapons, fearing defendant had a weapon, quickly grabbed defendant and forcibly removed defendant's hand from his pocket.

10. Defendant had nothing in his hand when it was removed from the pocket. Still not knowing if defendant had a weapon, the detective checked defendant's pocket and found no weapon, but two packages of cocaine. Until defendant put his hand in his pocket, no force, nor [*sic*] threats were employed by law enforcement officers against the defendant.

* * * *

CONCLUSIONS OF LAW

1. Law enforcement officers did not need a warrant to approach and ask questions of defendant.

2. At the point that the defendant put his hand in his pocket the law enforcement officers were within the law in detaining and searching defendant's pocket, given the circumstances including defendant's nervousness, his evasive action, having just left a drug house . . . .

3. There was no violation of statutory or constitutional law.

It is well established that an officer may undertake an investigatory stop of a person, so long as that officer has a reasonable and articulable suspicion, based on objective facts, that the person is engaged in criminal activity. *State v. Watson*, 119 N.C. App. 395, 397, 458 S.E.2d 519, 521-22 (1995). Courts must consider " 'the totality of the circumstances—the whole picture' " in making the determination as to whether a reasonable suspicion to make an investigatory stop existed at the time the stop was made. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L.Ed.2d 621, 629 (1981)).

The totality of the circumstances test must be viewed through the prism of a reasonable police officer standard; that is, the reviewing court must take into account an officer's training and experience. *Id.* Thus, a police officer must have developed more than an " 'unparticularized suspicion or hunch' " before an investigatory stop may occur. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)).

On the basis of the above-stated rules, we conclude that Officer Young's decision to stop defendant and make inquiries as to his identification and prior presence at the drug house was well grounded in law. Defendant argues he was stopped only because he exited a suspected drug house. Were this actually the case, we might agree there was an insufficient basis to justify the investigatory stop. *See State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 722-23 (1992) (mere presence of an individual on a corner known for drug activity is insufficient justification for an investigative stop). However, the record indicates the officers' decision to make the stop was based on more than defendant's mere presence at the suspected drug house.

The *Butler* Court held that, when an individual's presence at a suspected drug area is *coupled* with evasive actions, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop. *Id.* The instant case falls well within the confines of this rule from *Butler*. Here, defendant was not stopped just because he left a suspected drug house. Instead, defendant was stopped and detained because the totality of his conduct created a reasonable suspicion in Detective Sholar's mind that defendant was engaged in criminal conduct. Defendant left a suspected drug house just before the search warrant was executed. Defendant set out on foot and took evasive action when he knew he was being followed. And, at the suppression hearing, Detective Sholar testified that defendant had exhibited nervous behavior. We find that these facts, taken altogether, justified Officer Young's detention of defendant through an investigatory stop.

[2] Having determined that the investigatory stop and detention was proper, the next question we must answer is whether the ensuing warrantless search of defendant by the officers also passed constitutional muster. In the context of most "investigatory stops," police officers may perform only a limited frisk, or pat-down, of a suspect to discover any weapons which might be present. *Butler*, 331 N.C. at 234, 415 S.E.2d at 723. This limited frisk may take place, "[i]f, after the detention, [the investigating officer's] personal observations confirm his apprehension that criminal activity may be afoot and [] that the person may be armed . . . ." *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982) (quoting *State v. Streeter*, 283 N.C. 203, 210, 195 S.E.2d 502, 507 (1973)). In such a situation, the limited frisk is a function of "self-protection." *Id.*

In the instant case, the search undertaken by Detective Sholar and Officer Young exceeded the scope of the limited frisk contem-

plated by the *Butler* and *Peck* courts. This does not mean, however, that the more intrusive search involved here was improper. The correct inquiry under the circumstances of this search is "whether the degree of intrusion [was] reasonably related to the events that took place." *Watson*, 119 N.C. App. at 398, 458 S.E.2d at 522. With this inquiry in mind, we have frequently stated that:

> "In determining whether or not conduct is unreasonable, '[t]here is no slide-rule formula,' and '[e]ach case must turn on its own relevant facts and circumstances.' In determining reasonableness, courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

Id. (quoting *State v. Smith*, 118 N.C. App. 106, 114, 454 S.E.2d 680, 685, *cert. denied and supersedeas allowed*, 340 N.C. 362, 458 S.E.2d 196 (1995)).

Applying the principles elucidated in *Watson*, we conclude that the circumstances facing the officers in this case justified the warrantless search of the instant defendant. Both Officer Young and Detective Sholar testified that, in their experience, persons involved with drugs often carry weapons. Given their experience with drug trafficking, both officers were "entitled to formulate 'common-sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers.' " *Butler*, 331 N.C. at 234, 415 S.E.2d at 723 (citation omitted). When the officers' common-sense association of drugs and guns is combined with: (1) defendant's exit from a suspected drug house just prior to police execution of a search warrant; (2) defendant's furtive, evasive behavior; and (3) defendant's nervous demeanor; followed by, (4) defendant's sudden lunge of his hand into the interior of his jacket during the pat-down by Officer Young, it is entirely understandable that both officers justifiably feared for their personal safety.

In *Watson*, we held that "where [urgent] exigent circumstances are shown to exist," our courts have "allowed highly intrusive warrantless searches of individuals." *Watson*, 119 N.C. App. at 399, 458 S.E.2d at 522. The search at issue here, involving the emptying of defendant's interior jacket pocket, was perfectly consistent with, and proportionate to, the exigent circumstances facing the officers. Defendant's sudden movement of his hand into an interior jacket pocket, in the midst of Officer Young's pat-down, required immediate and decisive action. At that point, the situation became fluid and

volatile, and Detective Sholar reacted reasonably and proportionately in searching and emptying the jacket pocket.

That the jacket pocket did not end up containing a weapon is of no consequence to our analysis. In the highly charged atmosphere which resulted from defendant's sudden act, Detective Sholar moved in an immediate fashion to protect himself and the other officers. Detective Sholar's search was thus limited to the jacket pocket, and was proportionate to the exigent circumstances which occurred. For these reasons, this assignment of error is overruled.

[3] Defendant's second assignment of error concerns Detective Sholar's testimony that there exists, in his opinion, a close connection between those involved in the trade of illegal drugs and guns. This assignment merits no discussion, because defendant allowed Detective Ray Moss to testify about such connections without objection. *See State v. Moore*, 335 N.C. 567, 597, 440 S.E.2d 797, 814, *cert. denied*, —— U.S. ——, 130 L.Ed.2d 174 (1994). By failing to object to Detective Moss' testimony, defendant waived this subject as a proper issue for appellate review.

For the foregoing reasons, we find that defendant received a fair trial, free from error.

No error.

Judges LEWIS and WALKER concur.

ROYAL INSURANCE COMPANY OF AMERICA, PLAINTIFF v. THE CATO CORPORATION, DEFENDANT

No. COA96-545

(Filed 4 March 1997)

Insurance § 668 (NCI4th)— claim against insured—declaratory judgment—default judgment—failure to notify—insurance

The trial court did not err in granting summary judgment for plaintiff insurance company in a declaratory judgment action arising from a false imprisonment and malicious prosecution claim when plaintiff refused to indemnify defendant for a default judgment because defendant failed to timely notify plaintiff of the

claim. A "knowledge of occurrence" provision in the policy which designated plaintiff's insurance department and executive officers as the persons whose knowledge triggers a duty to report occurrences only addresses the duty to provide notice of "occurrences" and is separate and distinct from the duty to "immediately send" suit papers to plaintiff. It is clear that defendant did not comply with the requirement to "immediately send" legal papers by sending the papers to plaintiff three months after service. Moreover, plaintiff was materially prejudiced by that failure because a default judgment had already been entered and plaintiff was deprived of the opportunity to investigate or defend the claim. Moreover, defendant's delay in providing plaintiff with the legal papers eliminated any obligation under the policy to provide a defense.

Am Jur 2d, Automobile Insurance §§ 414 et seq.

Modern status of rules requiring liability insurer to show prejudice to escape liability because of insured's failure or delay in giving notice of accident or claim, or in forwarding suit papers. 32 ALR4th 141.

Appeal by defendant from order and judgment entered 30 November 1995 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 January 1997.

Smith, Helms, Mulliss & Moore, L.L.P., by Douglas W. Ey, Jr., and Leigh F. Moran, for plaintiff-appellee.

McCalla, Raymer, Padrick, Cobb, Nichols & Clark, by Carol V. Clark, and J. Gregory Fagan, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff Royal Insurance Company of America (Royal) brought this action seeking a declaration of its rights and obligations under a commercial general liability insurance policy (the Policy) issued to defendant Cato Corporation (Cato). The dispute arises out of the following factual background:

In January of 1993, Zenobia Hurt was charged, arrested, and jailed as a result of allegations of theft lodged against her by a manager of a Cato retail store in Bluefield, Virginia. The charges were subsequently dismissed. On 24 September 1993, Ms. Hurt filed an action against Cato in the Circuit Court for Tazewell County, Virginia,

alleging false imprisonment and malicious prosecution (the *Hurt* suit). Cato's Regional Vice President and duly-appointed registered agent for service of process was properly served with summons and a copy of the complaint in the *Hurt* suit on 28 September 1993. Defendant Cato did not file an answer to the *Hurt* complaint, and, on 24 November 1993, the trial court entered a default judgment in favor of Ms. Hurt in the amount of $500,000.

On 28 December 1993, Ms. Hurt's attorney in Virginia transmitted a copy of the court order and judgment in the *Hurt* suit to Cato's President in Charlotte, North Carolina. Ms. Hurt's attorney also informed Cato's Chief Financial Officer that the sheriff had seized Cato's Bluefield, Virginia store to satisfy the default judgment. Cato's Chief Financial Officer delivered a copy of the *Hurt* judgment to the Director of Risk Management of Cato's Insurance Department, who in turn, notified Royal of the *Hurt* suit for the first time. Cato unsuccessfully sought an injunction to stay execution to satisfy Ms. Hurt's judgment, and Cato subsequently paid Ms. Hurt $425,000 in settlement to satisfy the judgment.

On 29 December 1993, Royal received a General Liability Notice of Occurrence/Claim under the Policy from Cato, as well as a copy of the *Hurt* judgment, but did not receive a copy of the *Hurt* complaint until the next day. On 30 December 1993, Royal made a preliminary determination to deny coverage based on Cato's failure to meet the notice requirements of the Policy. Royal subsequently declined coverage by letter to Cato dated 28 February 1994 on the grounds that Cato had failed to "give Royal notice of the *Hurt* suit as soon as practicable and to forward the summons and complaint to Royal immediately" pursuant to Section IV, Paragraph 2 of the Policy. After Cato threatened to file suit, Royal filed this action seeking a determination of its obligation to indemnify Cato under the Policy. Cato answered and filed a counterclaim alleging claims for Royal's breach of the policy and refusal to pay the judgment, failure to defend, breach of duty of fair dealing, and bad faith refusal to pay Cato's claim under the policy.

After discovery, both parties moved for summary judgment. The trial court granted Royal's motion for summary judgment finding "no genuine issue as to any material fact concerning Royal's claim for declaratory judgment or concerning CATO's counterclaims for damages, and that Royal is entitled to entry of judgment as a matter of law on both its claim for declaratory judgment and CATO's counterclaims for damages." Defendant Cato appeals.

The rules with respect to summary judgment are well-established. When considering a motion for summary judgment, the trial court is required to view the pleadings, affidavits and discovery materials in the light most favorable to the non-moving party to determine whether any genuine issues of material fact exist and, if there are none, whether the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1990); *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). Summary judgment is a proper procedure in a declaratory judgment action when there are no disputed issues of fact. *Hendrickson v. Lee*, 119 N.C. App. 444, 459 S.E.2d 275 (1995).

Cato argues that the "Knowledge of Occurrence" provision of Endorsement A to the Policy modifies Section IV, Paragraph 2, and requires that an executive officer or the insurance department of Cato must receive written notice of a claim before it is "knowledge" for purposes of requiring Cato to notify Royal. Cato further argues that it timely notified Royal of the *Hurt* claim on 28 December 1993, the same day an executive officer of Cato received written notice of the *Hurt* judgment. On the other hand, Royal argues that the "Knowledge of Occurrence" endorsement has no effect on Section IV, Paragraph 2, and that under Condition 2(c) Cato had an obligation to "immediately send" suit papers to Royal. Thus, it argues, Cato's failure to do so was a breach of Cato's obligation under the Policy and relieves Royal of its obligation to indemnify Cato for its liability to Ms. Hurt.

Royal's complaint for declaratory judgment and the first claim in Cato's counterclaim, alleging Royal's breach of contract, present the same legal issues concerning the construction and interpretation of the Policy language. The determinative issue is whether the "Knowledge of Occurrence" endorsement modifies the notice requirements in Section IV, Condition 2(c) of the Policy.

Section IV entitled "Commercial General Liability Conditions" provides:

> 2. Duties In The Event Of Occurrence, Claim Or Suit
>
> a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim . . . .
>
> . . .

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit;" (emphasis added).

. . .

Endorsement Changes of the Policy provides:

ENDORSEMENT A

. . .

KNOWLEDGE OF OCCURRENCE

IT IS UNDERSTOOD AND AGREED THAT KNOWLEDGE OF AN OCCURRENCE BY THE AGENT, SERVANT OR EMPLOYEE OF THE INSURED, SHALL NOT IN ITSELF CONSTITUTE KNOWLEDGE BY THE INSURED UNLESS AN EXECUTIVE OFFICER OR THE INSURANCE DEPARTMENT OF THE INSURED CORPORATION SHALL HAVE RECEIVED WRITTEN NOTICE OF SUCH CLAIM FROM THE AGENT, SERVANT OR EMPLOYEE.

. . .

The construction of insurance policy provisions and the meaning of policy language is a question of law for the court to decide. *U.S. Fidelity & Guaranty Co. v. Country Club of Johnston County*, 119 N.C. App. 365, 458 S.E.2d 734, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 527 (1995).

We reject Cato's argument that the "Knowledge of Occurrence" endorsement modifies Section IV, Condition 2(c) such that Cato had no duty to send Royal the *Hurt* legal papers until an executive officer or the insurance department had the written materials in hand. By its terms, the "Knowledge of Occurrence" provision only addresses Cato's duty to provide notice with respect to underlying "occur-

rences," and designates the insurance department and executive officers as the persons whose knowledge triggers a duty to report "occurrences." The provision makes no reference to Cato's obligation to "immediately send" suit papers pursuant to Condition 2(c), which is separate and distinct from Cato's duty under the Policy to notify Royal of an occurrence, offense or claim. Accordingly, we conclude that the "Knowledge of Occurrence" endorsement does not modify Section IV, Condition 2(c).

Having determined that Condition 2(c) is not modified, we now turn to the questions of whether Cato complied with Condition 2(c), and if not, whether Royal had a duty to indemnify Cato as a matter of law.

> Notice provisions in insurance contracts have long been recognized as valid in North Carolina. "The purpose and intention of an insurance contract's notice provision is to enable the insurer to begin its investigation and to initiate other procedures as soon as possible after a claim arises, and to avoid any prejudice that might be caused by a delay in receiving notice."

South Carolina Ins. Co. v. Hallmark Enterprises, 88 N.C. App. 642, 645-46, 364 S.E.2d 678, 680, *disc. review denied*, 322 N.C. 482, 370 S.E.2d 228 (1988) (citations omitted). "[U]nless the insured or his judgment creditor can show compliance with the requirement, the insurer is relieved of liability." *Davenport v. Indemnity Co.*, 283 N.C. 234, 238, 195 S.E.2d 529, 532 (1973).

Section IV, Condition 2(c), required Cato to "immediately send" Royal copies of any legal papers received in connection with a claim or suit to Royal. On 28 September 1993, Cato's duly appointed registered agent for service of process was properly served with the *Hurt* summons and complaint. Cato, however, did not notify Royal of the *Hurt* suit until 28 December 1993. It is clear that by sending the *Hurt* legal papers to Royal three months after Cato was served, Cato did not comply with the requirement of Condition 2(c) to "immediately send" legal papers. Moreover, Royal was materially prejudiced by Cato's failure to "immediately send" the *Hurt* legal papers. By the time Cato notified Royal about the *Hurt* suit, a default judgment in favor of Ms. Hurt had already been entered against Cato. As a result, Royal was deprived of an opportunity to investigate or defend the *Hurt* claim. Accordingly, we conclude as a matter of law that Royal had no duty to indemnify Cato for the money it paid to settle the *Hurt* judgment.

We must next determine, pursuant to count two of Cato's counterclaim, whether Royal "further breached its obligations under the policy by failing to take any action to litigate the *Hurt* default and by failing to defend the *Hurt* action by seeking injunctive or other relief to set aside the judgment" as a matter of law.

Generally, an insurer's duty to defend the insured is broader than its obligation to pay damages. *Walsh v. National Indemnity Co.*, 80 N.C. App. 643, 343 S.E.2d 430 (1986). An insurer's duty to defend is triggered by the allegations of the complaint against its insured, and where it appears that there may be coverage for claims asserted in the complaint, the insurer has a duty to defend, whether or not the insured is ultimately liable. *Id.*

In order to begin to satisfy its duty to defend a suit against the insured, Royal not only must have notice that the suit has been filed pursuant to Condition 2(b), but it must also have copies of the suit papers and the time-critical information that they contain about the case as provided for in Condition 2(c). As stated above, Cato did not notify Royal of the *Hurt* suit until more than a month after a default judgment had been entered in favor of Ms. Hurt, and after the time to appeal the default judgment had expired. Moreover, by the time Royal received the actual *Hurt* complaint, Cato's motion to set aside the default judgment had been denied by the Virginia court. Thus, we hold, as a matter of law, that Cato's delay in providing Royal with the *Hurt* legal papers eliminated any obligation under the Policy to provide Cato a defense to the *Hurt* action.

Because we conclude as a matter of law that the "Knowledge of Occurrence" endorsement did not relieve Cato of its duty to "immediately send" the *Hurt* legal papers pursuant to Condition 2(c), that Cato did not comply with Condition 2(c), and that Royal had no duty to indemnify or to defend Cato, Cato's counterclaims for breach of fair dealing, bad faith, punitive damages, and attorneys' fees are without merit. Accordingly, we affirm the entry of summary judgment in Royal's favor.

Affirmed.

Judges EAGLES and GREENE concur.

GERTRUDE C. EAKES, EXECUTRIX OF THE ESTATE OF WALTER LEWIS EAKES, PLAINTIFF v. THE CITY OF DURHAM, DEFENDANT

No. COA96-543

(Filed 4 March 1997)

Highways, Streets, and Roads § 11 (NCI4th)— summary judgment—negligent placement of street sign—no legal responsibility in municipality

The trial court did not err in an action arising from an automobile accident in granting summary judgment in favor of defendant-city where plaintiff alleged negligence in the placement of a street sign but defendant had no legal responsibility for the area where the alleged negligence occurred. That area was part of the State highway system and not part of defendant's municipal roadway system even though it was located within municipal limits. N.C.G.S. §160A-297(a).

Am Jur 2d, Highways, Streets, and Bridges §§ 337-340, 352, 371, 380, 387, 422, 434, 435.

Appeal by plaintiff from Order entered 23 January 1996 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 28 January 1997.

This case arises out of an automobile collision which occurred on 8 October 1993 in Durham, North Carolina. Walter Lewis Eakes, the plaintiff's intestate, was driving eastbound on Elba Street approaching the intersection of Elba Street, Trent Drive, and N.C. Highway 147. Mr. Eakes turned left at the intersection, attempting to turn onto Trent Drive, but mistakenly turned onto the N.C. Highway 147 exit ramp and proceeded in the wrong direction (against traffic) along the ramp and onto N.C. Highway 147. N.C. Highway 147 is a four lane roadway divided by a median in the center with two lanes of travel in opposite directions. Mr. Eakes entered N.C. Highway 147 traveling east, against the flow of traffic, in the westbound lanes of traffic. He then collided head-on with a vehicle traveling west in the westbound lanes of traffic on N.C. Highway 147. Mr. Eakes died fourteen days later from injuries sustained in the accident.

Trent Drive and Elba Street are both city streets, located within the city limits of Durham and maintained by the City of Durham. N.C. Highway 147 is a state highway, also located within the city limits of Durham, but maintained by the North Carolina Department of

Transportation (NCDOT). Elba Street and Trent Drive share an intersection with the entry and exit ramps for N.C. Highway 147. Elba Street approaches the intersection from the west and Trent Drive approaches the intersection from the south. The entry and exit ramps to N.C. Highway 147 approach the intersection from the east and north, respectively. The entry ramp to N.C. Highway 147 permits one way traffic onto the highway and proceeds east from the intersection, commencing at the termination of Elba Street. The exit ramp from N.C. Highway 147 permits only one way traffic and approaches the intersection from the north, terminating at the beginning point of Trent Drive.

On 3 March 1992, the City of Durham installed a city street sign for Trent Drive on the south side of the traffic island separating Elba Street from the N.C. Highway 147 Exit ramp. The sign faced eastbound traffic on Elba Street and noted the intersection with Trent Drive to the south. The plaintiff contends that the placement of this sign and the absence of additional signs noting the exit ramp to N.C. Highway 147 caused Mr. Eakes to drive onto the one way exit ramp and ultimately into oncoming traffic on N.C. Highway 147.

The plaintiff filed a Complaint against the City of Durham (the City) alleging that the City was negligent when it "[f]ailed to erect and maintain signs at the intersection of the N.C. Highway 147 Exit, Elba Street and Trent Drive, which clearly marked, identified and distinguished those intersecting streets from the exit ramp of N.C. Highway 147" and that the City negligently "[e]rected and placed a street sign at the above-described intersection which incorrectly identified the exit ramp of N.C. Highway 147 as Trent Drive."

On 3 November 1995, the City filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure arguing that the plaintiff's claims were barred by governmental immunity and the City had no legal responsibility for the area where the alleged negligence occurred because those areas are part of the North Carolina State Highway system and not part of the City's municipal roadway system. On 23 January 1996, Judge Orlando F. Hudson entered an Order granting the City's motion for summary judgment. The plaintiff appeals from that Order.

King, Walker, Lambe & Crabtree, by Guy W. Crabtree, for the plaintiff-appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr. and Keith D. Burns, for the defendant-appellee.

EAGLES, Judge.

By her sole assignment of error, the plaintiff contends that the trial court erred in granting summary judgment to the City on the grounds of governmental immunity when genuine issues of material fact exist as to the City's control over the intersection of Elba Street, Trent Drive and N.C. Highway 147.

The question raised here is whether governmental immunity protects a municipality from suit for damages caused by a dangerous condition on a street located within a municipality's city limits but part of the state highway system and not subject to a maintenance contract between the city and the state.

A municipality may not be held liable for its acts if the incident arises out of a governmental function. *Colombo v. Dorrity*, 115 N.C. App. 81, 84, 443 S.E.2d 752, 755 (1994). "Unless a right of action is given by statute, municipal corporations may not be held civilly liable for neglecting to perform or negligence in performing duties which are governmental in nature." *Id.* "[A] municipality while acting on the State's behalf in promoting or protecting health, safety, security or the general welfare of its citizens, is an agency of the sovereign and not subject to an action in tort for resulting injury to person or property. . . ." *Id.*

Here, the plaintiff alleges that the actions of the City fall within a long recognized exception to the doctrine of governmental immunity. "While the maintenance of public roads and highways is generally recognized as a governmental function, exception is made in respect to streets and sidewalks of a municipality." *Millar v. Wilson*, 222 N.C. 340, 342, 23 S.E.2d 42, 44 (1942) (emphasis added). Municipalities have a positive duty to maintain their streets and sidewalks in a safe condition and are liable for failing to discharge that duty. *McDonald v. Village of Pinehurst*, 91 N.C. App. 633, 635, 372 S.E.2d 733, 734 (1988) (emphasis added); *see also*, *Matternes v. City of Winston-Salem*, 286 N.C. 1, 8, 209 S.E.2d 481, 485 (1974); *Smith v. Hickory*, 252 N.C. 316, 113 S.E.2d 557 (1960).

This common law exception to the rule of governmental immunity applies only to the streets and sidewalks of a municipality. A different rule applies when the street is part of the State highway system. N.C.G.S. 160A-297(a) provides:

> "A city shall not be responsible for maintaining streets or bridges under the authority and control of the Board of Transportation,

and shall not be liable for injuries to persons or property resulting from any failure to do so."

N.C.G.S. 160A-297(a) (1994).

Our legislature has also provided a rule of liability for roadways which are part of the State highway system but are located within the corporate limits of a municipality. N.C.G.S. 136-66.1 provides, in pertinent part:

> "Responsibility for streets and highways inside the corporate limits of municipalities is hereby defined as follows:
>
> (1) The State Highway System.—The State highway system inside the corporate limits of municipalities shall consist of system of major streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities and to major business, industrial, governmental and institutional destinations located inside the municipalities. The Department of Transportation shall be responsible for the maintenance, repair, improvement, widening, construction and reconstruction of this system. . . .
>
> (2) The Municipal Street System.—In each municipality the municipal street system shall consist of those streets and highways accepted by the municipality which are not a part of the State highway system. The municipality shall be responsible for the maintenance, repair, construction, reconstruction, and right-of-way acquisition for this system.
>
> (3) Maintenance of State Highway System by Municipalities.—Any city or town, by written contract with the Department of Transportation, may undertake to maintain, repair, improve, construct, reconstruct or widen those streets within municipal limits which form a part of the State highway system, and may also, by written contract with the Department of Transportation, undertake to install, repair and maintain highway signs and markings, electric traffic signals and other traffic control devices on such streets. . . ."

N.C.G.S. 136-66.1(1993).

"By virtue of the North Carolina General Statutes, a municipality is not liable for accidents which occur on a street which is part of the State highway system and under the control of the NCDOT." *Colombo*

v. Dorrity, 115 N.C. App. 81, 85, 443 S.E.2d 752, 755 (1994). Absent a contract with the Department of Transportation, a city has no responsibility for the maintenance or condition of a street within the State highway system and no liability to any person injured by a defective condition on a street within the State highway system, even when that street is located within the corporate limits of the city. *Matternes v. City of Winston-Salem*, 286 N.C. 1, 10-11, 209 S.E.2d 481, 486 (1974). A municipality is not liable in tort to individuals who sustain personal injuries in accidents caused by a defective condition on a State highway without a contract between the municipality and the NCDOT pertaining to that section of the roadway. *Id.*; *see also*, *Colombo v. Dorrity*, 115 N.C.App. 81, 86, 443 S.E.2d 752, 756 (1994). N.C.G.S. 160A-297(a), which states that a municipality is not liable for a defective condition on a State roadway, is intended to apply when there is no contract between the city and the Department of Transportation. *Id.*

Mr. Eakes' fatal accident occurred on a section of N.C. Highway 147 within the corporate limits of the City of Durham. The City is not liable for defective conditions on N.C. Highway 147 absent a contract with the NCDOT. N.C.G.S. 160A-297(a) (1994). At the time of the accident, the City had contracted with the NCDOT for maintenance by the City of certain traffic control devices along State highway system streets and highways located within the municipal corporate limits of the City. This contract specifically excepted "controlled access highways." N.C. Highway 147 is a "controlled access highway," therefore neither the highway nor its entry or exit ramps are subject to the contract between the City and the NCDOT. In fact, all areas within the boundaries of the "controlled access" area are part of the State Highway system and are excepted from the contract between the City and the NCDOT. The city of Durham is not responsible for dangerous conditions within the "controlled access" areas.

In an affidavit presented to the court by the City on their motion for summary judgment, Owen W. Synan, Director of the City's Department of Transportation, stated that the "controlled access area" included the intersection of Elba Street and Trent Drive, both of the traffic islands located at the intersection of Elba Street and Trent Drive, and a portion of Trent Drive south of the intersection.

The plaintiff contends that the dangerous condition causing Mr. Eakes' fatal accident was specifically the Trent Drive sign located on a traffic island at the Elba Street, Trent Drive intersection. This area

of the roadway is not part of the Durham municipal street system but is part of the State highway system. Therefore, the common law exception to governmental immunity for municipal streets does not apply. The intersection is also part of the "controlled access" area. Because this area was excepted from the contract between the City and the NCDOT, the City is not subject to suit under the contract. Conditions at the Elba Street and Trent Drive intersection are the legal responsibility of the State and the City is not liable for dangerous conditions at the intersection by exception to the governmental immunity doctrine, by statute, or by contract.

The plaintiff further contends that the City exposed itself to liability by placing the Trent Drive sign at the intersection because, by doing so, the City was maintaining one of its own municipal streets, Trent Drive south of the intersection. Plaintiff relies on this Court's decision in *Shapiro v. Motor Co.*, 38 N.C. App. 658, 248 S.E.2d 868(1978), wherein the Court stated "[I]n the absence of any control over a state highway within its border, a municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition." 38 N.C. App. at 662, 248 S.E.2d at 875. The plaintiff's reliance is misplaced. The *Shapiro* case suggests a municipality may be liable if it "created or increased" a dangerous condition on a State highway. *Id.* We note that here the City of Durham acted to improve the safety of the Elba Street and Trent Drive intersection by erecting the Trent Drive sign, installing pedestrian crossing signs and pedestrian crosswalk markings, and by replacing two damaged stop signs.

Accordingly, we affirm the order of the trial court entering summary judgment in favor of the City of Durham.

Affirmed.

Judges GREENE and McGEE concur.

BENJAMIN F. DOWELL AND MARY VIRGINIA DOWELL, PLAINTIFFS-APPELLANTS v. D.R. KINCAID CHAIR COMPANY, DEFENDANT-APPELLEE

No. COA96-446

(Filed 4 March 1997)

Secured Transactions § 30 (NCI4th)— security agreement—financing statement—after-acquired goods

Plaintiff secured creditors did not have a security interest in the debtor's after-acquired property where the security agreement was unambiguous and did not include after-acquired collateral, notwithstanding the financing statement included after-acquired equipment. The security agreement, not the financing statement, established the scope or limits of plaintiffs' security interest. N.C.G.S. § 25-9-203.

Am Jur 2d, Secured Transactions §§ 160, 163, 167, 168.

Sufficiency of debtor's signature on security agreement or financing statement under UCC §§ 9-203 and 9-402. 3 ALR4th 502.

Appeal by plaintiffs from order entered 22 February 1996 by Judge Zoro J. Guice, Jr., in Burke County Superior Court. Heard in the Court of Appeals 9 January 1997.

Tate, Young, Morphis, Bach & Taylor, L.L.P., by Paul E. Culpepper, for plaintiff appellants.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert C. Ervin, for defendant appellee.

COZORT, Judge.

In this action, plaintiffs are the secured parties in an agreement for the sale of plaintiffs' business. The security agreement covered, among other things, the equipment then being used by the business. The UCC financing statement filed in conjunction with the security agreement listed as collateral, among other things, after-acquired equipment. The question presented by this appeal is whether plaintiffs have a security interest in the after-acquired property. We hold that the financing statement does not amend the security agreement and that plaintiffs have no security interest in the after-acquired property. The facts and procedural history follow.

Prior to 16 January 1986, plaintiffs Benjamin F. and Mary Virginia Dowell, Regina K. Long, and Teresa G. Wise were the sole shareholders of Burke Wood Products, Inc. (Burke Wood), a business which manufactured wood frames for furniture in Burke County, North Carolina. On 16 January 1986, the shareholders sold all of the common stock of Burke Wood, along with the real and personal property used in connection with Burke Wood, to Suggs & Hardin Upholstery Company, Inc. (Suggs & Hardin), a North Carolina corporation.

As part of the purchase of Burke Wood stock by Suggs & Hardin, Suggs & Hardin signed a Promissory Note promising to pay plaintiffs Benjamin Dowell and Mary Dowell $475,000.00. Further, Suggs & Hardin executed a Deed of Trust naming plaintiffs Benjamin and Mary Dowell as beneficiaries to secure payment of the $475,000.00. As additional security, Suggs & Hardin also signed a security agreement, with Burke Wood as guarantor, granting a security interest in all inventory, equipment, accounts receivable, and fixtures used in connection with Burke Wood. This security agreement included an attached machinery list which did not mention after-acquired property. In conjunction with the security agreement, plaintiffs and Burke Wood signed a financing statement which was filed with the Burke County Register of Deeds, and the North Carolina Secretary of State, covering "[a]ll equipment, inventory, accounts receivable, and fixtures, *now or hereafter* attached to or used in connection with improvements to the real property owned by Burke Wood Products, Inc. located at Route 4, Box 777W, Hickory, North Carolina." (Emphasis added.) This UCC filing was continued in effect by the filing of a UCC-3 instrument on 15 January 1991, with the Burke County Register of Deeds and with the North Carolina Secretary of State.

On 27 August 1990, a Modification Agreement was signed between Burke Wood and plaintiffs releasing Suggs & Hardin from liability and leaving Burke Wood as the sole guarantor of the remaining debt owed to plaintiffs. Moreover, on the same date, a Stock Purchase Agreement was entered between Suggs & Hardin, D. Alan Reinhardt, plaintiffs Benjamin and Mary Virginia Dowell, and Kay Watts, wherein plaintiffs permitted the assumption of the Suggs & Hardin obligation by Reinhardt and Burke Wood. Plaintiffs also released Suggs & Hardin from any obligations under the Note. Burke Wood subsequently declared bankruptcy, while still owing plaintiffs $256,360.96. The building and equipment of Burke Wood were sold, and after the proceeds of those sales were applied, the outstanding debt due to plaintiffs was reduced to $108,566.87.

After the signing of the original security agreement in 1986, Burke Wood purchased a Bacci Copy Lathe and a 24 Spindle Master Carver, machines to be used in connection with Burke Wood's manufacturing operation located at Route 4, Box 777W, Hickory, North Carolina. It was later determined that sometime prior to 19 November 1993, Burke Wood transferred ownership of the Bacci Copy Lathe to Kings Creek, Inc., and transferred ownership of the 24 Spindle Master Carver to Foothills Wood Products, Inc., without any release or cancellation by plaintiffs of the financing statement previously described. However, both machines remained on the premises of Burke Wood until the time they were transferred to defendant D.R. Kincaid Chair Company, Inc. (Kincaid).

On or about 19 November 1993, defendant Kincaid purchased the Bacci Copy Lathe from Kings Creek, Inc., and the 24 Spindle Master Carver from Foothills Wood Products, Inc. Defendant paid $20,000.00 to Kings Creek, Inc., and $20,000.00 to Foothills Wood Products, Inc. Prior to purchasing these two pieces of equipment, agents of defendant communicated with D. Alan Reinhardt, who represented both Kings Creek, Inc., and Foothills Wood Products, Inc. D. Alan Reinhardt repeatedly advised agents of defendant company that the Bacci Copy Lathe and the 24 Spindle Master Carver were not subject to any liens. In reliance on these representations, defendant alleged that it had no knowledge of any security interest, lien or encumbrance on the equipment.

After defendant purchased the Bacci Copy Lathe and the 24 Spindle Master Carver, plaintiffs demanded that defendant company return the equipment to plaintiffs on the ground that those items were subject to plaintiffs' security interest. Defendant refused to return the Bacci Copy Lathe and the 24 Spindle Master Carver.

On 20 February 1995, plaintiffs filed suit against defendant seeking the return of the lathe and the carver. After appropriate responsive pleadings were filed, plaintiffs and defendant filed motions for summary judgment. On 22 February 1996, the trial court granted defendant's motion for summary judgment, holding that plaintiffs have no security interest in the subject property, and dismissed plaintiffs' action. Plaintiffs appeal.

Plaintiffs argue that the trial court committed reversible error by granting defendant's motion for summary judgment based on the conclusion that plaintiffs did not have a valid security interest in the Bacci Copy Lathe and the 24 Spindle Master Carver. It is undisputed

that the Bacci Copy Lathe and the 24 Spindle Master Carver were not owned by Burke Wood at the time that the Security Agreement was executed. Both the Bacci Copy Lathe and the 24 Spindle Master Carver were after-acquired property under the Uniform Commercial Code. The question presented on appeal is whether the terms of the security agreement or the terms of the financing statement determine if after-acquired collateral is subject to a security interest.

Resolution of this issue involves interpretation of certain provisions of the Uniform Commercial Code. N.C. Gen. Stat. § 25-9-203(1) (1995) provides that "a security interest is not enforceable against the debtor or third-parties . . . unless (a) the collateral is in the possession of the secured party . . . or the debtor has signed a security agreement which contains a description of the collateral . . . ." The Amended Official Comment to § 25-9-203 states that the section requires a writing, the debtor's signature, and a description of the collateral in order for a security agreement to exist. A financing statement, on the other hand, serves as notice to third parties that a security interest may be held in the property. N.C. Gen. Stat. § 25-9-402 (1995).

Plaintiffs contend that the financing statement signed by the original debtor and plaintiffs sufficiently establishes a security interest in the after-acquired property, or in the alternative, that the security agreement and financing statement when interpreted together created a security interest in the after-acquired property. Plaintiff argues that our Supreme Court in *Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971), held that so long as a financing statement meets the requirements of N.C. Gen. Stat. §§ 25-9-105(1)(h) and 25-9-203(1)(b), it may serve as a security agreement. Thus, plaintiffs contend, the financing statement itself created a security interest in the after-acquired property. In the alternative, plaintiffs contend, quoting from *Evans*, that a security interest was created by interpreting the financing statement and the security agreement together: "Although the Code contemplates the execution of two separate writings, it does not prohibit the combination of a security agreement and a financing statement." *Evans*, 279 N.C. at 357, 183 S.E.2d at 112. We disagree.

We find the instant case distinguishable from *Evans*. In *Evans*, our Supreme Court considered whether a financing statement could serve as the security agreement. No security agreement was executed in *Evans*, unlike in the instant action. Because a security agreement

exists in the case below, there is no necessity to use the provisions in the financing statement to serve as the security agreement.

Moreover, it has been noted that it is the security agreement, and not the financing statement, which defines the extent of the security interest involved. *Northwest Acceptance Corp. v. Lynnwood Equipment*, 841 F.2d 918 (9th Cir. 1988). If a conflict occurs between the property used in the financing statement on file and that used in the security agreement, the security agreement prevails. *Jones & Laughlin Supply v. Dugan Production Corp.*, 508 P.2d 1348 (N.M. 1973) (citing Ronald A. Anderson, Anderson on *The Uniform Commercial Code* § 9-204:9 (3d ed. 1996)). Further, the financing statement does not serve to add collateral not described in the security agreement. *Kurtz v. Illinois Nat. Bank*, 534 N.E.2d 1007 (Ill. App. 3d 1989). Security agreements must contain after-acquired property clauses; thus, if the after-acquired property clause is not contained in the security agreement, inclusion in the financing statement does not subject the property to a security interest. *Idaho Bank & Trust Co. v. Cargill, Inc.*, 665 P.2d 1093 (Idaho 1983) (citing Ronald A. Anderson, Anderson on *The Uniform Commercial Code* § 9-204:9)).

Furthermore, other jurisdictions which have considered the question involved in this action have held that it is the language in the security agreement, not the financing statement, that determines what collateral is subject to a security interest. *See Wollenberg v. Phoenix Leasing, Inc.*, 893 P.2d 4 (Ariz. App. 1994); *Central Production Credit v. Hopkins*, 810 S.W.2d 108 (Mo. App. 1991) (holding that "[t]he intent to create a security interest in after-acquired property must be ascertained and judged by the language of the security agreement, not the financing statement[]"); *Kurtz*, 534 N.E.2d at 1012 (holding that "[w]hen a financing statement describes a greater quantity of property than that described in the corresponding security agreement, the security interest is defined by the narrower description contained within the security agreement[]"); *Federal Land Bank v. Bay Park Place*, 412 N.W.2d 222 (Mich. App. 1987) (holding that "[a]lthough a financing statement may be used to assist in the interpretation of the security agreement, the financing statement does not create a security interest and cannot extend a security interest beyond what has been unambiguously described in a security agreement[]").

In the case below, the security agreement was unambiguous and did not include after-acquired collateral. We decline to extend the scope of the security interest beyond that which was set out in the

security agreement. Accordingly, we hold that the security agreement, not the financing statement, establishes the scope or the limits of the security interest. To hold as plaintiffs request would render security agreements obsolete. Therefore, we find the trial court did not err in granting defendant's motion for summary judgment.

Affirmed.

Judges JOHN and McGEE concur.

STATE OF NORTH CAROLINA v. GARY MARICE SMITH

No. COA96-341

(Filed 4 March 1997)

1. **Evidence and Witnesses § 871 (NCI4th)— victim's motivation—testimony not hearsay**

Testimony by a shooting victim's brother that the victim wanted to talk with defendant prior to the shooting "to find out what reason [defendant] wanted to shoot him" was not inadmissible hearsay because it was offered to explain the victim's motivation for going across the street to talk to defendant and not to prove that defendant threatened to kill him.

Am Jur 2d, Evidence §§ 664, 667.

2. **Evidence and Witnesses § 906 (NCI4th)— hearsay testimony—admission to show premeditation and deliberation—conviction of voluntary manslaughter—harmless error**

The admission of hearsay testimony by a shooting victim's relative that he told defendant prior to the shooting that he "heard that [defendant] told someone that he was going to shoot up the [victim's] trailer house" was harmless error where the testimony was admitted to establish a specific intent to kill the victim after premeditation and deliberation, and defendant was convicted of voluntary manslaughter, which does not require a finding of malice and deliberation.

Am Jur 2d, Criminal Law § 908; Evidence §§ 659, 661.

3. Criminal Law § 1096 (NCI4th Rev.)— voluntary manslaughter—use of firearm—enhancement of sentence improper

The trial court erred in enhancing the defendant's sentence for voluntary manslaughter, a Class E felony, because he was armed with a firearm at the time he committed the offense, even though use of the firearm was not an element of voluntary manslaughter, since defendant's use of the firearm was used to prove an element of the offense. N.C.G.S. §§ 14-2.2, 15A-1340.16A(a).

Am Jur 2d, Criminal Law §§ 537, 538, 599.

Appeal by defendant from judgment entered 12 September 1995 by Judge Narley L. Cashwell in Columbus County Superior Court. Heard in the Court of Appeals 13 January 1997.

Michael F. Easley, Attorney General, by Hal F. Askins, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

WYNN, Judge.

Having been charged with the first degree murder of Cleveland Barden, Jr. on 7 November 1994, defendant Gary Marice Smith pled not guilty at his trial on 16 August 1995 in Columbus County Superior Court. As proof of his guilt, the State presented evidence which we summarize as follows:

On 6 November 1994, Floyd Baldwin, the deceased's brother, saw defendant go into Barden's trailer in Whiteville seeking from Barden the repayment of a $350 debt due to him. After hearing cursing and the sounds of a struggle, Baldwin saw Barden throw defendant out the front door of the trailer.

The next day, Barden asked Baldwin to accompany him across the street to talk to defendant at a used car lot. On their arrival at the lot, defendant jumped up from between two cars, walked toward Barden with his right hand behind his back, held up his left hand and told Barden not to walk toward him. Barden held up both his hands, lifted his shirt, and took off his black leather hat which he held in his left hand, waving it back and forth. As he continued walking toward defendant, Barden told defendant that he did not have a gun. Defendant shot Barden when they were an arm's length apart.

Defendant agreed that he went to Barden's trailer on 6 November 1994 and to the car lot the next day; but in his defense, he presented a different version of the events which we summarize as follows:

Inside the trailer, Barden jumped on defendant and threw him out the front door. The next day, he saw Baldwin and Barden walking across the street toward the car lot. Defendant knew that Barden was a drug dealer who carried a gun with him nearly everywhere he went. He asked a car lot employee to tell them to leave him alone. When the men continued to approach the car lot, defendant told the men that he did not want any trouble and showed them a gun that he kept in his car. Defendant fearing that Barden and Baldwin were going to kill him, asked the men to leave, but Barden kept walking toward him while holding his hands up. When Barden suddenly lunged at him, defendant fired the gun.

At the close of all the evidence, the jury returned a verdict of guilty of voluntary manslaughter. At sentencing, the trial court made no written findings of aggravation or mitigation, but applied the firearm enhancement provision of the Structured Sentencing Act to impose an active sentence of 85 to 120 months. Defendant appeals from his conviction and sentence.

The issues on appeal are: (I) Whether the trial court committed prejudicial error by allowing the prosecutor to introduce inadmissible hearsay into evidence, and (II) Whether the trial court improperly applied the firearm enhancement provision to increase defendant's sentence under the Structured Sentencing Act. We find no prejudicial error in the determination of defendant's guilt, but find error in the application of the enhancement provision and therefore remand for resentencing.

I.

On the merits of his conviction, defendant objects to the trial court permitting Floyd Baldwin to testify that the deceased wanted to talk to defendant prior to the shooting "to find out what reason [defendant] wanted to shoot him." Defendant also objects to the testimony of Don Baldwin, Floyd Baldwin's brother, who testified he confronted defendant prior to the shooting and told him that he "heard that [defendant] told someone that he was going to shoot up the [victim's] trailer house." Defendant contends that the trial court committed prejudicial error by allowing the prosecutor to bring before the jury inadmissible hearsay that defendant had declared that

he intended to shoot Barden, thereby violating his constitutional right to confront witnesses. For the following reasons, we find that defendant's objections do not warrant the award of a new trial on the question of his guilt.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (1992). "When evidence of a statement by someone other than the testifying witness is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay." *State v. Reid*, 335 N.C. 647, 661, 440 S.E.2d 776, 784 (1994) (citation omitted).

[1] In the instant case, Floyd Baldwin's testimony does not qualify as hearsay because it was offered to explain the victim's motivation for going across the street to talk to defendant, not to prove that defendant threatened to kill him.

[2] On the other hand, Don Baldwin's testimony clearly did contain hearsay and the State does not argue in its brief nor is there evidence in the record that it was admissible under any of the hearsay rule's exceptions. Therefore, the trial court erred by admitting that testimony into evidence, but this error was harmless.

In considering whether a violation of a defendant's constitutional right (confrontation clause) constitutes prejudicial error, the issue is whether the error was harmless beyond a reasonable doubt. *State v. Jolly*, 332 N.C. 351, 360-61, 420 S.E.2d 661, 667 (1992) (citation omitted). In the instant case, the evidence complained of was apparently offered to establish a specific intent to harm or kill the victim after premeditation and deliberation. The statement could have provided some evidence of malice as well. Specific intent, premeditation and malice are elements required to establish first or second degree murder. N.C. Gen. Stat. § 14-17 (1993). The defendant, however, was found guilty of voluntary manslaughter, which does not require a finding of malice or premeditation. *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). It follows that the admission of Don Baldwin's testimony was harmless beyond a reasonable doubt in the determination of defendant's guilt on the charge of voluntary manslaughter.

Nevertheless, defendant argues that if a juror believed the inadmissible testimony that defendant had threatened to shoot Barden, then that juror would have had much more of a reason to believe that

defendant, although not acting with malice, was in a state of mind which led him to respond unreasonably to the confrontation. We disagree.

The record shows that the victim attacked defendant the day before the shooting. Defendant knew the victim was a drug dealer and that he usually carried a gun. Finally, the victim and his brother were about to confront defendant in the car lot and defendant testified that he feared for his life. This evidence shows that defendant was in a state of mind which led him to respond unreasonably to the situation. In the face of this direct evidence supporting this element of his conviction, we find that the error in admitting Don Baldwin's testimony was harmless beyond a reasonable doubt.

II.

[3] Following the return of the jury's verdict of guilty of voluntary manslaughter, the trial court noted that the offense was a Class E felony, and the parties agreed that because defendant had no points for qualifying prior convictions, he would be subject to a prior record level of Level I under N.C. Gen. Stat. § 15A-1340.14 of the Structured Sentencing Act. The prosecutor then asked the court to "make a finding that the Defendant was armed with a deadly weapon at the time of the crime, since use of a deadly weapon is not a necessary element of voluntary manslaughter." The prosecutor asserted that such a finding would bring into play the sentencing enhancement worked by N.C. Gen. Stat. § 14-2.2 and § 15A-1340.16A which essentially state:

> If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months.

N.C.G.S. § 15A-1340.16A(a).

Both statutes make their enhancement provisions inapplicable in cases in which "evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying . . . felony." N.C.G.S. § 14-2.2(b)(2); N.C.G.S. § 15A-1340.16A(b)(2). However, in the instant case, the trial court apparently agreed with the prosecutor's contention that the statutes' applicability turned on whether use or display of a firearm is actually an *element* of the offense. We disagree.

Under these statutes, the pertinent question is whether the use of a firearm is necessary "*to prove* an element," not whether it is an actual element. The law is well-settled that when use of firearm is used to prove an element of the underlying offense, it cannot later be used to enhance the punishment for the same offense. *See State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987); *State v. McKinney*, 88 N.C. App. 659, 364 S.E.2d 743 (1988); *State v. Heidmous*, 75 N.C. App. 488, 331 S.E.2d 200 (1985); State v. Green, 62 N.C. App. 1, 301 S.E.2d 920, *modified on other grounds*, 309 N.C. 623, 308 S.E.2d 326 (1983). For example, in *Green*, this Court held that under the Fair Sentencing Act, the defendant's use of a deadly weapon was improperly used as an aggravating factor to lengthen the sentence for a voluntary manslaughter conviction. The Court reasoned:

> The unlawful killing proven here was accomplished by shooting the victim with a gun, a deadly weapon. Evidence of use of the deadly weapon to shoot the victim was thus necessary to prove the unlawful killing, which was the essence of the offense.

62 N.C. App. at 4, 301 S.E.2d at 921.

In the instant case, the State contends that it could have proven that defendant was guilty of manslaughter without ever mentioning the gun, therefore, it was not necessary to prove an element of the offense. We disagree. The trial court specifically instructed the jury that in order to find defendant guilty of manslaughter, it had to find, *inter alia*, that he intentionally killed Barden with a deadly weapon. Therefore, as in *Green*, the possession and discharge of the gun to shoot the victim was necessary to prove the unlawful killing, which was the essence of the offense of voluntary manslaughter.

In sum, we find that defendant received a trial free of prejudicial error but remand for resentencing.

Chief Judge ARNOLD and Judge COZORT concur.

LINDA HENSLEY NICK, PLAINTIFF v. PENNY H. BAKER AND L. FAYE CAMPBELL, CO-EXECUTRIXES OF THE ESTATE OF MAMIE H. WISEMAN (DECEASED); DONNIE RAY BAKER; PENNY H. BAKER; CHRISTOPHER M. BAKER; L. FAYE CAMPBELL, INDIVIDUALLY; IGNAZIO LACHINA AND WIFE, BARBARA LACHINA; LORA B. GREENE; AND INVESTORS TITLE INSURANCE COMPANY, DEFENDANTS

No. COA96-509

(Filed 4 March 1997)

1. Deeds § 97 (NCI4th)—covenant against encumbrances—summary judgment improper

Summary judgment was improperly entered for defendants in plaintiff's action for breach of a covenant against encumbrances where defendants conveyed realty to plaintiff by warranty deed; the record failed to show whether plaintiff's property or property containing a perpetual easement in a roadway was subject to an undiscovered deed of trust; and defendants failed to controvert plaintiff's assertion that her property was encumbered by a deed of trust at the time it was sold to her.

Am Jur 2d, Covenants, Conditions, and Restrictions §§ 74, 75, 89.

2. Attorneys at Law § 50 (NCI4th)— negligent title search—failure to allege specific damages—summary judgment improper

It was improper for the trial court to grant summary judgment in favor of defendant attorney on plaintiff's claim for negligence in searching a title because plaintiff's complaint did not allege specific damages since plaintiff is entitled to at least nominal damages if she proves her case against defendant, and her complaint need not allege damages at all.

Am Jur 2d, Judgments §§ 203, 205, 495.

Allowance of punitive damages in action against attorney for malpractice. 13 ALR4th 95.

3. Insurance § 883 (NCI4th)— title insurance—breach of contract—summary judgment improper

Summary judgment in favor of defendant title insurance company was improperly granted on a breach of contract claim where plaintiff alleged that defendant breached a contract by failing to take measures to obtain marketable title, and issues of fact

remained as to the terms of the title insurance policy, what actions, if any, were taken by defendant, and the basic facts underlying any possible encumbrance of property purchased by plaintiff.

Am Jur 2d, Insurance §§ 525 et seq.

Misrepresentation or concealment by insured or agent avoiding liability by title insurer. 17 ALR4th 1077.

Appeal by plaintiff from judgment entered 8 February 1996 by Judge Julius A. Rousseau, Jr. in Yadkin County Superior Court. Heard in the Court of Appeals 29 January 1997.

Brewer and Brewer, by Graham T. Green, for plaintiff-appellant.

E. James Moore for defendant-appellee Lora B. Greene.

Zachary Zachary and Zachary, by Walter L. Zachary, for defendant-appellee Investors Title Insurance Company.

No brief filed for defendant-appellees Ignazio and Barbara LaChina.

LEWIS, Judge.

Plaintiff appeals the trial court's grant of summary judgment in favor of defendants.

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.R. Civ. P. 56(c) (1990). The record should be viewed in the light most favorable to the non-movant. *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 8, 472 S.E.2d 358, 362 (1996).

The record before us consists of verified pleadings and affidavits. These tend to show that on 14 September 1993, defendants Ignazio and Barbara LaChina ("the LaChinas") sold a parcel of land in South Fall Creek Township to plaintiff by general warranty deed. The deed included a perpetual easement along a dirt road. Prior to the conveyance, plaintiff hired defendant Lora B. Greene, an attorney, to conduct a title search on the parcel. Defendant Greene issued a written title opinion certifying that the LaChinas owned the land in fee simple, that it was free from encumbrances and that it included a per-

petual easement. Plaintiff also purchased a title insurance policy from defendant Investors Title Insurance Company ("Investors Title") on the property.

About 13 months after purchasing the property, plaintiff received a Notice of Foreclosure, which was the first she knew that a lien, in the form of a deed of trust, existed on the land she bought. She filed this action on 18 May 1995 alleging malpractice against defendant Greene, breach of contract against defendant Investors Title, and breach of warranties against the LaChinas and the remaining defendants. Thereafter, on 9 November 1995, the outstanding deed of trust was cancelled of record. In January 1996, defendants moved for summary judgment which was granted by judgment entered 8 February 1996.

Breach of Warranties

[1] Since plaintiff concedes on appeal that the trial court properly granted summary judgment in favor of the Bakers and Ms. Campbell, her only remaining breach of warranties claim is against the LaChinas. Because the LaChinas have not properly borne their burden, we hold that the trial court erred in granting summary judgment in their favor.

"The party moving for summary judgment has the burden of establishing the lack of any triable issue." *McClain v. Walker*, 124 N.C. App. 765, 768, 478 S.E.2d 670, 673 (1996). The "slightest doubt as to the facts" entitles the non-movant to a trial. *Snipes v. Jackson*, 69 N.C. App. 64, 72, 316 S.E.2d 657, 661, *disc. review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984). Summary judgment "is an extreme remedy and should be awarded only where the truth is quite clear." *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970).

Based on the record we have before us, we conclude that the LaChinas have not properly established the lack of any triable issues, as the facts in this case are not clear. The record does not contain a map of the property subject to the deed of trust. We have no way of knowing whether it was plaintiff's own property or the property containing her easement. The verified pleadings and affidavits provide no answer to this question. Since the truth is not "quite clear" and we have more than a slight doubt as to the facts, summary judgment cannot be granted.

Additionally, the LaChinas have not borne their burden because they have not shown that they are entitled to judgment as a matter of

law. In support of their motion for summary judgment, defendants submitted affidavits that the deed of trust was paid in full and that plaintiff was never deprived of her easement over the roadway. However, plaintiff's affidavit in reply to the motion asserts: "Subsequent to receiving the warranty deed, I learned that the subject property, in fact, was not free and clear of all encumbrances and there was a valid lien against the property."

"Facts asserted by the party answering a summary judgment motion must be accepted as true." *Railway Co. v. Werner Industries*, 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974). Therefore, since it has not been disproved by any of defendants' documents in support of summary judgment, we must assume that plaintiff's property was encumbered at the time it was sold to her. If so, defendants LaChina breached the covenant against encumbrances at the time the deed passed hands. *See Thompson v. Avery County*, 216 N.C. 405, 408, 5 S.E.2d 146, 148 (1939). Plaintiff would therefore be entitled to damages equal to the amount she paid to have the lien removed, if proved. *See id.* at 409, 5 S.E.2d at 148.

Since clearly there are still triable issues of fact, summary judgment in favor of the LaChinas is improper at this stage of the proceedings. At oral argument, Mr. LaChina contended *pro se* that he had done no wrong. It is not contended that the LaChinas knowingly undertook to cheat anyone. However, they signed a deed with warranties and promised therein to "warrant and defend the title."

Negligence

[2] Plaintiff asserts that summary judgment in favor of defendant Greene was also improper. She alleges that defendant Greene's title search of the property at issue was negligent and that an issue of fact remains as to the damages she suffered. Defendant Greene contends that summary judgment was proper because plaintiff failed to specifically allege what damages, if any, she suffered as a result of the alleged breach.

We first note that summary judgment is rarely appropriate in negligence cases. *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972). Secondly, we note that a plaintiff in a negligence action can recover nominal damages "where some legal right has been invaded but no actual loss or substantial injury has been sustained." *Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl*, 119 N.C. App. 608, 611, 459 S.E.2d 801, 804 (1995), *aff'd in part*, 342 N.C. 887, 467 S.E.2d

241 (1996). This is especially true in cases where professional negligence is alleged and the "redress of the wrong may be no more than the showing, in court, that the attorney did not do his job." *Id.*

Since plaintiff's complaint properly pleads negligence and she is entitled to at least nominal damages if she can prove her case against defendant Greene, her complaint need not allege damages at all. *See Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952) (recognizing this in the context of a trespass claim). Therefore, any arguments that plaintiff failed to sufficiently allege damages against defendant Greene are irrelevant and, as triable issues remain, her claim may go forward. The trial court's grant of summary judgment in favor of defendant Greene is reversed.

Breach of Contract

[3] Plaintiff finally argues that the trial court erred in granting summary judgment for Investors Title on her breach of contract claim. Because we find that issues of material fact remain in this claim, we reverse this ruling of the trial court.

In her verified complaint, plaintiff alleges that she purchased a policy from Investors Title which insured that she had marketable title. She further alleges that Investors Title breached this contract by failing to take measures to obtain marketable title. Subsequently, all defendants moved for summary judgment, supported by affidavits stating that the deed of trust was cancelled and that plaintiff was never denied use of her easement. Investors Title provided no other supporting affidavits.

Based on the record, we conclude that Investors Title has not borne its burden in summary judgment. Issues of fact remain as to the terms of the policy, what actions, if any, were taken by Investors Title, and, as we pointed out above, the basic facts underlying any possible encumbrance of plaintiff's property. Again, based on the record before us, it is too early in this proceeding for summary judgment on this claim.

In summary, the trial court's grant of summary judgment is affirmed as to the Bakers and Ms. Campbell and reversed as to the LaChinas, Ms. Greene and Investors Title.

Reversed in part and affirmed in part.

Judges WALKER and MARTIN, MARK D. concur.

WILMA LANG, PLAINTIFF-APPELLEE v. MANFRED LANG, DEFENDANT-APPELLANT

KARIN LANG, PLAINTIFF-APPELLEE v. MANFRED LANG, DEFENDANT-APPELLANT

No. COA96-456

(Filed 4 March 1997)

1. Divorce and Separation § 566 (NCI4th)— foreign agreement—registration—twenty days—statement of grounds for objection—not required

Defendant timely objected to the registration of a German domestic support agreement where he was served with a notice of registration on 2 July 1992, filed a motion to vacate on 10 July, and filed an amended motion to vacate on 24 July in which he first argued that the settlement agreement was not an order of the court. N.C.G.S. § 52A-30 does not require an obligor to state his or her grounds for objecting to the registration of a support order.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149.

2. Divorce and Separation § 566 (NCI4th)— German settlement agreement—registration—URESA order of support

The trial court did not err by allowing the registration of a German divorce decree and settlement agreement under N.C.G.S. § 52A-26 where defendant contended that the agreement was not a "judgment, decree, or order of support" as contemplated by URESA, but there is evidence in the record to support the trial court's determination that the agreement was an order of support. The record contained a certificate from a German court, which found that the claims in the domestic court decision were meritorious, and a letter in which a German Federal Prosecutor requested that North Carolina's Attorney General take measures against defendant for the recovery of arrearage, with plaintiffs' approved request for registration of a support order made in Germany, the partes divorce decree, and their settlement agreement attached. The record clearly showed that German authorities considered the settlement agreement to be an order of support.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149.

3. Divorce and Separation § 566 (NCI4th)— German support agreement—registration—enforcement issues not raised

Issues regarding enforcement of a German support order, which defendant contended would be more appropriately addressed by the German courts, were not addressed by the Court of Appeals where plaintiffs had registered the order but had not sought enforcement.

Am Jur 2d, Desertion and Nonsupport §§ 148, 149.

Appeal by defendant from order entered 17 August 1995 by Judge Mark E. Powell in Henderson County District Court. Heard in the Court of Appeals 13 January 1997.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon and Stephen B. Williamson, for defendant.

Philip T. Jackson, Frank B. Jackson and Charles R. Burrell for plaintiffs.

WYNN, Judge.

Plaintiff Wilma Lang and defendant Manfred Lang, both citizens of the Federal Republic of Germany, dissolved their marriage in Germany in April 1974 and entered into an agreement regarding child custody and support, alimony, and the division of property. Prior to the divorce hearing, Wilma Lang's attorney moved that the settlement agreement be entered into the court record. In his chambers, the German judge read the agreement, the parties then signed it, and thereafter, the settlement agreement was "included as an annex to the court record."

In June 1992, Wilma Lang registered the divorce decree and the settlement agreement in North Carolina as a "support order" pursuant to the provisions of the Uniform Reciprocal Enforcement of Support Act ("URESA"). Defendant objected to the registration on the grounds that the settlement agreement was not an order of the German court; however, a hearing was never held. In August 1994, plaintiff Karin Lang, defendant's' daughter, registered in North Carolina the same divorce decree and settlement agreement. Defendant objected again to the documents' registration. In August 1995, the district court entered an order which confirmed the registration of the settlement agreement as a support order in both cases from which defendant now appeals.

The issues on appeal are: (I) Whether the defendant timely objected to the registration of the alleged support order; (II) Whether the settlement agreement may be registered in North Carolina under URESA; and (III) Whether this action raises issues of enforcement that should be addressed by a German court. We address defendant's appeal and find that the agreement was properly registered in North Carolina raising no issues of enforcement.

I.

[1] Prior to considering the merits of defendant's appeal, we first determine whether he timely objected to the registration of the "support agreement." Although Wilma Lang and Karin Lang registered the documents separately, we treat their actions as one since the plaintiffs seek to register the same agreement.

N.C. Gen. Stat. § 52A-30(b) (1992) provides that:

> The obligor has 20 days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition, the registered support order is confirmed.

The record shows that Wilma Lang served defendant with a "Notice of Registration" on 2 July 1992 and defendant filed a "Motion to Vacate" on 10 July 1992. On 24 July 1992, defendant filed an "Amended Motion to Vacate," in which he first argued the settlement agreement was not an order of the court.

Plaintiffs contend that since defendant did not raise this particular defense until after the 20 day time limit, he waived his right to object to registration based on that issue. We disagree because N.C.G.S. § 52A-30 does not require an obligor to state his or her grounds for objecting to the registration of a support order. Nor is there any case law indicating that it is so required. All that an obligor must do is petition the court to vacate the registration within twenty days after he receives notice of it. Since defendant did exactly that, we will address his appeal.

II.

[2] Defendant primarily contends the district court erred by allowing registration because the German court that granted his divorce did not incorporate the settlement agreement into the divorce decree and therefore, the agreement is not a "judgment, decree, or order of support" as contemplated by URESA. We disagree.

Plaintiffs registered the German divorce decree and the settlement agreement under N.C. Gen. Stat. § 52A-26 (1992), which provides that an obligee may register a foreign support order in a court of this State; "[u]pon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State." N.C.G.S. § 52A-30(a). N.C. Gen. Stat. § 52A-3(14) (1992) defines a support order as "any judgment, decree, or order of support in favor of an obligee whether temporary or final, or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered."

In its order confirming the registration of the settlement agreement as a support order, the district court noted that the last page of the document states, "Executed and issued to the Plaintiff for the purpose of forcible execution." The parties stipulate that this passage was added pursuant to Section 794 Paragraph 1 of the German Code of Civil Procedure, which states that "forcible execution" can be undertaken:

> On the basis of settlements which are entered between the parties . . . for the purpose of resolving a legal dispute . . . before a German court or before a settlement board established and recognized by the state judicial administration, in addition to settlements which have been included by the judge on the court record pursuant to Section 118 para. 1 sent. 4 or Section 492 para. 3 hereof.

The district court found that the inclusion of this provision in the settlement agreement shows that the agreement was made part of a court order.

Moreover, the district court's decision was based in large part on the affidavit of Jon Faylor, plaintiffs' counsel in Germany. In so doing, the court acknowledged that Mr. Faylor was not a disinterested party, but nevertheless relied on his opinion on the grounds that Mr. Faylor is an expert in German law.

In his affidavit, Mr. Faylor stated that since the agreement was executed pursuant to Section 794, it "constitutes an enforceable court settlement having the quality of an enforceable court order." Defendant disagrees with Mr. Faylor's interpretation of Section 794. He notes that the statute does not explicitly state that a settlement agreement executed pursuant to its provisions has the quality of a court order. Defendant also points to several instances in which he

and his ex-wife treated the separation agreement as a contract. Nevertheless, we find that there is evidence in the record to support the trial court's determination that the settlement agreement was an order of support.

Section 6 of Germany's Foreign Maintenance Act holds that "[w]here an order . . . regarding the maintenance claim has already been made or issued by a domestic court, the person entitled to maintenance may . . . request registration of the order abroad." (Emphasis added). This request is made to a German local court, who then determines whether the maintenance claim in the order offers a reasonable prospect of success under German law. If the court so finds, the support order is transferred to the Federal Prosecutor General at the Federal Court of Justice, who then forwards it to the receiving agency designated abroad.

In the instant case, plaintiffs requested that the divorce decree and the settlement agreement be registered abroad as "a domestic court decision." The record contains a certificate from a local court that found that the claims in the "domestic Court decision" were meritorious. The record also includes a letter dated 12 February 1992, in which the German Federal Prosecutor asked North Carolina's Attorney General to take measures against defendant for the recovery of arrearage. Attached to the letter were plaintiffs' approved request for registration of a support order that was made in Germany, the Langs' divorce decree and their settlement agreement. Thus, the record clearly shows that the German authorities considered the parties' settlement agreement to be an order of support.

III.

[3] Finally, defendant contends that plaintiffs' claim raises issues of enforcement that would be more appropriately addressed by the German courts. However, we choose not to address this argument because the mere registration of the support order implicates no issues of German law.

This Court has stated that the provisions of N.C. Gen. Stat. § 52A-29 and § 52A-30 create a two-step procedure: (1) registration of the order, and if required, a hearing on whether to vacate the registration; and (2) enforcement of the order. *Pinner v. Pinner*, 33 N.C. App. 204, 206, 234 S.E.2d 633, 635 (1977). "Under G.S. 52A-29, the obligee has the option to merely register the order or to register and enforce simultaneously." *Id.*

In the instant case, plaintiffs chose only to have the order registered and have at the present not sought to enforce the order. Thus, the only issue on appeal is the registration of the support order.

Accordingly, we affirm the district court's decision to register the settlement agreement as a support order pursuant to N.C.G.S. § 52A-29.

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

DAVID C. VAN EVERY v. KELLY W. McGUIRE, (FORMERLY KELLY DIANE WEBB VAN EVERY)

No. COA96-485

(Filed 4 March 1997)

1. Divorce and Separation § 552 (NCI4th)— child custody—attorney fees—estates of parties improperly considered

The evidence in a child custody proceeding did not support the court's finding that the mother expended her full $120,000 income on food and other household expenses, and the trial court erred in considering the relative estates of the parties in assessing the mother's ability to employ adequate counsel and her entitlement to counsel fees. N.C.G.S. § 50-13.6.

Am Jur 2d, Divorce and Separation §§ 604, 606, 615, 618.

2. Divorce and Separation § 551 (NCI4th)— child custody—costs—guardian ad litem fees—no abuse of discretion

There was no abuse of discretion in the trial court's order which charged as costs of a child custody case to be paid by plaintiff father the fees of a guardian ad litem appointed to represent the interest of the child. In the assessment of court costs the trial court has no restrictions on its consideration of the relative estates of the parties. N.C.G.S. § 1A-1, Rule 17(b)(3); N.C.G.S. §§ 6-21(11), 7A-305(d)(7).

Am Jur 2d, Divorce and Separation §§ 587, 749, 971.

Appeal by plaintiff from order entered 20 December 1995 in Mecklenburg County District Court by Judge William G. Jones. Heard in the Court of Appeals 14 January 1997.

The Tryon Legal Group, by Jerry Alan Reese, for plaintiff-appellant.

Nelson M. Casstevens, Jr. and Teresa L. Conrad, for defendant-appellee.

GREENE, Judge.

David C. Van Every (plaintiff) appeals an order awarding Kelly McGuire's (defendant) counsel $55,688.35 in attorney's fees, $3,163.50 to the guardian ad litem, and $390.00 for expert witness fees.

The undisputed facts are that plaintiff and defendant were married in 1988 and divorced in 1992. One child was born to the marriage in 1989. A dispute arose with regard to the custody of the child and on 27 July 1994 the trial court appointed a guardian ad litem to represent the child. In entering its order the trial court found that the appointment was "in the child's best interests, and expedient to the administration of justice." The guardian ad litem was directed to: (1) "receive, review or copy documents concerning the child, whether or not the document is otherwise confidential;" (2) "investigate and determine the facts, the child's needs and the resources available to meet those needs and to present that information at Court hearings;" (3) "appear at all Court hearings and represent the child's interests by examining and cross-examining witnesses otherwise presenting evidence and making arguments to the Court;" and (4) "collect and present to the Court, to aid in custody and visitation determinations all available reports, evaluations, and other information regarding the child." On 19 December 1994 the trial court appointed two psychologists to "assist the Court in determining what custodial placement would be in the best interest of" the child. On 27 September 1995 the trial court entered an order granting the "care, custody and control" of the child to the defendant. The plaintiff was granted extensive visitation privileges.

On 20 December 1995 the trial court ordered the plaintiff to pay directly to the defendant's attorney the sum of $55,688.35 in payment of the attorney's "out of pocket expenses" and the "services" performed by the attorney on behalf of the defendant. The trial court also ordered the plaintiff to pay, as part of the costs in this action, the

sum of $3,163.50 to the guardian ad litem in payment of the "charges" made by the guardian ad litem in her representation of the child. The plaintiff was finally directed to pay, as part of the costs, the sum of $390.00 in payment of the "charges" made by the psychologists previously appointed by the trial court.

In support of the 20 December order, the trial court concluded in relevant part that: (1) the defendant "is an interested party acting in good faith who has insufficient means to defray the expenses of this litigation"[;] (2) the plaintiff "is able to pay the sum of $55,688.35"[;] and (3) the plaintiff "is able to pay the guardian *ad litem* charges." The trial court entered the following relevant findings of fact: (1) plaintiff's annual income in 1991, 1992 and 1993 was well over $1,000,000.00 and his net estate is worth $15,000,000.00; (2) until April 1995, defendant had no income, but from April until the present, defendant's income per month is $10,000.00 which is used to "pay for food and other household expenses"; (3) defendant's estate consists of three automobiles worth a total of $60,000.00, a savings account containing $3,000.00, and a gaming machine, the value of which is unknown, from which she receives her monthly income; and (4) defendant has no debts.

The evidence reveals that the defendant has paid all of her attorney's fees except $19,000.00 and that her present husband pays most of the household expenses. There is no evidence as to the amount of the defendant's expenses, including food and household expenses.

The issues are whether (I) a trial court may consider the relative estates of the parties when determining a party's entitlement to an award of attorney's fees in a custody action under N.C. Gen. Stat. § 50-13.6 (1995); and (II) the trial court erred in requiring the plaintiff to pay, as part of the court costs, the fees of the guardian ad litem.

I

[1] In a "proceeding for the custody or support, or both, of a minor child," the trial court has the discretion to enter an award of attorney's fees to an interested party, provided the interested party shows that she is "acting in good faith" and "has insufficient means to defray the expense of the suit." N.C.G.S. § 50-13.6 (1995); *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980). A party has insufficient means to defray the expense of the action, when he or she is "unable to employ adequate counsel in order to proceed as lit-

igant to meet the other spouse as litigant in the suit." *Hudson*, 299 N.C. at 474, 263 S.E.2d at 724.

As a general proposition, the trial court is not permitted to compare the relative estates of the parties in assessing a party's ability to employ "adequate" counsel. *See Taylor v. Taylor*, 343 N.C. 50, 57-58, 468 S.E.2d 33, 37-38, *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996). In the event, however, the party seeking an award of attorney's fees does not have sufficient income to employ "adequate" counsel and the expenses of the litigation would unreasonably deplete her estate, the trial court may examine the relative estates of the parties. *Cobb v. Cobb*, 79 N.C. App. 592, 596-97, 339 S.E.2d 825, 828-29 (1986); *Taylor*, 343 N.C. at 55, 468 S.E.2d at 36 (evidence did not show that requiring party to pay her own attorney's fees would cause an "unreasonable depletion of her estate").

In this case the trial court concluded that the defendant was an interested party acting in good faith and had insufficient means to defray the expenses of the action. There is no dispute that she is an interested party acting in good faith. The only question is whether the record supports the conclusion of law that the defendant was without sufficient means to defray the expenses of the action. *See Hudson*, 299 N.C. at 472, 263 S.E.2d at 724 ("good faith" and "insufficient means" inquiries present questions of law reviewable *de novo*).

The findings indicate that the defendant has an estate valued at $63,000 and an annual income of $120,000. The plaintiff has an estate valued at $15,000,000 with an annual income of $1,000,000. The findings also show that the defendant expends $120,000 annually "to pay for food and other household expenses." These findings, if supported by the evidence, can support the conclusion that she does not have sufficient "means to defray the expenses of this litigation." The finding, however, that she is required to expend her full income to defray her household expenses is simply not supported by the evidence. There is no evidence as to the amount of her "food and other household expenses" and indeed no evidence that she was required to expend all of her income for these purposes. Furthermore, the evidence shows that she was able to pay a large portion of her attorney's fees from her annual income.

Because the evidence fails to show that she did not have ample income to defray the expenses of this action and would have been required to deplete her estate to pay these expenses, the trial court erred in considering the relative estates of the parties in assessing the

defendant's ability to employ "adequate" counsel. The order requiring the plaintiff to pay the defendant's attorney's fees is therefore reversed and remanded. On remand the trial court must reconsider the defendant's entitlement to attorney's fees. The determination must be made on the basis of the evidence in this record and without a consideration of the relative estates of the parties.

II

[2] Court costs in custody proceedings "shall be taxed against either party, or apportioned among the parties, in the discretion of the court." N.C.G.S. § 6-21(11) (1986). The costs recoverable include those items enumerated in N.C. Gen. Stat. § 7A-305 (1995); *see Sealey v. Grine*, 115 N.C. App. 343, 347, 444 S.E.2d 632, 635 (1994) (allowing recovery of "deposition expenses" although not listed in section 7A-305). Section 7A-305(d)(7) specifically provides that "[f]ees of guardian ad litem[s]" are assessable as an item of costs.

In this case the trial court appointed a guardian ad litem to represent the interest of the child. This appointment was consistent with authority granted to the trial court in Rule 17 of the North Carolina Rules of Civil Procedure. Rule 17(b)(3) authorizes the trial court to appoint a "guardian ad litem for an infant or incompetent person . . . when it is deemed by the [trial] court in which the action is pending expedient to have the infant, or insane or incompetent person so represented." N.C.G.S. § 1A-1, Rule 17(b)(3) (1990). The trial court included in its order a finding that the appointment of the guardian ad litem was in the best interest of the child and "expedient to the administration of justice." The plaintiff does not assign error to this finding. The guardian ad litem was thus properly appointed.

Having properly appointed the guardian ad litem, the trial court was within its discretion to assess as an item of costs the fees of the guardian ad litem and to tax those fees to either party or apportion them between the parties. This Court can reverse that decision only "upon a showing that [the decision is] manifestly unsupported by reason." *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Thus, contrary to the argument of the plaintiff, the assessment of costs is determined using a different criteria than that used for the assessment of attorney's fees under section 50-13.6. *See Smith v. Price*, 315 N.C. 523, 537, 340 S.E.2d 408, 417 (1986). In the assessment of court costs the trial court has no restrictions on its consideration of the relative estates of the parties.

In this case our review of the record discloses no manifest abuse of discretion with respect to the assessment of court costs, including the fees for the guardian ad litem. The order of the trial court directing the plaintiff to pay the guardian ad litem fees is thus affirmed.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and MARTIN, John C., concur.

GEORGE S. CROCKER, PLAINTIFF v. THE DELTA GROUP, INC., THOMAS N. ANDERSON, JR., AND WIFE, JOAN ANDERSON, DEFENDANTS

No. COA96-3

(Filed 4 March 1997)

1. Secured Transactions § 34 (NCI4th)— sale of business—personal property—absence of security interest

Plaintiff seller had no security interest in personal property transferred as part of the sale of business property where the parties never executed a separate writing denominated a security agreement; the purchase money note and deed of trust do not mention personal property; language in the purchase contract stating that the buyer "will execute UCC Financing forms" is insufficient to create a security interest in the personal property; although a UCC financing statement stated that it covered inventory and personal property, the financing statement and purchase contract together were insufficient to constitute a security agreement; plaintiff's former attorney testified that it was his understanding that the note was secured only by real property; and plaintiff's former attorney permitted the buyers to remove personal property from the business premises after default.

Am Jur 2d, Secured Transactions §§ 192-194.

Sufficiency of description of collateral in financing statement under UCC §§ 9-110 and 9-402. 100 ALR3d 10.

Sufficiency of description of collateral in security agreement under UCC §§ 9-110 and 9-203. 100 ALR3d 940.

2. Mortgages and Deeds of Trust § 119 (NCI4th)— purchase money deed of trust—no security interest in personalty—anti-deficiency statute

Where plaintiff failed to perfect a security interest in personal property transferred as part of the sale of business property and had only a subordinate purchase money note and deed of trust secured by real property, the anti-deficiency statute barred plaintiff from bringing an *in personam* action against the purchaser or the guarantors for the outstanding debt after the foreclosure of a senior deed of trust eroded the security for plaintiff's purchase money deed of trust. N.C.G.S. § 45-21.38.

Am Jur 2d, Mortgages § 775.

Mortgages: effect upon obligation of guarantor or surety of statute forbidding or restricting deficiency judgments. 49 ALR 3d 554.

Appeal by plaintiff from judgment entered 25 April 1994 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 24 September 1996.

In March 1985, defendant The Delta Group, Inc. (Delta) entered into a contract with Cabana East, Inc. (Cabana East) to purchase a business property in Nags Head. Upon purchase of the property, Delta executed a promissory note and deed of trust in favor of Sovran Bank, N.A. (the Bank) in the amount of $2,200,000. At the same time, Delta executed a promissory note and deed of trust in favor of Cabana East in the amount of $1,400,000. The promissory note and deed of trust to Cabana East were purchase money instruments, and defendants Thomas N. Anderson, Jr. and Joan Anderson (the Andersons) signed the promissory note in favor of Cabana East as guarantors. The purchase contract provided the $1,400,000 was to be secured by a second mortgage on the real estate. The deed of trust in favor of Cabana East was subordinate to the lien in favor of the Bank and constituted a second lien on the property.

The purchase contract contained a clause stating: "Buyer will execute UCC Financing forms assigning a second position to Seller of all furniture, fixtures, and equipment." At the time the deed and deeds of trust covering the property were filed, a UCC financing statement was also filed in the office of the Dare County Register of Deeds. The financing statement stated it covered "items purchased by Delta Group from Cabana East, Inc., constituting inventory and personal

property" in the purchased businesses, and stated the filing was "junior and subordinate to a filing on the same property for Sovran Bank, N.A." The parties never executed a separate writing denominated as a security agreement.

In December 1989, Cabana East assigned its rights in the deed of trust to plaintiff George S. Crocker, the president of Cabana East. Delta defaulted on the note held by the Bank, and the property was sold at auction pursuant to the Bank's deed of trust in May 1990. Prior to the sale, Thomas Anderson sold certain items of personal property from the businesses located on the real property. The foreclosure sale generated insufficient funds to satisfy Delta's debt to the Bank, and therefore, no funds were available to pay the second deed of trust in favor of Cabana East. As of 30 October 1989, the date of the last payment made on the promissory note payable to Cabana East, the outstanding principal amount remaining unpaid to Cabana East was $1,339,738.50.

Plaintiff filed this action 19 June 1991 seeking recovery of the unpaid amount. Plaintiff amended his complaint 5 June 1992 to include, among other things, allegations that plaintiff held a security interest in the personal property transferred under the purchase contract, and that the Anderson's personal guarantee constituted a separate obligation outside the anti-deficiency judgment statute, N.C. Gen. Stat. § 45-21.38. The parties waived trial by jury.

In a judgment entered 25 April 1994, the trial court held plaintiff's promissory note was secured only by real property, that plaintiff did not have a security interest in the personal property that was a part of the 1985 sale, and that the anti-deficiency statute barred any recovery against Delta. The trial court also held the personal guaranty by the Andersons fell within the scope of the anti-deficiency statute, barring any recovery against the Andersons by plaintiff. From this judgment, plaintiff appeals.

Aycock, Spence & Butler, by W. Mark Spence, for plaintiff-appellant.

Aldridge, Seawell & Khoury, by Christopher L. Seawell, for defendant-appellees.

McGEE, Judge.

[1] In this case, the parties stipulated the value of the real property purchased by Delta was $3,738,500 and the value of the personal

property purchased was $611,500. On appeal, plaintiff argues the trial court erred in determining he had no security interest in the personal property transferred as part of the 1985 sale. Plaintiff further argues that because he had a security interest in the personal property, the anti-deficiency statute does not bar recovery from the defendants to the extent of his security interest in the personal property. We hold plaintiff did not have a security interest in the personal property and affirm the judgment of the trial court.

Plaintiff alleges that the purchase contract, when read together with the financing statement, constitutes a security agreement. We disagree.

> The determination of whether a security interest exists is a two-step process. First, the court must determine as a question of law whether the language in the writing required by N.C. Gen. Stat. § 25-9-203 objectively indicates that the parties intended to create a security interest. If the statute of frauds requirement is met, then the factfinder must determine whether the parties actually intended to create a security interest.

In re Murray Brothers, Inc., 53 B.R. 281, 285 (Bankr. E.D.N.C. 1985). Plaintiff failed to show a valid security interest under both prongs of this test.

The fact that the parties did not execute a separate instrument denominated as a "security agreement" is not fatal to plaintiff's claim, *Little v. Orange County*, 31 N.C. App. 495, 497, 229 S.E.2d 823, 825 (1976), and our Supreme Court has held that separate writings may be considered together to satisfy the statute of frauds requirement. *See Evans v. Everett*, 279 N.C. 352, 183 S.E.2d 109 (1971). However, at a minimum, the writings claimed to be a security agreement must: (1) "contain language clearly manifesting the debtor's intent to create, grant, and provide for a security interest;" (2) bear the debtor's signature; (3) describe the obligation secured; (4) describe the collateral subject to the security interest; and (5) describe the land involved if the security interest covers crops or timber. *Id.* at 360, 183 S.E.2d at 114. Here, the writings fail to fulfill these requirements.

The promissory note in favor of Cabana East states it is a purchase money note and does not mention personal property. Instead, it states it is secured by a deed of trust. The deed of trust in favor of Cabana East states it is a purchase money deed of trust and only lists a description of real property as security for the note.

The financing statement in this case, standing alone, does no more than meet the requirements of N.C. Gen. Stat. § 25-9-402, and therefore, does not create a security interest in the personal property. *Evans*, 279 N.C at 358, 183 S.E.2d at 113. The only writing that could conceivably be read in conjunction with the financing statement to create a security agreement is the purchase agreement. However, language in the contract stating the buyer "will execute UCC Financing forms" falls far short of "clearly manifesting the debtor's intent to grant, create, and provide for a security interest" as required by *Evans*. *See In re Murray Brothers, Inc.* 53 B.R. at 284-85 ("Since a financing statement may be filed for reasons other than the perfection of an existing security interest, the filing of a financing statement alone is not enough to create a security interest."). Further, neither the financing statement nor the clause in the purchase agreement describe the obligation alleged to be secured by the personal property. *See Evans, supra*; *see also* 8A Ronald A. Anderson, *Anderson on The Uniform Commercial Code* § 9-203:99 (3rd ed. 1996) ("A written security agreement must identify the debt or obligation for the securing of which the security interest has been given."). Therefore, the writings in this case fail as a security agreement as a matter of law.

We also note plaintiff failed to satisfy the second prong of the *Murray Brothers* test, *i.e.*, convincing the factfinder that the parties intended to create a security interest. The trial court found as a fact that "the parties did not agree in the contract that the purchase money note would be secured by any personal property." "[T]he trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 753-54, 315 S.E.2d 537, 538 (1984).

Here, the note and the deed of trust did not mention a security interest in the personal property and the parties never executed a separate security agreement. Further, plaintiff's former attorney testified in his deposition it was his understanding that the note was secured only by real property, and that there would be no further recourse against Delta if the property sold for less than the amount of the debt at a foreclosure sale. Also, after default but before foreclosure, plaintiff's former attorney sent defendants' attorney a letter stating he had "no problem with [defendants] removing items of personal property" from the premises, but that "no item which can be considered a fixture" could be removed. Although there was also

some evidence to the contrary, this evidence supports the trial court's finding that the parties did not agree the note would be secured by personal property. The trial court's finding is therefore binding on this Court.

[2] Because plaintiff failed to perfect a security interest in the personal property, as a purchase money creditor his recovery upon foreclosure was limited to the sale proceeds. *Merritt v. Edwards Ridge*, 323 N.C. 330, 336, 372 S.E.2d 559, 563 (1988). Even though the foreclosure of the senior deed of trust eroded the security for plaintiff's purchase money deed of trust, plaintiff is barred by the anti-deficiency statute from bringing an *in personam* action against Delta for the outstanding debt. N.C. Gen. Stat. § 45-21.38; *Sink v. Egerton*, 76 N.C. App. 526, 333 S.E.2d 520 (1985). Plaintiff is also barred by the statute from bringing an action against the Andersons as guarantors of the note. *See Adams v. Cooper*, 340 N.C. 242, 460 S.E.2d 120 (1995) (anti-deficiency statute bars action against guarantors of purchase money note for balance of purchase price represented by the note.).

For the reasons stated, the judgment of the trial court ordering plaintiff recover nothing from the defendants is affirmed.

Affirmed.

Judges WYNN and JOHN concur.

WILLIAM J. CHILDRESS, EMPLOYEE, PLAINTIFF v. TRION, INC., EMPLOYER; THE PMA GROUP, CARRIER, DEFENDANTS

No. COA96-412

(Filed 4 March 1997)

1. Workers' Compensation § 478 (NCI4th)— appeal in Court of Appeals—attorney fees—no abuse of discretion

The Industrial Commission did not abuse its discretion in a workers' compensation case by awarding plaintiff attorney fees for successfully defending an appeal to the Court of Appeals after the Court of Appeals denied plaintiff's request to award attorney fees. N.C.G.S. § 97-88.

Am Jur 2d, Administrative Law §§ 52, 69; Workers' Compensation § 725.

2. Workers' Compensation § 304 (NCI4th)— interest—medical fees—no error

The Industrial Commission did not err in its award of interest on plaintiff's outstanding medical expenses pursuant to N.C.G.S. § 97-86.2.

Am Jur 2d, Workers' Compensation § 640.

Appeal by defendants from orders filed 16 January 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 1997.

On 7 November 1995 this Court affirmed an order and award of the Full Commission granting plaintiff an award for medical expenses (COA94-1136). The issue in dispute in that appeal was whether the defendants were liable for plaintiff's allegedly unauthorized surgery. This Court affirmed the Full Commission and held that defendants were liable for all of plaintiff's medical expenses arising out of his injury. Plaintiff requested this court to award attorney fees pursuant to G.S. 97-88 (1991). In its discretion this Court denied plaintiff's request.

On 18 December 1995 plaintiff made a motion to the North Carolina Industrial Commission for attorney fees pursuant to G.S. 97-88. Plaintiff sought attorney fees for successfully defending the prior appeal to this Court. Plaintiff asserted that "[t]he decision of the Court of Appeals not to exercise its authority does not preclude the Industrial Commission from exercising its own authority under G.S. 97-88 to award a fee to plaintiff's counsel . . . ." On 18 December 1995 plaintiff also made a motion before the Industrial Commission for interest on outstanding medical expenses pursuant to G.S. 97-86.2 (1991).

On 16 January 1996 Commissioner Thomas Bolch filed orders awarding plaintiff attorney fees in the amount of $1,350.00 and awarding plaintiff interest on outstanding medical expenses. Defendants appeal from these orders.

Lore & McClearen, by R. James Lore, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Dan M. Hartzog and Tracy C. Myatt, for defendant-appellants.

EAGLES, Judge.

[1] The first issue is whether the Industrial Commission abused its discretion in awarding plaintiff attorney fees for successfully defending his appeal pursuant to G.S. 97-88. Defendants argue that the reasonableness of defendants' prior appeal should be considered by this Court upon review of the award of attorney fees. We respectfully disagree.

An abuse of discretion standard of review is applied in an award of attorney fees by the Industrial Commission. *Taylor v. J.P. Stevens & Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983). In a recent decision of this Court, *Brown v. Public Works Commission*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996), we found that a reasonableness analysis of the appeal was inapplicable to an award of attorney fees under G.S. 97-88 and that abuse of discretion continues to be the appropriate standard. Upon careful review of the record and consideration of the parties' arguments, we conclude there is no showing that the Industrial Commission abused its discretion in its award of attorney fees.

[2] The second issue is whether the Industrial Commission erred in requiring defendants to pay interest on plaintiff's outstanding medical expenses. Defendants contends that interest on an "award" pursuant to G.S. 97-86.2 is limited to compensation due an employee and does not include medical expenses. We respectfully disagree.

Although its practices are not binding on this Court, we note that the Industrial Commission has entered awards of interest on medical expenses. *Simon v. Triangle Material, Inc. & Lumbermens' Underwriting Alliance Insurance Co.*, I.C. No. 841030; *see also Deese v. Southern*, 306 N.C. 275, 278, 293 S.E.2d 140, 143, disc. *review denied*, 306 N.C. 753, 303 S.E.2d 83 (1982) (Industrial Commission's opinions may be considered as persuasive authority). This practice of the Industrial Commission is consistent with the majority of states that have found that interest is payable on medical awards. 3 Larson's Workers' Compensation § 83.42(c) (1996).

No appellate court in North Carolina has specifically interpreted the definition of "award" pursuant to G.S. 97-86.2 (1991). G.S. 97-86.2 provides as follows:

> Interest on awards after hearing.
>
> In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where

> there is a appeal resulting in a ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

Generally, if the language of the statute is clear and not ambiguous, we must conclude that the General Assembly intended the statute to be implemented according to the plain meaning of its terms. *Hyler v. GTE Products*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993) (citations omitted). Nothing in the plain language of the statute indicates that an award pursuant to G.S. 97-86.2 is limited to compensation due an employee and does not include medical expenses.

Defendants argue that as a matter of public policy a narrow interpretation of "award" pursuant to G.S. 97-86.2 is appropriate. Defendants suggest that the General Assembly could not have intended medical expenses to be included in an "award," because the statute was designed to compensate a plaintiff who was deprived of the use of his money. Defendants opine that here it was the medical providers who provided the treatment and who waited for the resolution of this matter to receive their funds, not the plaintiff. In essence, defendants contend that an award of interest for medical expenses to plaintiff would be a windfall for plaintiffs and an undue burden on defendants. However, we note that in contested cases, workers' compensation plaintiffs incur the liability for all medical expenses if they lose; that plaintiffs often pay significant out-of-pocket medical expenses for prescription drugs, travel, deductibles, or actual payment of medical expenses when there is no other way plaintiffs can obtain treatment; and that because the factual scenarios in determining whether plaintiffs in workers' compensation cases have incurred out-of-pocket expenses are so numerous, the only reasonable construction is that any award of medical compensation for the plaintiff's benefit is covered by G.S. 97-86.2. Furthermore, this construction of "awards" is in accordance with the following guidelines for interpreting the Workers' Compensation Act provided by the North Carolina Supreme Court: The General Assembly intended the Act to "be construed liberally in favor of the injured worker to the end that its benefits not be denied upon technical, narrow, or strict interpretation;" and "[w]hile a court should not construe the Act liberally in favor of an employee if such construction contravenes 'the

plain and unmistakable language of the statute,' ambiguous provisions properly are interpreted in the employee's favor." *Hyler*, 333 N.C. at 266, 425 S.E.2d at 703 (1933) (citations omitted).

In *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984), the North Carolina Supreme Court commented that the goals of awarding interest include the following: "(a) [T]o compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement." All of these goals are met by the payment of interest on an award of medical expenses to workers' compensation claimants. Accordingly, we conclude that the Industrial Commission did not err in its award of interest on medical expenses pursuant to G.S. 97-86.2.

Affirmed.

Judges GREENE and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. THOMAS W. DICKERSON

No. COA96-1104

(Filed 4 March 1997)

Arrest and Bail § 70 (NCI4th)— State Capitol Police—territorial jurisdiction

The legislature intended in N.C.G.S. § 143-340 to give State Capitol Police officers the same power of arrest and territorial jurisdiction as police officers of the City of Raleigh; therefore, a State Capitol Police officer had jurisdiction to arrest defendant for driving while impaired and driving while his license was revoked on streets owned by the City of Raleigh.

Am Jur 2d, Sheriffs, Police, and Constables §§ 46, 47.

Appeal by the State from order entered 11 December 1995 by Judge Knox V. Jenkins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 February 1997.

Defendant was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 (1993) and driving while license revoked

in violation of N.C. Gen. Stat. § 20-28 (Cum. Supp. 1996). The district court found defendant guilty, and he appealed to the superior court for trial *de novo*. Following a hearing on defendant's motion to dismiss, the trial court entered an order in which it made the following findings of fact and conclusions of law:

> 1. Officer W. J. Weaver is a sworn State Capital [sic] Police Officer.
>
> 2. He is employed by the Secretary of the Department of Administration pursuant to N.C. Gen. Stat. § 143-335, et. seq.
>
> 3. His oath of office was administered by a person with the authority to administer such oaths.
>
> 4. That on October 28, 1994 at about 8:15 p.m., Officer W. J. Weaver was patrolling at about the intersection of Capital Boulevard and Peace Street in the State of North Carolina, County of Wake, City of Raleigh.
>
> 5. That at this time, Officer Weaver saw the Defendant Thomas W. Dickerson, driving a motor vehicle and weaving within the roadway.
>
> 6. That Officer Weaver had probable cause to stop and did stop the Defendant.
>
> 7. That he subsequently charged said Defendant with Driving While Impaired.
>
> 8. That the Defendant was not at any time in the arrest process on property that was owned or controlled by the State of North Carolina.
>
> 9. That the Court takes judicial notice that Capital Boulevard and Peace Street are streets in and owned by the City of Raleigh.
>
> 10. That under N.C. Gen. Stat. § 143-340, the duties of said officer are specifically limited as set out therein.
>
> 11. That it was not within Officer Weaver's jurisdiction to stop the Defendant.

Based upon these findings and conclusions, the trial court dismissed the charges. The State appeals.

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

DeMent, Askew, Gammon & DeMent, by Russell W. DeMent, Jr., and Angela L. DeMent, for defendant appellee.

ARNOLD, Chief Judge.

The State argues the trial court erred by dismissing the charges against defendant because the arresting officer had territorial jurisdiction to effectuate the arrest. We agree.

The powers and territorial jurisdiction of State Capitol Police officers are set out in N.C. Gen. Stat. § 143-340 (1996), which provides in pertinent part as follows:

> The Secretary of Administration has the following powers and duties:
>
> . . .
>
> (21) To serve as a special police officer and in that capacity to have the same power of arrest as the police officers of the City of Raleigh. Such authority may be exercised within the same territorial jurisdiction as exercised by the police officers of the City of Raleigh, and in addition thereto the authority of a deputy sheriff may be exercised on property owned, leased or maintained by the State located in the County of Wake.
>
> (22) To appoint as special police officers such reliable persons as he may deem necessary, and such officers shall have the same power of arrest as herein conferred upon the Secretary.

The State contends this statute gives State Capitol Police officers the same territorial jurisdiction as that of police officers of the City of Raleigh. Defendant contends, and the trial court concluded, that the statute gives State Capitol Police officers jurisdiction only on State property.

Where the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). If, however, the provisions of a statute are ambiguous, a court must construe the

statute to ascertain the legislative will. *Young v. Whitehall Co.*, 229 N.C. 360, 367, 49 S.E.2d 797, 801 (1948). In construing an ambiguous statute, earlier statutes on the subject and the history of legislation in regard thereto, including statutory changes over a period of years, may be considered in connection with the object, purpose, and language of the statute. *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 536, 135 S.E.2d 574, 577 (1964).

The statute in question is clear and definite that State Capitol Police officers have the same power of arrest as that of police officers of the City of Raleigh. Assuming *arguendo* the phrase "within the same territorial jurisdiction" is ambiguous, we have examined the statutory history to determine the legislative intent and believe the General Assembly intended to also grant State Capitol Police officers the same territorial jurisdiction as that of police officers of the City of Raleigh.

Prior to 1971, the powers and territorial jurisdiction of State Capitol Police officers were set out in N.C. Gen. Stat. § 129-4 (1964) which provided in pertinent part as follows:

> The Director of General Services has the following powers and duties:
>
> . . .
>
> (6) To serve as a special police officer, and in that capacity to arrest with warrant any person violating any law in or on, or with respect to, public buildings and grounds, and to arrest, or to pursue and arrest, without warrant any person violating in his presence any law in or on, or with respect to, public buildings and grounds. . . .
>
> (7) To designate as special peace officers such reliable and efficient employees of the Division as he may think proper, who shall have the same powers of arrest as the Director is given herein. . . .

In 1971, the General Assembly amended the statute and transferred it to Chapter 143 of the General Statutes.

"In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it." *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968) (citation omitted). The amendment in this case did not clarify the mean-

ing of the former statute. Instead, it changed the territorial jurisdiction of State Capitol Police officers from "public buildings and grounds," defined by N.C. Gen. Stat. § 129-2 (1964) as "all buildings and grounds owned or maintained by the State in the City of Raleigh," to "within the same territorial jurisdiction as exercised by the police officers of the City of Raleigh." Defendant's contention that the territorial jurisdiction of State Capitol Police officers is limited to State property comports only with the pre-1971 provisions. To hold that the General Assembly did not change the territorial jurisdiction of State Capitol Police officers by amending the statute in 1971 would be anomalous.

The effect of the amendment is even more obvious when the provision in question is considered in context. "Words and phrases of a statute may not be interpreted out of context, but individual expressions 'must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' " *In re Hardy*, 294 N.C. 90, 95-96, 240 S.E.2d 367, 371-72 (1978) (quoting *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 210, 69 S.E.2d 505, 511 (1952)). The current statute provides that in addition to the other powers and territorial jurisdiction of State Capitol Police officers, the officers may exercise the authority of a deputy sheriff in Wake County. However, the General Assembly has imposed as a limitation that this authority may be exercised only "on property owned, leased or maintained by the State located in the County of Wake." By failing to impose a similar limitation on the officers' exercise of authority inside the City of Raleigh, the General Assembly indicated its intention not to limit that territorial jurisdiction in any way.

We hold the trial court erred by concluding that the arresting officer had no jurisdiction to arrest defendant and by dismissing the charges. The order of the trial court is reversed, and the matter is remanded to Superior Court, Wake County, for reinstatement of the charges against defendant and for further proceedings.

Reversed and remanded.

Judges LEWIS and WALKER concur.

EDWARD O. LEDFORD, EMPLOYEE, PLAINTIFF v. ASHEVILLE HOUSING AUTHORITY, SELF-INSURED, EMPLOYER, GALLAGHER BASSETT SERVICES, INC., SERVICING AGENT, DEFENDANTS

No. COA96-639

(Filed 4 March 1997)

Workers' Compensation § 440 (NCI4th)— agreement unenforceable—reinstatement on hearing docket—unappealable interlocutory order

An order of the Industrial Commission concluding that a handwritten agreement signed by the parties at the conclusion of a mediation settlement conference was not enforceable as a compromise settlement agreement and reinstating the matter on the active hearing docket was interlocutory and not immediately appealable.

Am Jur 2d, Workers' Compensation § 688.

Appeal by defendants from order filed 11 March 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 February 1997.

No brief for plaintiff appellee.

Root & Root, P.L.L.C., by Allan P. Root and Louise Critz Root, for defendant appellants.

ARNOLD, Chief Judge.

Defendants appeal from an order of the Full Commission which denied their motion to enforce a memorandum of agreement signed by the parties at the conclusion of a mediated settlement conference.

On 8 July 1992, plaintiff suffered a compensable accidental injury. The parties executed a Form 21 agreement to pay compensation, which the Industrial Commission approved on 8 October 1992. Pursuant to the rules of the Industrial Commission, the parties held a mediated settlement conference on 28 February 1995. At that time the parties signed a handwritten agreement that contained the following terms:

> Agreement: The parties pursuant to mediation conference held on Feb. 28, 1995, in Asheville, have agreed to settle this case on the following basis:

(1) $125,000 lump sum

(2) Payment of meds to date of this agreement.

(3) Defendants payment of mediation expenses incurred today.

(4) Defendants agree to cooperate in the wording of the agreement so as to attempt to protect Plaintiff's other income.

Plaintiff subsequently determined that, due to the subrogation rights of his long-term disability carrier, the handwritten agreement was not in his best interest. When the parties could not agree upon a more formal settlement agreement, defendants sought an order from the Industrial Commission to enforce the terms of the handwritten agreement. Deputy Commissioner Morgan S. Chapman determined that a policy decision was involved and referred the matter to the Full Commission.

The Full Commission reviewed the matter and heard oral arguments from the parties on 26 January 1996. In its order filed 11 March 1996, the Full Commission found that: (1) the above agreement had been signed by all the parties; (2) plaintiff had determined that the memorandum of agreement was not in his best interest; and (3) defendants were seeking an order to enforce the language of the above agreement as a compromise settlement agreement. The Full Commission then concluded that the "memorandum of agreement [was] not enforceable as a Compromise Settlement Agreement under I.C. Rule 502," denied defendants' motion, and ordered the case reinstated to the active hearing docket. From the Full Commission's order, defendants appeal.

Defendants contend that the Full Commission erred in finding as a matter of law that it lacked legal authority to review and enforce a mediation settlement agreement. They argue that the Full Commission must review any agreement to determine that it is fair and just. *See* N.C. Gen. Stat. § 97-17 (1991); N.C. Gen. Stat. § 97-82 (Cum. Supp. 1996). We are not persuaded by defendants' argument.

The dispositive issue is whether this appeal must be dismissed as interlocutory. Although not raised by the parties, the issue is appropriately raised by this Court *sua sponte*. *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). An appeal from the Full Commission is taken "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (Cum. Supp. 1996). Only from a

final order or decision of the Industrial Commission is there an appeal of right to this Court. *Lynch v. Construction Co.*, 41 N.C. App. 127, 129, 254 S.E.2d 236, 237, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979); N.C. Gen. Stat. § 7A-29(a) (1995). An order is not final if it fails to determine the entire controversy between all the parties. *Veazey v. Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

In its order the Full Commission concluded that the parties' agreement was not enforceable and ordered the matter reinstated on the active hearing docket. The duties of parties, representatives, and attorneys in finalizing an agreement reached in a mediated settlement conference are defined as follows:

> Finalizing Agreement. Upon reaching agreement, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, sign it along with their counsel, and file it with the Industrial Commission within 20 days of the conclusion of the mediation conference. All agreements for payment of compensation shall be submitted on proper forms or by clincher for Industrial Commission approval.

Rule 4(b) of the Rules for Mediated Settlement Conferences of the North Carolina Industrial Commission. A "clincher" or compromise agreement is a form of voluntary settlement used in contested or disputed cases. *See Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 430, 444 S.E.2d 191, 193 (1994). "All compromise settlement agreements must be submitted to the Industrial Commission for approval." Rule 502(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission. In order for such an agreement to be approved by the Industrial Commission, it must contain specified language or its equivalent. *See* N.C. Industrial Commission Workers' Compensation Rule 502(2).

Contrary to defendants' assertion, the Full Commission did not find as a matter of law that it lacked legal authority to review and enforce the handwritten agreement signed by the parties at the conclusion of the mediation settlement conference. Rather, it concluded that the memorandum of agreement was not enforceable as a compromise settlement agreement under Rule 502.

The Full Commission's order has not finally disposed of this case, for further action in the form of a hearing on the merits is required.

See Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 477, 363 S.E.2d 642, 643 (1988). No substantial right is involved, nor will injury result if defendants' appeal is not heard at this time. *See Culton v. Culton*, 327 N.C. 624, 626, 398 S.E.2d 323, 325 (1990). Defendants' appeal is therefore interlocutory, and their appeal from the Full Commission's order is dismissed.

Dismissed.

Judges LEWIS and WALKER concur.

T&T DEVELOPMENT CO., INC. (ALSO KNOWN AS T&T DEVELOPMENT CO.) AND MARSHA HARVEY (FORMERLY KNOWN AS MARSHA H. TAYLOR) v. SOUTHERN NATIONAL BANK OF SOUTH CAROLINA

No. COA96-544

(Filed 4 March 1997)

1. **Evidence and Witnesses § 671 (NCI4th)— motion in limine—no objection at trial—appeal**

The evidentiary issues raised in plaintiffs' brief were not properly before the appellate court where plaintiff did not offer any evidence after the trial court allowed the defendant's motion *in limine* and the case was called for trial. Rulings on motions *in limine* are merely preliminary and subject to change during trial, depending upon the actual evidence offered. The issue on appeal is not whether the granting or denying of the motion *in limine* was error, but whether the evidentiary rulings of the court during trial are error.

Am Jur 2d, Trial §§ 402, 411-414, 420.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters. 63 ALR3d 311.

2. **Appeal and Error § 178 (NCI4th)— motion in limine—appeal from—trial court jurisdiction**

The trial court was not divested of jurisdiction and did not err by calling a case for trial where plaintiffs had given notice of

appeal from the granting of a motion *in limine* for defendants. An appeal from a nonappealable order does not deprive the trial court of jurisdiction to try and determine a case on its merits.

Am Jur 2d, Appellate Review §§ 421, 432, 694.

Appeal by plaintiffs from orders entered 8 January 1996 and 19 January 1996 in Brunswick County Superior Court by Judge D. Jack Hooks, Jr. Heard in the Court of Appeals 28 January 1997.

Moore and Brown, by B. Ervin Brown, II and Martha Marie Eastman, for plaintiff-appellants.

Murchison, Taylor, Kendrick, Gibson & Davenport, L.L.P., by Vaiden P. Kendrick, for defendant-appellee.

GREENE, Judge.

T&T Development Company (T&T) and Marsha Harvey (Harvey) (collectively plaintiffs) appeal from the granting of Southern National Bank of South Carolina's (Bank) motion *in limine* and from an order dismissing their suit for failure to prosecute their claim which sought a declaratory judgment to determine the balance they owed to the Bank.

In 1992 a dispute arose between the Bank and plaintiffs with regard to the balance due on a loan the Bank made to plaintiffs in 1984. On 12 May 1994 plaintiffs filed this action seeking a declaration of their obligation under the 1984 note. That complaint was later amended to include claims for breach of contract, unfair or deceptive acts or practices, negligent misrepresentation, constructive fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. In an order entered on 12 December 1994, Judge James D. Llewellyn determined that the "plaintiff[s] may pay all monies alleged to be owed to the [Bank] under protest and *still retain* a justiciable and triable cause of action of all issues" before the trial court (emphasis added). Judge Llewellyn also concluded as a matter of law that:

> neither the [Bank's] demand for the above amounts nor its acceptance of the aforesaid sums shall be admissible in evidence against the defendant as evidence of any wrongful conduct by the defendant or as evidence of any damages by the plaintiff[s] but may be introduced by the plaintiff[s] as evidence of payment if

the defendant continues to assert any claim for principal and interest under the note referred to in the complaint.

On 8 January 1996, Judge D. Jack Hooks, Jr., granted the Bank's motion *in limine* to exclude evidence of the Bank's "demand and its acceptance of the amount stated in the Court's Order of [12 December 1994] as evidence of either wrongful conduct by the [Bank] or of any damages to the plaintiffs be excluded on the grounds that: (a) the admission of the evidence is precluded by the Court's Order of [12 December 1994]." Immediately after the granting of the motion *in limine* the plaintiffs gave oral notice of appeal. The trial court then called the case for trial and the plaintiffs refused to offer any evidence on the grounds that the trial court was "functus officio." The trial court then granted the Bank's motion to dismiss plaintiffs' claims. On 29 January 1996 plaintiffs gave notice of appeal from the dismissal of their action.

The issues are whether: (I) an order granting a party's motion *in limine* is appealable; and (II) the trial judge lacked jurisdiction to dismiss plaintiffs' case for failure to prosecute after plaintiffs filed notice of appeal from the order granting the Bank's motion *in limine.*

I

[1] While the North Carolina Rules of Evidence do not explicitly provide for motions *in limine,* their use in North Carolina is well recognized. *State v. Conaway,* 339 N.C. 487, 521, 453 S.E.2d 824, 845-46 (1995). Rulings on these motions, however, are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion "is insufficient to preserve for appeal the question of the admissibility of evidence." *Id.* A party objecting to an order granting or denying a motion *in limine,* in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted). *Conaway,* 339 N.C. at 521, 453 S.E.2d at 846 (motion denied); *Beaver v. Hampton,* 106 N.C. App. 172, 177, 416 S.E.2d 8, 11 (1992) (motion denied), *modified on other grounds,* 333 N.C. 455, 427 S.E.2d 317 (1993); *Morris v. Bailey,* 86 N.C. App. 378, 383, 358 S.E.2d 120, 123 (1987) (motion allowed). On appeal the issue is not whether the granting or denying of the motion *in limine* was error, as that

issue is not appealable, but instead whether the evidentiary rulings of the trial court, made during the trial, are error.

In this case after the trial court allowed the Bank's motion *in limine* and the case was called for trial, plaintiffs did not offer any evidence. The evidentiary issues, raised in plaintiffs' brief, are therefore not properly before this court and will not be addressed.

II

[2] Plaintiffs argue that their notice of appeal from the granting of the Bank's motion *in limine* divested the trial court of all jurisdiction and that the court thus had no authority to call the case for trial. It follows, plaintiffs contend, that the order dismissing their claims for failure to prosecute was error. We disagree.

Although an appeal generally divests the trial court of jurisdiction, an appeal from a nonappealable order does not deprive the trial court of jurisdiction to try and determine a case on its merits. *See Veazey v. City of Durham*, 231 N.C. 354, 364, 57 S.E.2d 375, 383 (1950). In this case because plaintiffs had no right to appeal the granting of the motion *in limine*, the trial court was not deprived of jurisdiction and did not err in calling the case for trial and dismissing it when plaintiffs failed to offer any evidence. *See* N.C.G.S. § 1A-1, Rule 41(b) (1990) (allowing dismissal of action for failure to prosecute).

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

STEWART H. SMITH AND THOMAS H. BATTEN v. VICKY SUE JOHNSON, JOHN B. HARDEE, AND CELESTE HARDEE DAY

No. COA96-489

(Filed 4 March 1997)

1. Appeal and Error § 206 (NCI4th)— sanctions and summary judgment—Rule 59 motion for reconsideration—time for notice of appeal—not tolled

Defendant's notice of appeal was not timely where plaintiffs filed an action seeking damages and injunctive relief for clearing

a piece of land and placing a mobile home on it, defendants answered and asserted adverse possession as an affirmative offense, plaintiffs requested sanctions for discovery violations, the trial court struck the adverse possession defense as a sanction and the court granted summary judgment for plaintiffs on November 7, defendants requested that the summary judgment be set aside and a new trial granted, that motion was denied on December 21, and appeal was taken on December 27. Although the thirty-day period for filing an appeal under Rule 3 of the Rules of Appellate Procedure is tolled by a timely Rule 59 motion, it appears that this motion is merely an attempt to reargue matters already decided by the trial court and thus cannot be treated as a Rule 59(e) motion.

Am Jur 2d, Appellate Review §§ 285 et seq., 292 et seq.

Tolling of time for filing notice of appeal in civil action in federal court under Rule 4(a)(4) of Federal Rules of Appellate Procedure. 74 ALR Fed. 516.

2. Judgments § 541 (NCI4th)— Rule 59 and 60 motion— denied—merely a request to reconsider

A motion to set aside a sanction order and a summary judgment under N.C.G.S. § 1A-1, Rules 59 and 60 was properly denied where the motion was merely a request to reconsider its earlier decision and did not qualify as a Rule 59(e) motion and contained no allegations of fraud, misrepresentation, or other misconduct and thus was properly denied as a Rule 60 motion.

Am Jur 2d, Judgments §§ 203, 205, 495.

Appeal by defendants Vicky Sue Johnson and John B. Hardee from orders entered 7 November 1995 and 21 December 1995 in Craven County Superior Court by Judge W. Russell Duke, Jr. Heard in the Court of Appeals 14 January 1997.

Ward and Smith, P.A., by Donald S. Higley, II and Ryal W. Tayloe, for plaintiff-appellees.

David P. Voerman, P.A., by David P. Voerman, for defendant-appellants Johnson and Hardee.

Lee, Hancock, Lasitter & King, P.A., by Moses D. Lasitter, for defendant Day.

GREENE, Judge.

Vicky Sue Johnson and John B. Hardee (defendants) appeal an order dated and filed 7 November 1995 striking their affirmative defense of adverse possession. The defendants also appeal the denial of their "Motion To Set Aside Judgment And For a New Hearing" (motion), which order was dated 21 December 1995.

The undisputed facts are that Stewart H. Smith and Thomas H. Batten (plaintiffs) initiated this action against defendants seeking damages and injunctive relief after defendants cleared a piece of land owned by plaintiffs and placed a mobile home on it. Defendants answered and asserted as an affirmative defense that they acquired title to the piece of property by adverse possession.

The order striking the defendants' affirmative defense of adverse possession was in response to the plaintiffs' request for sanctions as a consequence of alleged discovery violations. After the sanction order the trial court granted summary judgment for the plaintiffs. The motion requested that the summary judgment be set aside "pursuant to Rule 60(b)(3)" and that a "new trial be granted pursuant to Rule 59(a)(2) and (7)."

Defendants' motion detailed the factual and procedural history of the case and specifically alleged that plaintiffs decided to seek a motion for sanctions for defendants having failed to comply with discovery requests when it was "well-known" that defendants' counsel was vacationing out of the country; plaintiffs did not first seek a motion to compel discovery; and all of the information and documents plaintiffs sought, "with the exception of a few receipts," had been available to plaintiffs at a previous preliminary injunction hearing concerning the same action. Based upon this information, defendants alleged that "[p]laintiffs' counsel has engaged in unprofessional and offensive trial tactics" and that plaintiffs have been unable to show that they were prejudiced by the alleged discovery violations. On 27 December 1995 the defendants gave notice of appeal "from the final Judgment dated and filed November 7, 1995, and from the Order denying Defendants' Motion to Set Aside Judgment and for New Hearing dated December 21, 1995."

The dispositive issue is whether the notice of appeal from the 7 November 1995 order striking the defendants' affirmative defense was timely.

[1] Rule 3 of the North Carolina Rules of Appellate Procedure provides thirty days to file an appeal from a judgment or order in a civil action. N.C. R. App. P. 3(c) (1997). "The running of the time for filing and serving a notice of appeal in a civil action . . . is tolled . . . by a timely [Rule 59] motion" for a new trial or to alter or amend a judgment. N.C. R. App. P. 3(c), (c)(3), (c)(4).

To qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must "state the grounds therefor" and the grounds stated must be among those listed in Rule 59(a). N.C.G.S. § 1A-1, Rule 7(b)(1) (1990); N.C.G.S. § 1A-1, Rule 59(a) (1990); *Dusenberry v. Dusenberry*, 87 N.C. App. 490, 492, 361 S.E.2d 605, 606 (1987); *see* Charles Alan Wright et al., *Federal Practice and Procedure: Civil* 2d § 2811, at 132 (1995) (hereinafter *Federal Practice*) (motion that "does not sufficiently state grounds has been treated as a nullity and ineffective" for extending time for taking appeal). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion. *Sherman v. Myers*, 29 N.C. App. 29, 30, 222 S.E.2d 749, 750 (motion must state "specific grounds upon" which relief is sought), *appeal dismissed and disc. rev. denied*, 290 N.C. 309, 225 S.E.2d 830 (1976); *Federal Practice* § 2811, at 132 (*pro forma* statement of grounds not sufficient).

In this case the defendants indicate in the motion that they rely on Rule 59(a)(2) & (7) as the bases of their motion. There are, however, no allegations in the motion revealing any "[m]isconduct of the jury or prevailing party," N.C.G.S. § 1A-1, Rule 59(a)(2), or an "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C.G.S. § 1A-1, Rule 59(a)(7).

It appears that the motion is merely a request that the trial court reconsider its earlier decision granting the sanction and although this may properly be treated as a Rule 59(e) motion, *Federal Practice* § 2810.1, at 122, it cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made. *See Waye v. First Citizen's Nat'l Bank*, 846 F. Supp. 310, 314 (M.D. Pa. 1994); N.C.G.S. § 59(e) (motion to alter or amend must be based on grounds listed in Rule 59(a)). In this case the defendants attempt to reargue matters already decided by the trial court and the motion thus cannot be treated as a Rule 59(e) motion.

Because the motion is not a Rule 59 motion, the time to file an appeal from the 7 November 1995 order was not tolled. Therefore, defendants' 27 December 1995 notice of appeal from the order was not timely and must be dismissed. *Saieed v. Bradshaw*, 110 N.C. App. 855, 859, 431 S.E.2d 233, 235 (1993).

[2] Defendants have timely appealed from the denial of their motion. Having determined, however, that the motion is merely a request that the trial court reconsider its earlier decision and having determined that it does not qualify as a Rule 59(e) motion, and because there are no other provisions for motions for reconsideration, the motion was properly denied. We note that the motion also asserts that it is based on Rule 60(b)(3). The defendants make no argument in their brief in support of this contention. In any event, there are no allegations in the motion of any "[f]raud . . . , misrepresentation, or other misconduct of an adverse party." N.C.G.S. § 1A-1, Rule 60(b)(3) (1990). As noted earlier the motion is nothing more than an attempt by the defendants to correct what they see as an erroneous order and this cannot be done under Rule 60(b). *Coleman v. Coleman*, 74 N.C. App. 494, 498, 328 S.E.2d 871, 873 (1985) (Rule 60(b) cannot be used as a substitute for appellate review). Thus to the extent the motion is considered a Rule 60(b) motion, it was properly denied by the trial court.

Appeal from order dismissed and appeal from motion affirmed.

Judges EAGLES and MARTIN, John C., concur.

EMMALINE SHELLA, PLAINTIFF v. HENRY MOON, DIVISION RIGHT OF WAY AGENT FOR THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND DAVID R. MINGES, ASSISTANT ATTORNEY GENERAL AT THE NORTH CAROLINA DEPARTMENT OF JUSTICE, DEFENDANTS

No. COA96-427

(Filed 4 March 1997)

1. Actions and Proceedings § 10 (NCI4th)— Public Records Act—action to compel disclosure—mootness

Plaintiff condemnee's action seeking to compel disclosure of appraisals and other records associated with the condemnation of her land pursuant to the Public Records Act was moot where, following a Court of Appeals opinion ending litigation in the con-

demnation matter, defendants offered plaintiff the opportunity to inspect the requested records, but plaintiff refused that opportunity because she doubted the sincerity of defendants' offer and wanted it made before a judge. N.C.G.S. § 132-9.

Am Jur 2d, Actions § 50.

2. Records of Instruments, Documents, or Things § 14 (NCI4th)— ruling that records not discoverable—failure to appeal—action under Public Records Act prohibited

Where plaintiff condemnee did not appeal the trial judge's ruling in a condemnation proceeding that appraisals and other records sought by plaintiff were not discoverable under the Public Records Act or the rules of discovery, plaintiff could not then seek the same records in an action seeking an order compelling the disclosure of public records pursuant to N.C.G.S. § 132-9.

Am Jur 2d, Judgments §§ 582, 589, 596.

Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor. 9 ALR2d 984.

Appeal by plaintiff from order entered 17 January 1996 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 8 January 1997.

Emmaline Shella, plaintiff-appellant, pro se.

Attorney General Michael F. Easley, by Senior Deputy Attorney General Eugene A. Smith and Assistant Attorney General David R. Minges, for defendants-appellees.

LEWIS, Judge.

This appeal requires us to determine whether the trial court's entry of summary judgment in favor of defendants was proper. Since we determine that plaintiff's case is moot, we affirm the dismissing of her action.

On 12 May 1992, the Department of Transportation instituted a condemnation action against plaintiff to condemn a portion of her property in Guilford County. By letter dated 28 January 1994, plaintiff requested public records, including any appraisals, associated with

the condemnation of her land. In his reply letter dated 2 February 1994, defendant Minges objected to plaintiff's request because it was an untimely discovery request under local rules and a request for privileged information.

Plaintiff's request for the records, and other pending condemnation issues, came before Judge Melzer A. Morgan, Jr. at the 7 February 1994 civil session of Guilford County Superior Court. In an order filed 11 February 1994, the court concluded that the records and appraisals were not discoverable under the Public Records Act or the rules of discovery at that time. Plaintiff did not appeal this order. Instead, on 24 February 1994, she filed the present action seeking an "Order Compelling Disclosure of Public Records" in accordance with N.C. Gen. Stat. section 132-9. Subsequently, this Court issued an opinion in the condemnation matter on 2 May 1995, ending any pending litigation. On 21 September 1995, after hearing that plaintiff still desired access to her condemnation file, defendant Minges wrote to her and offered the records for her review.

On 20 December 1995, defendants moved for summary judgment in the present matter. On 4 January 1996, plaintiff moved to amend the complaint to add certain defendants and request compensatory and punitive damages. Both motions were heard by Judge Catherine C. Eagles at the 16 January 1996 civil session of Guilford County Superior Court. Judge Eagles granted defendants' motion and therefore denied plaintiff's. Plaintiff appeals.

[1] After reviewing the record in this case, we conclude that plaintiff's action is moot.

> "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." An appeal which presents a moot question should be dismissed. Judicial power only extends to concrete, justiciable, and actual controversies properly brought before the court and each decision of law must be based on specific facts established by stipulation or by appropriate legal procedure.

Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (citations omitted).

Plaintiff brought this action under N.C. Gen. Stat. section 132-9. At that time, prior to the October 1995 amendments, it provided: "Any person who is denied access to public records for purposes of inspection, examination or copying, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders." 1995 N.C. Sess. Laws ch. 338, § 4. Accordingly, the only recovery provided for by this statute is the opportunity to inspect public records.

Plaintiff in this case was given the opportunity to inspect the requested records. However, she refused it because she doubted the sincerity of defendants' offer and wanted it made before a judge. Nonetheless, we hold that she has been granted the relief she sought by initiating this action under G.S. 132-9 and her case must be dismissed. It is not the function of this Court to consider and rule on imagined controversies.

[2] Furthermore, even if plaintiff's case was not moot, the grant of summary judgment for defendants would have to be upheld. On 11 February 1994, the trial judge in the condemnation case ruled that "the records and appraisals of the plaintiff are not discoverable under the Public Records Act or the rules of discovery at this time." Plaintiff did not appeal this order and therefore should not be allowed to subsequently seek the denied relief, albeit in a different form, from another Superior Court judge two weeks later. *See Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967) ("A judgment entered by one Superior Court judge may not be modified, reversed, or set aside by another.")

In a case dealing with this issue in a criminal context, the Supreme Court made the following pronouncement which we find instructive:

> It is illogical to assume that the General Assembly would preclude a criminal defendant from obtaining certain investigatory information pursuant to the criminal discovery statutes while at the same time mandating the release of this information to the defendant, as well as the media and general public, under the Public Records Act.

Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 597-98, 434 S.E.2d 176, 177 (1993). Likewise, we determine that it would be illogical to allow plaintiff to circumvent the rules of discovery in a civil context through use of the Public Records Act.

Plaintiff's request for the documents was denied by an order filed in the condemnation proceeding. To allow her to then seek the same records two weeks later in an action brought under the Public Records Act would make a mockery of our discovery rules and undermine the authority of the trial judge who had recently denied access. Surely, this was not the intent of the General Assembly when it passed the Public Records Act. As a result, even if it were not moot, plaintiff's action could not stand.

Affirmed.

Judges WALKER and MARTIN, MARK, D. concur.

THELMA WIGGINS LAFFERTY, PLAINTIFF v. ROY ELVIN LAFFERTY, DEFENDANT

No. COA96-432

(Filed 4 March 1997)

Abatement, Survival, and Revival of Actions § 11 (NCI4th)—separation agreement—counterclaim in another county—reply seeking affirmative relief—voluntary dismissal without consent—ineffectiveness—abatement of new action

Plaintiff's Nash County claim for specific performance of a separation agreement abated because there was a pending action between the same parties for the same cause in Hertford County where plaintiff counterclaimed in defendant's divorce action in Hertford County for enforcement of the separation agreement; defendant filed a reply seeking nullification or modification of the separation agreement and other affirmative relief; plaintiff subsequently filed a notice of dismissal of her counterclaim in Hertford County without defendant's consent; plaintiff's notice of dismissal without defendant's consent was ineffective because defendant's reply sought affirmative relief growing out of the same transaction; and the Hertford County counterclaim was thus not properly dismissed and is still pending.

Am Jur 2d, Abatement, Survival, and Revival §§ 5, 6, 13, 14.

Pendency of prior action for absolute or limited divorce between same spouses in same jurisdiction as precluding subsequent action of like nature. 31 ALR2d 442.

Appeal by plaintiff from order entered 21 November 1995 and amended 20 February 1996 by Judge Albert S. Thomas, Jr. in Nash County District Court. Heard in the Court of Appeals 8 January 1997.

Godwin & Spivey, by W. Michael Spivey, for plaintiff-appellant.

Perry W. Martin for defendant-appellee.

LEWIS, Judge.

The following facts are contained in the trial court's findings and have not been assigned as error by plaintiff. They are therefore binding on this Court. *See State v. Ward*, 66 N.C. App. 352, 354, 311 S.E.2d 591, 592 (1984).

On 30 September 1985, defendant Roy Elvin Lafferty filed for absolute divorce from plaintiff Thelma Wiggins Lafferty in Hertford County District Court. On 13 December 1985, plaintiff filed an answer and counterclaimed for enforcement of a separation agreement entered into by the parties. In response to plaintiff's counterclaim, defendant filed a reply seeking various forms of affirmative relief, namely nullification or modification of the separation agreement, reimbursement for an unauthorized sale of property and the emancipation of the parties' child. The Hertford County District Court thereafter severed the counterclaim from the divorce action and entered a decree of absolute divorce. No other written judgment was ever entered into or signed.

Subsequently, plaintiff, defendant in Hertford County, filed this action in Nash County District Court on 14 September 1994 seeking specific performance of the separation agreement. Defendant, plaintiff in Hertford County, moved to dismiss this action on the ground that the Hertford County action was still pending. Subsequently, on 10 May 1995, plaintiff filed a Notice of Voluntary Dismissal in Hertford County.

Based on these findings of fact, the Nash County District Court concluded that, despite plaintiff's attempt to voluntarily dismiss it, the Hertford County case was still pending and therefore the Nash County case must abate. Plaintiff appeals this ruling. We affirm.

In North Carolina, "the pendency of a prior action between the same parties for the same cause in a state court of competent jurisdiction abates a subsequent action in another court of the state having like jurisdiction." *Weaver v. Early*, 325 N.C. 535, 538, 385 S.E.2d 334, 336 (1989). Therefore, the issue in the present case is whether plaintiff's notice of dismissal was sufficient to terminate the Hertford County case. We hold that it was not.

N.C.R. Civ. P. 41 allows a plaintiff to voluntarily dismiss his or her case at any time prior to resting. N.C.R. Civ. P. 41(a)(1) (1990). However, in situations "[w]here defendant sets up a claim for affirmative relief against plaintiffs arising out of the same transactions alleged by plaintiffs, plaintiffs cannot take a voluntary dismissal under Rule 41 without the consent of defendant." *Maurice v. Motel Corp.*, 38 N.C. App. 588, 592, 248 S.E.2d 430, 433 (1978) (citing *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976)). This exception has also been applied to a defendant attempting to dismiss a counterclaim when the plaintiff has joined in the requested relief by reply. *See Hunt v. Hunt*, 117 N.C. App. 280, 284, 450 S.E.2d 558, 561 (1994).

> The rationale for this rule of practice is simply that it would be manifestly unjust to allow a plaintiff, who comes into court upon solemn allegations which, if true, entitle defendant to some affirmative relief against the plaintiff, to withdraw, *ex parte*, the allegations after defendant has demanded the relief to which they entitle him. Upon demand for such relief defendant's right to have his claim adjudicated in the case "has supervened," and plaintiff thereby loses the right to withdraw allegations upon which defendant's claim is based without defendant's consent.

McCarley v. McCarley, 289 N.C. 109, 113, 221 S.E.2d 490, 493 (1976) (citation omitted).

Although this is not a situation where the plaintiff wishes to withdraw his or her original action after the defendant has filed a counterclaim or one where the reply also seeks the relief requested by the counterclaim, we discern no reason why the rule set out in the above cases should not apply here. Plaintiff attempted to dismiss her counterclaim in the Hertford County action, which sought enforcement of the parties' separation agreement, after defendant had replied and sought affirmative relief arising out of the same transaction. Plaintiff argues that because defendant's reply improperly contained new claims for relief, it should be disregarded and her voluntary dismissal

allowed. Although we agree that a reply may not contain a new cause of action, *see Miller v. Ruth's of North Carolina, Inc.*, 69 N.C. App. 153, 157, 316 S.E.2d 622, 625, *disc. review denied*, 312 N.C. 494, 322 S.E.2d 557 (1984), the facts of this case preclude our siding with plaintiff.

"[M]atters within a reply [which state a new cause of action] may properly be stricken on motion." *Id.* In this case, plaintiff never moved to strike the improper aspects of defendant's reply in the almost ten years which passed between the service of the reply and her attempt to voluntarily dismiss the Hertford County suit. We find that Ms. Lafferty has implicitly accepted Mr. Lafferty's request for affirmative relief and is estopped from withdrawing her counterclaim and frustrating his right to seek that relief. *See Hunt*, 117 N.C. App. at 284, 450 S.E.2d at 561. Therefore, since Mr. Lafferty never granted his permission for Ms. Lafferty to dismiss her counterclaim, it was not properly dismissed and still remains in full force and effect in Hertford County.

Accordingly, the trial court in Nash County correctly ruled that the present action abates since there is a pending action between the same parties for the same cause of action in another state court.

Affirmed.

Judges WALKER and MARTIN, MARK D. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 MARCH 1997

CAROLINA BUILDERS v. ALEXANDER SCOTT GROUP No. 96-442	Wake (94CVS6334)	Affirmed
CHILDRESS v. BAKER No. 96-508	Yadkin (95CVS434)	Affirmed in part, Reversed in part and Remanded
DANCO v. MARLOWE No. 96-441	Catawba (93CVS2828)	Affirmed
DANIELS v. CITY OF NEW BERN No. 96-486	Craven (94CVS1379)	Affirmed
GASCOYNE v. EVERETT No. 96-1004	Catawba (91CVS50)	Affirmed
HIGGINS v. HIGGINS No. 96-668	Buncombe (91SP422)	Dismissed
INCOME PROPERTIES OF RALEIGH v. HARRIS No. 96-189	Wake (94CVS05615)	Reversed and Remanded
JOHNSON v. DALE No. 96-560	Wake (93CVS11891)	No Error
JOHNSON v. SHULL No. 96-428	Gaston (94CVS1669)	No Error
JONES v. PIGGLY WIGGLY OF ROCKY MOUNT No. 96-103	Edgecombe (94CVD438)	Affirmed
LOOS v. DUTRO No. 96-57	Wake (93CVD7429)	Affirmed
MUNDAY v. MASSENGILL & BLUESTONE, INC. No. 96-567	Wake (95CVS10234)	Affirmed
ORETEGA v. CARTER No. 96-490	Gaston (94CVS282)	No Error
PHILLIPS v. SANDERS No. 95-1118	Carteret (92CVS518)	Affirmed
RAY v. BANTHER No. 96-582	Henderson (94CVD1355)	Affirmed

SANDERS v. WEST No. 95-1337	Randolph (94CVS1484) (94CVS1485)	Affirmed
SCOTT v. BYRD FOOD STORES No. 96-492	Durham (94CVS00716)	Reversed
SHAW v. SMITH No. 96-536	Brunswick (93CVS603)	Affirmed
SOUTHPORT CONSULTANTS INTERNATIONAL v. DILLARD No. 96-623	Durham (95CVD2163)	Affirmed
STATE v. ALLISON No. 96-905	Polk (95CRS19) (95CRS20)	No Error
STATE v. BAILEY No. 96-909	Mecklenburg (94CRS8831)	No Error
STATE v. BURNS No. 96-203	Forsyth (95CRS11507) (95CRS11509) (95CRS11510)	New Trial
STATE v. COX No. 96-369	Mecklenburg (94CRS90084)	No Error
STATE v. DAVIS No. 96-959	Wayne (95CRS14999)	New Trial
STATE v. FRIZZELL No. 96-555	Forsyth (95CRS13507)	No Error
STATE v. GUTIERREZ No. 96-890	Wilkes (95CRS6646)	No Error
STATE v. HERNANDEZ No. 96-690	Wilkes (95CRS002669)	No Error
STATE v. HODGE No. 96-988	Pender (96CRS197)	Appeal Dismissed
STATE v. JENKINS No. 96-225	Durham (91CRS28272) (91CRS28273)	No Error
STATE v. JOHNSON No. 96-1005	Haywood (95CRS5721)	No Error
STATE v. JORDAN No. 96-970	Northampton (95CRS1124)	No Error
STATE v. MARCH No. 96-1185	Northampton (95CRS2320) (95CRS2321)	No Error

STATE v. McCLEAN No. 96-1184	Halifax (95CRS3248)	No Error
STATE v. MILES No. 96-607	Wake (94CRS26578) (94CRS26579) (94CRS26580) (94CRS93352)	Remanded
STATE v. MITCHELL No. 96-978	Wake (95CRS57637) (95CRS71452)	No Error
STATE v. PRETREE No. 96-1124	Mecklenburg (95CRS68511)	No Error
STATE v. RIVENS No. 96-974	Iredell (92CRS206) (92CRS207)	No Error
STATE v. SCHEXNAYDER No. 96-1179	Wake (93CRS84497)	Reversed and remanded with instructions
STATE v. TEEL No. 96-1044	Guilford (95CRS20507) (95CRS42911) (95CRS42912)	No Error
STATE v. TERCERO No. 96-1011	Pitt (95CRS25943)	Affirmed
TRAILMOBILE, INC. v. WILSON TRAILER SALES No. 96-269	Wilson (91CVS1763)	New Trial
VESTAL v. R. J. REYNOLDS TOBACCO CO. No. 96-413	Ind. Comm. (350630)	Affirmed
VIRGINIA MUT. INS. CO. v. NEWCOMB No. 96-603	Rockingham (94CVS1394)	Dismissed
WOODS v. K & C PROPERTIES No. 96-854	Ind. Comm. (423979)	Appeal Dismissed

CHARLES A. COOK AND SHIRLEY COOK, PLAINTIFFS v. WAKE COUNTY HOSPITAL SYSTEM, INC., D/B/A WAKE MEDICAL CENTER, DEFENDANT

No. COA96-76

(Filed 18 March 1997)

1. Trial § 491 (NCI4th)— motion for judgment treated as renewal of motion for directed verdict

A motion for judgment pursuant to N.C.G.S. § 1A-1, Rule 50(b)(1) should be treated by the court the same as a renewal of an earlier motion for a directed verdict.

2. Negligence § 152 (NCI4th)— negligence—motion for judgment—prima facie case—hospital—slip and fall—doctor—invitee

In a negligence action brought by plaintiff, a doctor who had staff privileges and thus was an invitee on defendant hospital's premises, the trial court erred in granting defendant hospital's motion for judgment pursuant to N.C.G.S. § 1A-1, Rule 50(b)(1) where the plaintiff's evidence established a *prima facie* case of negligence and showed that a reasonable trier of fact could conclude that the doctor slipped on a wet floor; that defendant knew or should have known that the floor was wet; that defendant had a duty to warn plaintiff of dangers; and that the wet floor proximately caused plaintiff to sustain injury.

3. Discovery and Depositions § 10 (NCI4th)— motion to compel—hospital accident report—written pursuant to hospital policy—not in anticipation of litigation

An accident report prepared by defendant hospital's employee after plaintiff doctor's slip and fall was not prepared "in anticipation of litigation" and was thus discoverable in plaintiff's personal injury action where the hospital's accident reporting policy served a number of nonlitigation, business purposes, and the accident report would have been compiled by defendant, pursuant to its policy, regardless of whether plaintiff intimated a desire to file a suit against the hospital or whether litigation was ever anticipated by the hospital. N.C.C.S. § 1A-1, Rule 26(b)(3).

Judge SMITH concurring in part and dissenting in part.

Appeal by plaintiffs from judgment entered 26 April 1995, pursuant to G.S. 1A-1, Rule 50(b)(1), by Judge Henry V. Barnette, Jr., in

Wake County Superior Court. Heard in the Court of Appeals 7 October 1996.

Plaintiff Dr. Charles Cook (Cook) is a physician specializing in internal medicine with privileges at Wake Medical Center. Plaintiff Shirley Cook is Dr. Cook's wife. On the morning of 29 November 1990, Cook was making rounds in the hospital when his route took him to the Surgical Intensive Care Unit (SICU) section of the hospital. As Cook entered the SICU doorway, Cook fell by allegedly slipping on a wet spot on the floor.

As he fell, Cook spilled a cup of coffee he had been holding. Cook's impact with the floor rendered him unconscious and caused injuries to his head, left knee, and other parts of his body. Prior to Cook's fall, a housekeeper employed by the hospital had damp mopped SICU room 6, which is in the vicinity of the SICU entryway. After his fall, Cook observed a wet floor sign near his feet. The exact position of the sign, both before and after Cook's fall, is a matter of dispute. However, at least one employee did see the wet floor sign sliding down the hallway as plaintiff fell.

Upon realization that Cook had fallen, a number of hospital personnel, including Dale O'Neal (O'Neal), the nurse manager of the SICU, rushed to render aid. None of these hospital employees saw or felt a wet spot, other than spilled coffee, in the SICU entryway area. Shortly after the accident, and in accordance with then existing hospital policy, O'Neal prepared a routine report of the accident on a standard hospital form.

This form, denominated "Hospital Incident or Accident Report" (accident report), directs hospital personnel to "complete [and report] within 24 hours . . . any incident [or] happening which is not consistent with the routine operation of the hospital or the routine care of a particular patient." After the accident report is completed by an employee, they must forward it to "Risk Management," a hospital "committee." In this regard, Hospital administrative record Number 400.55 notes that it is the responsibility of "[t]he employee discovering, directly involved, or closest to the incident when it occurs [to] complete the [accident] report."

In accordance with existing hospital policy, O'Neal completed the accident report, and forwarded it to Jeannie Sedwick (Sedwick), risk manager of the hospital. Sedwick reported the incident to Claire Moritz (Moritz), legal counsel for Wake Medical Center. In response

to Sedwick's notification of Cook's fall in the SICU, Moritz requested the accident report be sent to her.

On 24 November 1993 plaintiffs filed suit against defendant Wake Medical Center alleging negligence and loss of consortium. During discovery, defendant refused production of the accident report filled out by O'Neal. The trial court denied plaintiffs' pretrial motion to compel production of the accident report. At trial, plaintiffs renewed their request for production of the report and asked the trial court to conduct an *in camera* review of the report. The trial court denied both requests.

After a trial on the merits, the jury could not reach a unanimous verdict and the trial court declared a mistrial. The trial court granted defendant's motion for judgment pursuant to Rule 50(b)(1) of the North Carolina Rules of Civil Procedure. Plaintiffs appeal the trial court's denial of their motions to compel and the trial court's decision to grant judgment for defendant pursuant to Rule 50(b)(1).

Fuller, Becton, Slifkin, Zaytoun & Bell, P.A., by Charles L. Becton, Michele L. Flowers and Maria J. Mangano, for plaintiff-appellants.

Patterson, Dilthey, Clay, & Bryson, L.L.P., by Ronald C. Dilthey, Susan M. Easter and G. Lawrence Reeves, Jr., for defendant-appellee.

EAGLES, Judge.

[1] We first consider whether the trial court erred in granting defendant's motion for judgment pursuant to Rule 50(b)(1) of the North Carolina Rules of Civil Procedure.

A motion for judgment pursuant to Rule 50(b)(1) is essentially a renewal of an earlier motion for a directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368, 329 S.E.2d 333, 337 (1985). By making such a motion, the moving party asks that judgment be entered in accordance with the previous motion for directed verdict, notwithstanding any contrary verdict, or lack thereof, rendered by the jury. *Summey v. Cauthen*, 283 N.C. 640, 648, 197 S.E.2d 549, 554 (1973). The test for determining the sufficiency of the evidence when ruling on a motion for judgment is identical to that applied when ruling on a motion for directed verdict. *Id.* at 646, 197 S.E.2d at 553.

In ruling on a Rule 50(b)(1) motion, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving it the benefit of all reasonable inferences to be drawn therefrom, resolving all conflicts in the evidence in its favor. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). The heavy burden carried by the movant is particularly significant in cases such as the one before us, in which the principal issue is negligence. Only in exceptional cases is it proper to enter a directed verdict against a plaintiff in a negligence case. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473, 251 S.E.2d 419, 423 (1979). Issues arising in negligence cases are ordinarily not susceptible to summary adjudication because application of the prudent person test, or any other applicable standard of care, is generally for the jury. *King v. Allred*, 309 N.C. 113, 115, 305 S.E.2d 554, 553 (1983), *appeal after remand*, 76 N.C. App. 427, 333 S.E.2d 758 (1985), *disc. review denied*, 315 N.C. 184, 337 S.E.2d 857 (1986).

Thus, in order to survive defendant's motion for judgment, plaintiffs were obligated to present evidence at trial setting forth a *prima facie* case of negligence, *i.e.*, that defendant owed plaintiff Cook a duty of care, that defendant's conduct breached that duty, that the breach was the actual and proximate cause of plaintiffs' injury, and that damages resulted from the injury. *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990).

Plaintiff Cook was an invitee on defendant's premises because of his status as a doctor with privileges at the hospital: A status bestowing mutual economic benefit to him and the hospital. *See Morgan v. Great Atlantic and Pacific Tea Co.*, 266 N.C. 221, 226, 145 S.E.2d 877, 881 (1966). Because Cook was an invitee, the hospital had a duty to keep the SICU entrances in a reasonably safe condition for invitees entering or leaving the premises. *Lamm v. Bissette Realty, Inc.*, 327 N.C. at 416, 395 S.E.2d at 115. Additionally, defendant "ha[d] a duty to warn invitees of hidden dangers about which [defendant] knew or should have known." *Lamm*, 327 N.C. at 416, 395 S.E.2d at 115.

[2] Under our rules, an invitee cannot recover "unless he can show that the unsafe or dangerous condition had remained there for such length of time that the inviter knew, or by the exercise of reasonable care should have known, of its existence." *Long v. National Food Stores, Inc.*, 262 N.C. 57, 60, 136 S.E.2d 275, 278 (1964). As we have often stated, "the mere existence of a condition which causes an injury is not negligence *per se*, and the occurrence of the injury does

not raise a presumption of negligence." *Spell v. Mechanical Contractors, Inc.*, 261 N.C. 589, 592, 135 S.E.2d 544, 547 (1964).

In *Smith v. Cochran*, 124 N.C. App. 222, 476 S.E.2d 364 (1996), this Court reversed the decision of the trial court granting defendants summary judgment in a slip and fall case. In *Smith* there was conflicting testimony about who had mopped the floor where plaintiff fell, whether the floor was still wet, and whether there were any warning signs placed on the floor. The *Smith* Court resolved the conflicting testimony in favor of the plaintiff on the grounds that there was " '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.' " 124 N.C. App. at 224, 476 S.E.2d at 365-66 (quoting *Rone v. Byrd Food Stores*, 109 N.C. App. 666, 670, 428 S.E.2d 284, 286 (1993)).

Here there is also conflicting testimony about whether the floor was wet, and whether defendant knew or should have known of the wet spot. Although Cook was knocked unconscious by the fall, Cook testified that almost immediately after he pushed open a set of solid double doors leading down the SICU hallway, he stepped and felt his foot slide; he looked down and saw "a wet streaking as if one can see when a floor is wet and slides something across it." He further testified that while lying on the floor he saw a wet floor sign at his feet; the wet floor sign he saw was in the middle of the hallway, a few feet inside the solid double doors.

One defense witness testified that when she heard Cook yell, she ran to the doorway to the hall where she saw Cook's body in mid-air and the wet floor sign sliding down the hallway. This circumstantial evidence corroborates Cook's testimony concerning the location of the sign. Furthermore, because of the presence and location of the sign, this circumstantial evidence permits the inference that defendant had knowledge that the floor was wet. In addition, although an employee of defendant denied that she had mopped the floor in the hall where Cook fell, she admitted to mopping the floor in close proximity to where he fell shortly before the fall. While that same employee testified that her job is to mop the rooms of the hospital instead of the hallways, she admitted that she would at times mop the hallways when necessary.

Viewing the evidence in the light most favorable to plaintiffs, a reasonable trier of fact could conclude that Cook slipped on a wet floor, that defendant knew or should have known that the floor was

wet, and that the wet floor proximately caused plaintiffs to sustain injury. Any inconsistencies in the evidence should be decided by the jury. Accordingly, we conclude that the trial court erred in granting defendant a directed verdict.

[3] We next consider whether the trial court erred in denying plaintiff's motion to compel production of the accident report.

Pursuant to the rules of discovery outlined by G.S. 1A-1, Rule 26(b)(3), documents prepared "in anticipation of litigation" are afforded a qualified immunity from discovery by the party seeking those documents. *Willis v. Duke Power*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976). In general, documents created in anticipation of litigation are considered "work product," or "trial preparation" materials, and are protected because "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 516, 91 L.Ed. 451, 465 (1947)).

The phrase "in anticipation of litigation" is an elastic concept. The phrase itself indicates that its boundaries lack specific definition. In *Willis*, our Supreme Court defined this phrase as including "not only materials prepared after the party has secured an attorney, but those *prepared under circumstances in which a reasonable person might anticipate a possibility of litigation.*" *Willis*, 291 N.C. at 35, 229 S.E.2d at 201 (emphasis added) (citing to Wright and Miller, *Federal Practice and Procedure: Civil*, § 2024 at 197 (1970)). Unfortunately, the *Willis* decision offers little guidance as to what conditions constitute a "possibility of litigation." Our review of authorities from other jurisdictions indicates that North Carolina's definition of "in anticipation of litigation" is unique in its phraseology.

Plaintiffs assert that the facts of this case present an issue of first impression, and we are inclined to agree. For this reason, we rely in part on federal decisions for guidance in defining "in anticipation of litigation" as it applies here. *See Brewer v. Harris*, 279 N.C. 288, 292, 182 S.E.2d 345, 347 (1971) (directing us to federal and New York state courts for "enlightenment and guidance" on North Carolina's rules of civil procedure).

The *Willis* Court does instruct that "materials prepared in the ordinary course of business *are not protected*," and are thus, not considered materials "prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis*, 291

N.C. at 35, 229 S.E.2d at 201 (emphasis added). The treatise cited by the *Willis* Court, 8 Wright, Miller and Marcus, *Federal Practice and Procedure: Civil*, § 2024 at 343 (1994), offers the following guidance:

> Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that *even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.*

(emphasis added).

In *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987), *cert. denied*, 484 U.S. 917, 98 L.Ed.2d 225 (1987), the Eighth Circuit of the United States Court of Appeals faced a work product argument almost identical to the one presented by the defendant here. There, defendant G.D. Searle & Co. claimed that its "Risk Management" documents were protected by the work product doctrine. *Id.* at 399, 400. The *Simon* Court (like the *Willis* Court) looked to Wright and Miller's treatise for authority, and observed: "Materials assembled in the ordinary course of business . . . *or for other nonlitigation purposes* are not under the qualified immunity provided by this subdivision." *Simon*, 816 F.2d at 401 (emphasis added) (quoting 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970) (quoting Fed. R. Civ. P. 26(b)(3) advisory committee notes)).

Applying the analysis above, the *Simon* Court found G.D. Searle & Co.'s "risk management documents [to be] in the nature of business planning documents . . . ." *Simon*, 816 F.2d at 401. Among the business planning objectives achieved by G.D. Searle & Co.'s risk management system were "budget, profit and insurance considerations"—much like the risk management system used by the defendant here. *Simon*, 816 F.2d at 401. Because G.D. Searle & Co.'s risk management documents served a nonlitigation purpose (in addition to some purposes admittedly helpful in a litigation context), the *Simon* Court allowed discovery of the documents at issue. *Id.* at 402; and *see Brennan v. Walt Disney Productions, Inc.*, 1987 WL 15919 at *1 (D. Del. 1987) (finding Disney's use of accident "reports to have a broad[] use in Disney's business . . . [making them] discoverable").

The *Simon* Court's analysis is on all fours with the situation here. The record indicates that defendant had enacted an extensive risk management policy as part of its Administrative Manual and risk management plan. The stated purposes for the hospital policy, implementing a mandatory reporting procedure for incidents and accidents, go well beyond preparation for possible litigation. Policy 400.55 exists "[t]o identify areas of risk," and to facilitate the "report[ing of] any occurrence that is not consistent with the desired safe operation of the hospital or the care of the patients." In essence, and in defendant's own words, "[t]hese reports are administrative tools." According to hospital policy, accident reports are not discretionary, but are a required "responsibility" of any "employee discovering, directly involved, or closest to [an] incident when it occurs." They must be "turn[ed] in . . . within 24 hours to Risk Management." Once a report is taken, "Administration and Risk Management will make the final decision to report potential claims of liability," and "[a] monthly statistical summary of hospital incident reports is reviewed by the hospital's insurance broker . . . ." These employee reports are then compiled into "[m]onthly summar[ies] . . . for administrative and medical staff review and [are] presented to the Risk Management Committee and the Medical Staff Quality Assurance Committee and the Board of Directors."

Here defendant's accident reporting policy exists to serve a number of nonlitigation, business purposes. These business purposes impose a continuing duty on hospital employees to report any extraordinary occurrences within the hospital to risk management. These duties exist whether or not the hospital chooses to consult its attorney in anticipation of litigation. Here, absent any other salient facts, it cannot be fairly said that the employee prepared the accident report because of the prospect of litigation. In short, the accident report would have been compiled, pursuant to the hospital's policy, regardless of whether Cook intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital.

Defendant contends that, under the circumstances of Cook's fall, and "in the context of today's litigious society . . . only a person of extraordinary naivete would not expect Dr. Cook, an educated, sophisticated professional, to make a claim against the hospital." Were this the rule intended by the *Willis* Court, any accident report compiled by a business would be considered undiscoverable work product. We conclude that defendant's position is contrary to the discovery rules established by the *Willis* and *Simon* Courts, and there-

fore, the trial court erred in denying plaintiffs' motions to compel production of the accident report.

Reversed.

Judge MARTIN, John C., concurs.

Judge SMITH concurs in part and dissents in part.

Judge SMITH concurring in part and dissenting in part.

While I wholeheartedly agree with the majority that the accident report should have been produced, I dissent from that portion of the opinion which deals with defendant Hospital's tort liability for Cook's slip and fall.

It is well-settled in North Carolina that a business is not an insurer of its premises. *Rone v. Byrd Food Stores*, 109 N.C. App. 666, 669, 428 S.E.2d 284, 285 (1993); *Hull v. Winn-Dixie Greenville, Inc.*, 9 N.C. App. 234, 236, 175 S.E.2d 607, 609 (1970). The doctrine of *res ipsa loquitur* does not apply to slip and fall cases; that is, no inference of negligence arises from the mere fact of an accident or injury. *Skipper v. Cheatham*, 249 N.C. 706, 709, 107 S.E.2d 625, 628 (1959). Thus, defendant Hospital's duty to plaintiff Cook was that of " 'ordinary care to keep [the Hospital] in a reasonably safe condition . . . and to give warning of hidden perils or unsafe conditions insofar as they c[ould] be ascertained by reasonable inspection and supervision.' " *Rone*, 109 N.C. App. at 669, 428 S.E.2d at 285-86 (quoting *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963)).

In the instant case, there is simply no evidence, other than speculation based on inference, that the Hospital should have been aware of the alleged wet spot prior to Cook's fall. Plaintiff Cook's testimony reveals that his left foot slipped as he took his first step into the SICU—approximately thirty inches into the SICU doorway. By all accounts, there was a "Wet Spot" sign in the doorway of Room 6—over six feet from where plaintiff fell—just prior to plaintiff Cook's fall. Not a single witness testified to the contrary. After Cook's fall, the "Wet Spot" sign had moved outward toward the hall, in the vicinity of Room 7.

Even given the benefit of the doubt of all the evidence to plaintiffs, I fail to see how the pre-fall location of the sign—in a room door-

way, two doors down and five-to-six-feet from where the fall initiated—could constitute notice of an entryway wet spot to defendant Hospital. Where the sign was located after the fall is irrelevant to such a question.

The majority's after-the-fact determinations, addressed in the language of negligence, are really no more than a *sub silentio* application of the doctrine of *res ipsa loquitur*. A fact such as the housekeeper mopping Room 6 (whom we note, specifically *denied* spot-mopping in the hall on this occasion), two doors down from the SICU entryway, tells us nothing about the condition of the SICU entryway. One must ask the question, if the housekeeper had placed the sign in Room 10, rather than Room 6, would the majority's inferences still obtain? What the majority is really saying is that, because a housekeeper mopped a room two doors down from where the doctor slipped and fell and there was a wet spot sign in that doorway, the Hospital *must have caused* a wet spot (or should have discovered it) in the SICU entryway over two yards away in another location. This is the exact inference of negligence from injury disclaimed by the *Skipper* Court. *Id.* at 709, 107 S.E.2d at 628.

Moreover, even if we were to assume the existence of a wet spot at the entryway, plaintiffs' case is still deficient. As the majority correctly states, an invitee cannot recover "unless he can show that the unsafe or dangerous condition had remained there for *such length of time* that the inviter knew, or by the exercise of reasonable care should have known, of its existence." *Long v. National Food Stores, Inc.*, 262 N.C. 57, 60, 136 S.E.2d 275, 278 (1964) (emphasis added). The majority is virtually silent on this duration issue, save for this statement: "[B]ecause of the presence and location of the sign . . . circumstantial evidence permits the inference that defendant had knowledge the floor was wet." I submit that no evidence exists as to how long the alleged entryway wet spot existed prior to Cook's fall.

Once again, though, the majority hangs its hat on the facts that Room 6 was mopped and that a sign was placed in that room's doorway. From this, the majority bootstraps the issues of: Actual or constructive notice of the wet spot, duration of the wet spot, and proximate cause. In essence, if a business mops in one discrete location, it becomes the insurer of all falls in all other tangential locations. I cannot concur in such an analysis. *See Skipper*, 249 N.C. at 709, 107 S.E.2d at 628 (A business is "not [an] insurer[] of the safety of [its] customers.").

Simply put, I do not find the post-fall location of the sign relevant to the issues of notice, duration of the wet spot, or whether defendant Hospital should have discovered the alleged wet spot upon reasonable inspection. Without competent evidence on these issues, a jury could not have found defendant Hospital negligent. Having failed to present competent evidence addressing necessary elements of their tort claim, plaintiffs' case is *ipso facto* fatally deficient. Therefore, in my opinion, the trial court correctly granted defendant Hospital's Rule 50(b)(1) motion. For these reasons,

I dissent.

RONALD LEE CARTER, ANDREW WILLIAM ATKINS, LARRY McCROSKY, HOUSTON F. MAULDIN, SHERRILL DRYE, WALTER S. SMITH, ROBERT ELWOOD SMITH, BILLY PATRICK SMITH, FREDERICK LANE SMITH, LILLY ROSE STOKER, BETTY JANE SMITH GARNER, AND KENNETH HUNEYCUTT, PLAINTIFFS v. STANLY COUNTY AND THE BOARD OF COUNTY COMMISSIONERS OF STANLY COUNTY CONSISTING OF DAVID MORGAN, MARTHA SUE HALL, JOHN LOWDER, SHERRILL SMITH, AND GERALD EFIRD, DEFENDANTS

No. COA96-705

(Filed 18 March 1997)

1. **Counties § 54 (NCI4th)— purchase of property—conveyance to State for prison—no statutory authorization**

The statute permitting a county to acquire property for use by the county, N.C.G.S. § 153A-158, and the statute authorizing the county to engage in joint use of its property with another governmental unit, N.C.G.S. § 160A-274(b), as limited by Dillon's Rule, do not authorize a county to purchase real property and convey it to the State as an economic inducement to build a prison on the site.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 532 et seq.

2. **Counties § 54 (NCI4th)— purchase of property—conveyance to State for prison—authorization by legislative act**

Stanly County's purchase of real property for the purpose of conveying it to the State as an inducement to build a prison on the site was validated by the General Assembly's ratification of an

act stating that Stanly County has the power to acquire property and convey it to the State for use as a correctional facility. The fact that the caption of the act stated that it is an act to "confirm" that Stanly County may purchase and convey such property did not constitute the act a mere resolution stating the opinion of the General Assembly on Stanly County's power under the general law.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 532 et seq.

3. Zoning § 103 (NCI4th)— rezoning—use for prison—sufficiency of notification

A newspaper advertisement for a zoning amendment hearing stating that the county commissioners intended to add "government owned buildings, facilities and institutions" to the list of permitted uses in certain zoning districts was a sufficient notification under N.C.G.S. § 160A-364 of the county's plan to amend its zoning ordinance to allow purchased property to accommodate a state prison.

Am Jur 2d, Zoning and Planning §§ 586-598.

Validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation. 96 ALR2d 449.

4. Pleadings § 63 (NCI4th)— Rule 11 sanctions not warranted

Plaintiffs' conduct in bringing an action to determine the validity of a county's purchase of property for the purpose of transferring it to the State as an inducement to build a prison on the site did not merit Rule 11 sanctions against plaintiffs.

Am Jur 2d, Pleading § 341.

Judge WALKER concurring.

Appeal by plaintiffs from dismissal entered 11 April 1996 by Judge Judson D. DeRamus, Jr., in Stanly County Superior Court, and appeal by defendants from orders entered 24 April 1996 and 5 June 1996 by Judge Judson D. DeRamus, Jr., in Stanly County Superior Court. Heard in the Court of Appeals 4 December 1996.

Ferguson & Scarbrough, P.A., by James E. Scarbrough and Edwin H. Ferguson, Jr.; and Steven F. Blalock, for plaintiff appellants-appellees.

Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker; and Michael W. Taylor for defendant appellant-appellees.

SMITH, Judge.

The central issue in this appeal is whether Stanly County (the County) has the statutory authority to purchase privately owned land, and then give that land to the State as an enticement for the building of a state prison. Secondary issues are whether the County provided adequate notice of the zoning changes necessary for the placement of the proposed prison on the site, and whether the trial court should have granted defendants' motion for N.C. Gen. Stat. § 1A-1, Rule 11 (1990) sanctions against plaintiffs.

We hold that the County has the authority to effect the land transaction at issue, and so, the trial court's dismissal of plaintiffs' claims was appropriate. Furthermore, we find no error in the trial court's determination that the County provided adequate notice of the zoning amendments and no error in the trial court's denial of defendants' Rule 11 motion for sanctions.

On 10 January 1996, plaintiffs filed suit seeking a declaratory judgment and injunctive relief against the County and members of the County Board of Commissioners. By their suit, plaintiffs questioned the legal propriety of the County's intention to purchase land which would, in turn, be given to the North Carolina Department of Correction for the purpose of building a prison on the site. Plaintiffs allege that the County's use of the land as an inducement to build a prison adversely affects the value of their land and reduces the County's tax base (thereby raising the overall financial burden on the County).

The authority of our courts to render declaratory judgments is set forth in N.C. Gen. Stat. § 1-253 (1996):

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration

> may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

While the statute does not expressly so provide, this Court has held on a number of occasions that courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute. *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404 (1949).

We have described an actual controversy as a "jurisdictional prerequisite" to a proceeding brought under the Declaratory Judgment Act, the purpose of which is to " 'preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status or other legal relations.' " *Adams*, 295 N.C. at 703, 249 S.E.2d at 414 (quoting *Lide*, 231 N.C. at 118, 56 S.E.2d at 409).

In *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 205, 22 S.E.2d 450, 453 (1942), our Supreme Court acknowledged that, although the actual controversy rule may be difficult to apply in some cases and the definition of a "controversy" must depend on the facts of each case, as "[a] mere difference of opinion between the parties" does not constitute a controversy within the meaning of the Declaratory Judgment Act. *Id.* Thus the Declaratory Judgment Act does not "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Id.* at 204, 22 S.E.2d at 453.

When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) will be granted. *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E.2d 264, *cert. denied*, 298 N.C. 297, 259 S.E.2d 300 (1979). Prior to the time plaintiffs filed suit, the County had purchased options to the land at the heart of this dispute. As of the date of this appeal, the County was in the process of executing those options to purchase for the purpose of transferring the land to the State. Having examined the pleadings in the case at hand, we conclude that even though this

matter presents a genuine controversy, plaintiffs have no basis for the relief they seek.

Plaintiffs primarily rely upon the assertion that the County's actions exceed the specific but limited authority granted by N.C. Gen. Stat. §§ 153A-158 (1991) and 160A-274(b) (1994). The well-settled rule in this State governing the permissible scope of municipal or county actions, commonly called Dillon's Rule, is set out in *White v. Union County*, 93 N.C. App. 148, 377 S.E.2d 93 (1989). The rule states:

> '[A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . .'

White, 93 N.C. App. at 151, 377 S.E.2d at 95 (quoting *Greene v. City of Winston-Salem*, 287 N.C. 66, 72, 213 S.E.2d 231, 235 (1975)).

[1] Thus, the question framed by plaintiffs is whether the County's use of land as an economic inducement to State investment (*i.e.*, the prison) is permissible under §§ 153A-158 and 160A-274(b) as limited by Dillon's Rule. N.C. Gen. Stat. § 153A-158, reads as follows:

> A county may acquire, by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property *for use by the county* or any department, board, commission, or agency of the county. In exercising the power of eminent domain a county shall use the procedures of Chapter 40A.

(Emphasis added.) N.C. Gen. Stat. § 160A-274(b) reads:

> Any governmental unit may, upon such terms and conditions as it deems wise, with or without consideration, exchange with, lease to, lease from, sell to, purchase from, or enter into agreements *regarding the joint use* by any other governmental unit of any interest in real or personal property that it may own.

(Emphasis added.)

Defendants argue that "[t]he terms of th[ese] statute[s] are broad in nature; no restriction on the *purpose* of the acquisition is set forth . . . . Thus, pursuant to G.S. § 153A-158 [and § 160A-274(b)], Stanly County has the authority to acquire the real property for the proposed correctional facility." (Emphasis added.)

We think defendants' expansive interpretation of §§ 153A-158 and 160A-274(b) is patently incorrect. First of all, both statutes place express limits on who may use the property purchased by the County. Under § 153A-158, acquired property is "*for use by the county* or any department, board, commission, or agency of the county." (Emphasis added.) Likewise, § 160-274(b) allows the County to engage in a "*joint use* [with] any other governmental unit . . . in real or personal property that [the County] may own." (Emphasis added.) Quite manifestly, and by its own affirmations, the County does not intend to use the property for its own governmental functions, nor does the County intend a joint use of the facility with the State. We think that Dillon's Rule, applied to the plain language of both statutes, straightforwardly and unambiguously denies the County authority to make this transfer.

Neither of these statutes provide *expressly* for the County's actions. Nor do we believe §§ 153A-158 or 160-274(b) necessarily or fairly *imply* such power. Further, we do not believe that this particular economic inducement is *essential or indispensable* to " 'the declared objects and purposes of the [County].' " *White*, 93 N.C. App. at 151, 377 S.E.2d at 95 (citation omitted); and *see Bowers v. High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994).

[2] Therefore, we hold that the County's purchase and transfer exceeded its authority under §§ 153A-158 and 160-274(b). We reach this position primarily because the language in these statutes, assumably reflective of our legislature's intent, limits us. Therefore, absent anything else, we would be disposed under Dillon's Rule to reverse the trial court. However, in the instant case, we are guided by more than §§ 153A-158 and 160-274(b). After plaintiffs filed suit in this case, the following act was passed by our General Assembly on 20 June 1996:

CHAPTER 600
SENATE BILL 1360

AN ACT TO CONFIRM THAT STANLY COUNTY MAY PURCHASE AND CONVEY PROPERTY TO THE STATE OF NORTH CAROLINA FOR USE AS A CORRECTIONAL FACILITY.

The General Assembly of North Carolina enacts:

Section 1. The County of Stanly has power under general law to acquire real and personal property and convey it to the State under G.S. 160A-274 or other applicable law for use as a correctional facility.

Sec. 2. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 20th day of June, 1996.

s/ Dennis A. Wicker
Dennis A. Wicker
President of the Senate

s/ Harold J. Brubaker
Harold J. Brubaker
Speaker of the House
of Representatives

Plaintiffs argue that Ratified Bill 1360 is nothing more than a resolution interpreting "Stanly County['s] . . . power under general law to acquire the land." We do not agree.

A plain reading of Ratified Bill 1360 (the Act) indicates that it is, in fact, a positive statement of law authorizing Stanly County's acquisition and conveyance of property to the State. Plaintiffs disagree and point to the caption of the Act as proof that the Act has no substantive legal force. The Act's caption declares that it is "An Act to Confirm that Stanly County May Purchase and Convey Property . . . ." (Emphasis in Plaintiffs' Brief).

Plaintiffs assert that the word "confirm" in the caption controls the meaning of the Act as a whole. Accordingly, plaintiffs maintain the Act is merely "a resolution stating the opinion of the General Assembly." It goes without saying that we are not bound by the apparent opinion of the legislature in the construction of statutes. *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996). However, it is a familiar canon of construction that, when the text of a statute is clear, the caption does not control. *State v. Cronin*, 299 N.C. 229, 235, 262 S.E.2d 277, 282 (1980).

We think the text of the Act is sufficiently clear as to what it means. The Act, with unnecessary surplusage removed, states that: "[t]he County of Stanly has [the] power . . . to acquire . . . property and convey it to the State . . . for use as a correctional facility." Clearly, under this construction, Stanly County's actions are now authorized by the General Assembly. *See 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) (legislative intent may be ascertained from amendments to a statute). Accordingly, Stanly County's purchase of the options, and the execution of those options

for the purpose of transfer, did not violate Dillon's Rule, as those actions have been validated by the legislature's actions. Effectively, the gravamen of this dispute has been mooted. Thus, the trial court must be affirmed on this issue.

We will pay brief heed to the remaining issues.

[3] First, plaintiffs argue Stanly County did not provide adequate notice of the County Commission's plan to amend its zoning ordinances to allow the purchased property to accommodate a state prison. We disagree. According to plaintiff appellants, the newspaper advertisement for the zoning text amendment hearing stated that the County intended to add " 'government owned buildings, facilities, and institutions' to the list of permitted uses in certain zoning districts." This advertisement, plaintiff appellants contend, was a "deliberate attempt by the county commissioners to conceal from the public the true purpose of [the zoning hearing] so that concerned citizens would not attend."

In *Pinehurst Area Realty v. Pinehurst*, 100 N.C. App. 77, 80, 394 S.E.2d 251, 253 (1990), *cert. denied*, 501 U.S. 1251, 115 L. Ed. 2d 1055 (1991), this Court faced a similar question concerning the adequacy of a zoning notification. There, we held that a zoning notification is proper under N.C. Gen. Stat. § 160A-364 (1991) so long as it fairly and sufficiently notifies the affected property owner of the character of the action proposed. *Id.* We are not empowered to look behind the motives of the duly elected members of the County Commission, so long as they act in compliance with the law. In this instance, the Commission provided facially accurate notice to plaintiffs of the zoning text amendments under consideration. The notice alerted affected property owners that zoning changes were being contemplated, which would potentially allow for placement of government institutions upon land. The advertisement also described the nature and character of the action proposed. *Sellers v. City of Asheville*, 33 N.C. App. 544, 549, 236 S.E.2d 283, 286 (1977).

The mere fact that the notice provided was so generic that it did not pique plaintiffs' interest does not, in and of itself, make the notice violative of § 160A-364. We are mindful that, in the eyes of a property owner, abutting a state prison is quite a different thing from abutting a veteran's service office. However, we are a judicial, not a political, body. Since the Commission has adhered to the letter of the law, plaintiffs' true remedy in this case is a political one, and that we cannot give.

[4] Finally, we address the trial court's ruling against defendants on their motion for Rule 11 sanctions against plaintiffs. Whether an attorney's conduct merits Rule 11 sanctions is determined by looking at the totality of the circumstances, *Mack v. Moore*, 107 N.C. App. 87, 94, 418 S.E.2d 685, 689 (1992), and is a matter reviewable *de novo*. *See Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). We have conducted a *de novo* review of the various bases defendants posit in support of their motion for sanctions. In our view, plaintiffs' conduct in bringing this case does not merit sanctions, and we decline to remand for the taking of any further evidence on the subject. *See McClerin v. R-M Industries, Inc.*, 118 N.C. App. 640, 644-45, 456 S.E.2d 352, 355-56 (1995).

As to the various sub-issues brought by the instant parties, but not discussed herein, we find them unworthy of merit and decline to discuss them here.

Accordingly, the trial court's order dismissing plaintiffs' claims is affirmed, and the order denying defendants' motion for Rule 11 sanctions is affirmed.

Affirmed.

Judge LEWIS concurs.

Judge WALKER concurs in separate concurring opinion.

Judge WALKER concurring.

Senate Bill 1360, as ratified by the 1996 General Assembly, states the following: "The County of Stanly has power under general law to acquire real and personal property and convey it to the State under G.S. 160A-274 or other applicable law for use as a correctional facility." N.C. Gen. Stat. § 160A-274(b) provides:

> Any governmental unit may, upon such terms and conditions as it deems wise, with or without consideration, exchange with, lease to, lease from, sell to, purchase from, or enter into agreements regarding the joint use by any other governmental unit of any interest in real or personal property that it may own.

I agree with the General Assembly that Stanly County already had the authority to acquire land and transfer it to the State for use as a correctional facility. I deem that portion of the opinion which states

that Stanly County would not be authorized to make such a conveyance absent Senate Bill 1360 to be dicta and not necessary to the holding of the case.

ANNE RUSSELL v. DONALD ADAMS

No. COA96-534

(Filed 18 March 1997)

1. **Physicians, Surgeons, and other Health Care Professionals § 125 (NCI4th)— malpractice by psychologist—physician-patient relationship required**

Plaintiff did not have the requisite physician-patient relationship with defendant psychologist to state a claim for medical malpractice where plaintiff's daughter, not plaintiff, was defendant's patient and plaintiff alleged that defendant rendered false unsolicited psychological opinions about plaintiff without ever having treated her.

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

What constitutes physician-patient relationship for malpractice purposes. 17 ALR4th 132.

2. **Limitations, Repose, and Laches § 19 (NCI4th)— emotional distress—statute of limitations—erroneous dismissal on pleadings**

The trial court erred in dismissing on the pleadings plaintiff's claims for negligent and intentional infliction of emotional distress based on a plea in bar of the statute of limitations where plaintiff's complaint was silent as to when her alleged distress manifested itself, and the facts necessary to support defendant's plea in bar of the statute of limitations were not contained in the complaint.

Am Jur 2d, Fright, Shock, and Mental Disturbances §§ 13 et seq.

3. Negligence § 9 (NCI4th)— negligent misrepresentation—dismissal—element of malpractice claim

It was not error for the trial court to dismiss plaintiff's claim for negligent misrepresentation where plaintiff alleged negligent misrepresentation as an element of her malpractice claim against defendant psychologist but failed to allege negligent misrepresentation as a separate claim.

Am Jur 2d, Negligence §§ 126, 127.

Judge WYNN concurring in the result.

Appeal by plaintiff from order entered 23 February 1996 in New Hanover County Superior Court by Judge James E. Ragan, III. Heard in the Court of Appeals 28 January 1997.

David P. Parker and Beth R. Setzer for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by John T. Williamson, Karon B. Thornton and James A. Roberts III, for defendant-appellee.

GREENE, Judge.

Anne Russell (plaintiff) appeals the dismissal pursuant to N.C. Gen Stat. § 1A, Rule 12(b)(6) (1996) of her complaint which alleged that Dr. Donald Adams (Dr. Adams), a licensed psychologist in North Carolina, had committed medical malpractice, negligently and intentionally inflicted emotional distress, and made slanderous statements which caused the plaintiff to be ostracized from her daughter, Betsy Johnson (Ms. Johnson).

The relevant allegations of the complaint, filed on 12 September 1995, show that in 1989 Ms. Johnson sought the services of Dr. Adams. In April of 1989 Ms. Johnson told plaintiff that Dr. Adams had told her, during his treatment of her, that plaintiff was mentally ill with a borderline personality and in need of extensive psychotherapy. Dr. Adams recommended that Ms. Johnson sever all ties with plaintiff. The relationship between plaintiff and Ms. Johnson deteriorated during the professional relationship Ms. Johnson had with Dr. Adams. In June of 1989 Ms. Johnson told plaintiff that she was not to attempt to visit with her (Ms. Johnson's) child. Ms. Johnson threatened to kill plaintiff and rejected all of plaintiff's efforts to continue a loving relationship, "justifying these actions with the [purported] 'diagnosis' of

Dr. Adams that [plaintiff] is a 'borderline personality' who has abused" her. On 8 September 1992 Dr. Adams informed James Alfred Miller (Miller), plaintiff's father, that she suffers from a mental illness known as borderline personality. On 2 November 1994 Miller related this information to plaintiff. The plaintiff "does not have a borderline personality" and is not "mentally unstable" and has never been a patient of Dr. Adams.

The issues presented are whether: (I) there is a requirement of a physician-patient relationship in order to state a claim for medical malpractice against a psychologist in North Carolina; and (II) the claims for infliction of emotional distress are barred by the statute of limitations.

"A motion to dismiss for failure to state a claim upon which relief may be granted under [N.C.G.S. § 1A-1, Rule 12(b)(6) (1990)] is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory." *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *cert. denied*, 318 N.C. 694, 351 S.E.2d 746 (1987).

I

[1] "It is well settled that the relationship of physician to patient must be established as a prerequisite to an actionable claim for medical malpractice." *Easter v. Lexington Memorial Hosp.*, 303 N.C. 303, 305-06, 278 S.E.2d 253, 255 (1981); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E.2d 744, 746 (1931); *see Mozingo v. Pitt County Memorial Hosp.*, 331 N.C. 182, 189, 415 S.E.2d 341, 345 (1992) (physician supervising resident actually treating patient "may be held accountable" to patient). In this case there are no allegations, when considered in the light most favorable to the plaintiff, that the plaintiff had a relationship of patient-physician with Dr. Adams.

The plaintiff nonetheless argues that privity is "not a requirement for a claim of malpractice against a psychologist" because they have the "ability to render" and often do render "unsolicited psychological" opinions about persons they are not treating in an effort to assist the person they are treating. In rendering these opinions, the plaintiff contends, the Code of Ethics of Psychologists and the North Carolina Psychology Act (Chapter 90, Article 18A) require the psychologist to avoid misrepresentations that may mislead or exploit persons other than the patient. *See* N.C.G.S. § 90-270.15(a)(4) (1993) (allowing revo-

cation of license of psychologist for any "misrepresentation upon the public"); *Principle E: Ethical Principles of Psychologists and Code of Conduct*, Amer. Psychologist, Dec. 1992 (psychologists must weigh the welfare of "affected persons").

We reject plaintiff's argument. Psychologists, like the other "health care provider[s]" listed in section 90-21.11, are liable in medical malpractice only to their patients. We are aware that the treatment of the emotional problems of the patient may, in some instances, have adverse consequences on the patient's relationship with others. We understand that the opinions of the psychologist, if communicated to third parties, may have adverse consequences on those third parties. It does not follow, however, that the affected third party should have a cause of action for malpractice against the health care provider. Health care providers must "be free to recommend a course of treatment and act on the patient's response to the recommendation free from the possibility that someone other than the patient might complain in the future." *Lindgren v. Moore*, 907 F. Supp. 1183, 1189 (N.D.Ill. 1995). In other words, "doctors should owe their duty to their patient and not to anyone else" so as not to compromise this primary duty. *Id.* Furthermore, the plaintiff's reliance on N.C. Gen. Stat. § 90-270.15 and the Ethical Code is misplaced. Section 90-270.15 sets out the licensing requirements for a psychologist and those standards are not relevant to the standard of care required of a psychologist in a medical malpractice action. *See In re Dailey v. North Carolina State Bd. of Dental Examiners*, 309 N.C. 710, 722, 309 S.E.2d 219, 226 (1983). The code of ethics for psychologists, before it can serve as a source for legal rules, must be accepted as a legal standard. *See McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 182 (1985). There is nothing in this record, nor does the plaintiff cite any authority, supporting the concept that the code of ethics has been accepted as the legal standard for evaluating the duty of care required of psychologists. Accordingly, the trial court correctly dismissed plaintiff's medical malpractice claim.

II

[2] Dr. Adams argues that the plaintiff's emotional distress claims are barred by the statute of limitation. We disagree.

Causes of action for emotional distress, both intentional and negligent, are governed by the three-year statute of limitation provisions of N.C. Gen. Stat. § 1-52(5) (1996). *King v. Cape Fear Memorial Hosp.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989). Because

severe emotional distress is an essential element of both negligent and intentional emotional distress claims, *Waddle v. Sparks*, 331 N.C. 73, 82-83, 414 S.E.2d 22, 27 (1992), the three-year period of time for these claims does not begin to run (accrue) until the "conduct of the defendant causes extreme emotional distress." *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 12, 437 S.E.2d 519, 525 (1993), *cert. denied*, 336 N.C. 71, 445 S.E.2d 29 (1994). In other words, these claims do not accrue until the plaintiff "becomes aware or should reasonably have become aware of the existence of the injury." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985); N.C.G.S. § 1-52(16).

A dismissal of an action on the pleadings based on a plea in bar of the statute of limitations is proper only when "all the facts necessary to establish the plea in bar . . . are either alleged or admitted in the plaintiff's pleadings, construing plaintiff's pleadings liberally in [the plaintiff's] favor." *Reidsville v. Burton*, 269 N.C. 206, 210, 152 S.E.2d 147, 150 (1967).

In this case the plaintiff alleges that Dr. Adams negligently and intentionally caused her severe emotional distress when he stated to Ms. Johnson (in 1989) and to Miller (on 8 September 1992) that she was mentally ill with a borderline personality. The complaint is silent as to when plaintiff's alleged severe emotional distress manifested itself and we are thus unable to determine when the action accrued. The severe emotional distress may not have occurred until she was informed by Miller on 2 November 1994 of his 8 September 1992 conversation with Dr. Adams or at some later time, in which event the complaint was timely filed. The facts necessary to support Dr. Adams' statute of limitation plea are therefore not contained in the complaint and dismissal of the action on this basis cannot be sustained. We do not address whether the complaint otherwise alleges the necessary elements of these torts, as Dr. Adams confines his brief to this Court to the statute of limitation issue.

[3] The plaintiff argues in her brief that she has alleged a claim for negligent misrepresentation and that the trial court erred in dismissing that claim. We disagree. Our reading of the complaint does not reveal a separate negligent misrepresentation claim. She only alleges misrepresentation as an element of her malpractice claim. She does allege a claim for libel and slander but has abandoned those claims because she has not argued those issues in her brief to this Court. N.C. R. App. P. 28(a).

In summary, the dismissal of plaintiff's emotional distress claims is reversed and remanded. The dismissal of plaintiff's other claims is affirmed.

Affirmed in part, reversed in part and remanded.

Judge MARTIN, John C., concurs.

Judge WYNN concurs in the result with separate opinion.

Judge WYNN concurring in the result.

I disagree with the majority's position that a silent complaint may afford plaintiff the benefit of a discovery rule such as N.C.G.S. § 1-52(16). In my view, a complaint which indicates two specific acts occurring outside the statute of limitations, such as the complaint at hand which alleges that the acts causing severe emotional distress took place in June 1989 and on 8 September 1992, must further set forth in the pleadings facts sufficient to show when the "bodily harm to the claimant . . . [became] or ought reasonably to have become apparent to the claimant." N.C.G.S. § 1-52(16). Since the discovery rule of N.C.G.S. § 1-52(16) provides that the cause of action will not accrue until this time, the complaint should indicate the time the injury occurred or reasonably manifested itself to plaintiff.

Nevertheless, I concur with the result reached by the majority because the complaint in the subject case, taken as a whole, makes sufficient allegations to survive a Rule 12(b)(6) challenge that the statute of limitations has run. The complaint outlines the specific acts causing injury and then further alleges that plaintiff was unaware of these acts prior to 2 November 1994. It is inconceivable that plaintiff's emotional distress would arise *before* plaintiff became aware of Dr. Adams' alleged injurious acts. Thus, the face of the complaint shows that plaintiff's injury must have occurred after 2 November 1994 and within the applicable three year statute of limitations. Accordingly, I believe the trial court's dismissal of the action was inappropriate not because the necessary facts are missing from defendant's statute of limitations plea, but rather because the plaintiff's complaint, on its face, is sufficient to show that the statute of limitations is not a bar.

JERRY M. BRAFFORD, SR., EMPLOYEE-PLAINTIFF v. BRAFFORD'S CONSTRUCTION COMPANY, EMPLOYER-DEFENDANT, AND AETNA CASUALTY AND SURETY COMPANY, CARRIER-DEFENDANT

No. COA96-469

(Filed 18 March 1997)

1. Workers' Compensation § 179 (NCI4th)— work-related accident—exacerbation of pre-existing injury

The Industrial Commission properly determined that plaintiff's work-related fall from a roof contributed in some reasonable degree to his current disability where a neuropsychologist opined that plaintiff's accident aggravated his existing multifocal brain damage; plaintiff testified that he recovered from neurological difficulties brought on by a previous injury; plaintiff was able to return to work as a roofer after the prior accident; and plaintiff testified that he suffered from occasional bouts of blurred vision and dizziness as a result of his recent accident. Pursuant to *Morrision v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458, a work-related accident is compensable when a pre-existing, non-disabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment.

Am Jur 2d, Workers' Compensation §§ 317-320.

2. Workers' Compensation § 390 (NCI4th)— medical opinion—causal link—reliance on plaintiff's statement of his activity level

The Industrial Commission properly permitted a neuropsychologist to offer his opinion as to whether plaintiff's recent work-related accident exacerbated his previous medical condition based on information provided by plaintiff as to his prior level of functioning.

Am Jur 2d, Workers' Compensation §§ 586-689.

Admissibility of opinion evidence as to cause of death, disease, or injury. 66 ALR2d 1082.

Sufficiency of proof that mental or neurological condition complained of resulted from accident or incident in suit rather than from pre-existing condition. 2 ALR3d 487.

3. Workers' Compensation § 416 (NCI4th)— visual impairment of hearing commissioner—surveillance tapes—no review by Full Commission

The hearing commissioner's total visual impairment did not prevent him from reviewing surveillance videotapes of plaintiff and understanding the significance of their application to the issues where the record indicated that defendants were able to offer the contents of surveillance tapes into evidence through the testimony of a private investigator and a neuropsychologist. Consequently, the Full Commission did not err in its decision to not review the videotaped evidence.

Am Jur 2d, Workers' Compensation § 687.

4. Workers' Compensation § 252 (NCI4th)— roofer—evidence of activities—disability finding supported by evidence

Despite evidence which depicted several isolated events in which plaintiff, a roofer, ran errands, went to breakfast with his wife, and washed his car, the Industrial Commission's determination that plaintiff was still totally disabled was supported by plaintiff's testimony that he still suffers occasional bouts of blurred vision and dizziness, and by the written recommendation of defendants' medical expert that, while plaintiff was able to return to full work-related duties, he should not be allowed to work at unprotected heights, on a ladder, or on roofs.

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

Appeal by defendants from Opinion and Award entered 7 December 1995 by the Full Commission. Heard in the Court of Appeals 13 January 1997.

Cecil R. Jenkins, Jr. for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III and John T. Jeffries, for defendants-appellants.

WYNN, Judge.

In 1991, the Industrial Commission approved as compensable plaintiff Jerry M. Brafford's claim for a back injury of 18 November 1990, arising out of and in the course of his employment with defendant Brafford's Construction Company. Several months thereafter,

defendant-carrier Aetna Casualty and Surety Co., requested that the compensation payments be stopped. Plaintiff responded by requesting a hearing; subsequently, he amended that request to indicate that he also suffered a brain injury in the 18 November 1990 accident.

At the hearing before Deputy Commissioner Richard B. Ford, the parties stipulated to approximately thirty pages of medical records, and defendants introduced four surveillance videotapes. It is relevant only for purposes of an issue raised in this appeal to indicate that Deputy Commissioner Ford has total sight impairment. Among the witnesses who testified were plaintiff; Dr. Erwin Batchelor, a neuropsychologist; and James C. Boatner, a private investigator.

In April 1995, Deputy Commissioner Ford entered an Opinion and Award finding in part that:

> 1. On November 18, 1990, plaintiff sustained an injury by accident arising out of and in the course of the employment with defendant-employer when he fell approximately 14 or 20 feet to the ground while repairing a roof injuring his back, a crushed vertebrae at L-1, and head causing unconsciousness.
>
> 2. As the result of said fall, the plaintiff's head and brain were injured by closed head injury, or brain trauma principally to the left hemisphere, superimposed on previous brain injuries occurring in 1970 and 1978 causing injury at the time and exacerbating the previous injuries of 1970 and 1978.
>
> 3. As a result of the said brain injury of November 18, 1990, the plaintiff has had diminished right arm swing and use of his right hand, problem with use of language, difficulty shifting between information and new learning, non-verbal problem solving, depression and anxiety.
>
> 4. Due to his brain injury which the plaintiff sustained on November 18, 1990, he is unable to return to his former level of activity existing prior to said date of November 18, 1990 when he was able to perform his work duties although he may experience some future improvement in his activity level.
>
> 5. Although the plaintiff has been observed on March 2, 1992 to perform the functions of washing a truck at a car wash and on other occasions to drive and operate a motor vehicle, his brain injuries remain such that, at this time, he is unable to be gainfully employed and rejoin the work force as he was functioning prior to November 18, 1990.

Deputy Commissioner Ford concluded that defendants should pay total disability compensation benefits to plaintiff until such time as he returned to work or became gainfully employed. Defendants' follow-up appeal resulted in conclusions by the Full Commission ("Commission") that defendants had not shown good grounds to (1) reconsider the evidence, (2) receive further evidence, (3) rehear the parties, or (4) amend the Opinion and Award. Defendants now appeal to this Court for relief.

The issues on appeal are whether the Commission erred in: (I) finding that the accident on 18 November 1990 exacerbated any pre-existing condition from which plaintiff suffered; (II) relying upon the testimony of Dr. Batchelor; (III) failing to reconsider defendants' surveillance videotapes; and (IV) finding that plaintiff was unable to return to his former level of activity. We find no error in the Commission's order and therefore affirm.

I.

[1] Defendants first object to the Commission's finding that the accident on 18 November 1990 exacerbated plaintiff's pre-existing condition. They contend that there was virtually no change in the symptoms reported by plaintiff subsequent to the 1990 accident from those which he suffered as a result of his previous closed head injury. They also contend that plaintiff suffered from dementia, as evidenced by cerebral atrophy, that could have caused many of plaintiff's medical problems. Nevertheless, we find that there is competent evidence in the record to support the Commission's finding.

A work-related injury need not be the sole causative force to render an injury compensable. *Kendrick v. City of Greensboro*, 80 N.C. App. 183, 186, 341 S.E.2d 122, 123, *disc. review denied*, 317 N.C. 335, 346 S.E.2d 500 (1986). "When a pre-existing, *non-disabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment . . . so that disability results, then the employer must compensate the employee for the entire resulting disability . . . ." *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981). This "aggravation rule" does not bar recovery if there is evidence of a causal connection between a claimant's current disability and a prior condition. *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 470 S.E.2d 357 (1996). It also does not require that claimant suffer from new or different symptoms from those of which he previously complained; rather, the

claimant must only demonstrate that his work-related injury contributed in some reasonable degree to the disability. *Id.* at 466, 470 S.E.2d at 359.

In the instant case, Dr. Batchelor opined that plaintiff's work-related accident aggravated any multifocal brain damage existing prior to that time.[1] In addition, plaintiff testified that he recovered from the neurological difficulties brought on by his 1989 accident, and the record shows that he was able to return to work as a roofer. Finally, Plaintiff stated that he suffers from occasional bouts of blurred vision and dizziness as a result of this most recent accident. We find this to be competent evidence in support of the Commission's determination that plaintiff's 18 November 1990 accident contributed in some reasonable degree to his current disability.

II.

[2] Defendants next contend that Dr. Batchelor's medical opinion amounted to nothing more than "conjecture, surmise and speculation" as to the causal relationship between plaintiff's accident and his injury because the doctor relied upon a comparison between plaintiff's self-report of his level of activity before and after the 18 November 1990 accident. We find that defendants' objection is without merit.

Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. *Booker v. Medical Center*, 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979). Medical opinions given may be based either on " 'personal knowledge or observation or information supplied by others, including the patient.' " *Id.* at 479, 256 S.E.2d at 202 (citation omitted).

In the instant case, relying upon the unequivocal language of *Booker*, it was permissible for the doctor to base his opinion on information provided by plaintiff. Accordingly, we must conclude that the lack of empirical data on plaintiff's prior level of functioning did not render Dr. Batchelor incapable of offering his opinion as to whether plaintiff's 1990 accident exacerbated his previous medical condition.

1. We note this Court recently held that a neuropsychologist's opinion as to whether an injured motorist had suffered a closed head injury was not admissible under Rule 702. *Martin v. Benson*, No. COA95-1417 (N.C. Court of Appeals Feb. 18, 1997). However, this issue is not present in the instant case because defendants did not assign error to Commissioner Ford's decision to allow Doctor Batchelor to give his medical opinion as to whether plaintiff suffered a closed head injury.

III.

[3] Defendants next contend that Deputy Commissioner Ford's total visual impairment prevented him from reviewing the surveillance videotapes and from understanding the significance of their application to the issues to be determined, and therefore, the Full Commission should have reconsidered the videotape evidence. We disagree.

We first note that defendants never objected nor moved for Deputy Commissioner Ford to recuse himself. More importantly, the record indicates that defendants were able to offer the contents of the surveillance tapes into evidence through the testimony of Mr. Boatner, the private investigator, and Dr. Batchelor. The record shows Mr. Boatner testified that he observed and videotaped plaintiff: (1) having breakfast at a local restaurant at which he appeared to be a regular customer; (2) operating a motor vehicle alone and, in every instance, taking the shortest, most direct route to his intended destination; and (3) washing his truck. The witness testified that plaintiff never appeared disoriented, confused, or unable to function normally. Defense counsel's cross-examination of Dr. Batchelor illustrates that counsel was able to describe the activities depicted on the tape in full detail:

> Q. [Plaintiff] is in one of these car washes where you have a wand overhead, and he is using the spray wand to wash his truck; is that correct?
>
> A. That's correct.
>
> Q. And he is holding the wand with his right hand over his head and moving it back and forth, is that correct?
>
> A. That's correct.
>
> Q. No apparent abnormalities about the use of his right arm in that situation, is that correct?
>
> A. That's correct. . . .
>
> Q. He has also got what appears to be a pistol grip type mechanism that would require one to pull a trigger of some kind with his right hand to actually make the water flow, is that correct?
>
> A. That's correct. . . .

Q. And this is a pretty big sized pickup truck, is it not, in terms of being tall . . . now he's stepping up on a rail of the truck to get to the top of it so that he can wash the top with the wand again using his right hand; is that right?

A. Yes sir.

Q. He doesn't appear to be having any problem with balance in association with doing that, does he? . . .

A. He looked like he did okay.

Thus the record shows that defendants were successful in having all their evidence considered despite Deputy Commissioner Ford's visual impairment. Therefore, we affirm the Full Commission's decision not to review the videotape evidence.

IV.

[4] Finally, defendants object to the Commission's finding of fact that plaintiff's brain injuries remained such that he was still unable to rejoin the work force. They contend that the level of activity depicted in the surveillance tapes proves that plaintiff no longer suffers from any disability. We find however, that there is evidence in the record to support the Commission's finding that plaintiff was still disabled. If there is competent evidence to support a finding of fact of the Industrial Commission, such finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. *Woodell v. Starr Davis Co.*, 77 N.C. App. 352, 356, 335 S.E.2d 48, 50 (1985) (citation omitted).

Defendants' surveillance videotapes depicted several isolated events in which plaintiff ran errands, went to breakfast with his wife, and washed his car. However, plaintiff testified that he still suffered occasional bouts of blurred vision and dizziness. This testimony was competent and adequately supports the finding made. "The credibility and weight of plaintiff's testimony was for the Commission to decide, not us." *Perkins v. Broughton Hospital*, 71 N.C. App. 275, 279, 321 S.E.2d 495, 497 (1984) (citation omitted). We note that in its Opinion and Award, the Commission did not state that plaintiff was completely disabled; rather, it found that his brain injuries remained such that he was unable to return to his regular job *as a roofer*:

> As a result of the compensable injury by accident, plaintiff is unable to return to his regular job and defendants have not offered him suitable work. Plaintiff is in need of vocational assist-

ance in order to conduct a meaningful search for employment which is suitable to his capacity. Plaintiff's capacity shall be determined by an evaluation as Ordered herein. (Emphasis added).

Moreover, the Commission's determination that plaintiff is still disabled is supported by the written recommendation of Dr. John Camp, defendants' medical expert, who recommended that while plaintiff was able to return to full work-related duties, he not be allowed to work at unprotected heights, on a ladder, or on the roofs themselves. Since there is competent evidence to support this finding, we affirm the Commission's determination.

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

THOMAS H. WADE; SANDRA WADE; WILLIAM S. HOLLAND; BARBARA B. HOLLAND; ELIZABETH A. WHITE; CHARLES F. WHITE; REUBEN HILL; WANDA HILL; HAL TILL; BRENDA TILL; GLADYS PIERCE; JULIAN PIERCE; JOEY PIERCE; B.P. MOSELEY; ANN MOSELEY; ADDIE ALLEGOOD; DOROTHY DOLLBERG; MARY ALICE DAVENPORT; LOU ELLEN SANDERS; RONALD J. KWIATKOWSKI; MARY V. KWIATKOWSKI; DAVID WATTS; EDNA HOOKS; IMELDA A. STANG; BROWNIE EDWARDS; JEFFREY FARRELL; SHERI SMITH; JANIECE JOYNER; JAMES R. ROBINSON; JACKIE ROBINSON; W.E. PHILLIPS; LENA PHILLIPS; CLIFFORD A. STANG; ROBERT SCOTT; CHARLIE B. DAVENPORT; MARJORIE HARRINGTON; STEPHEN L. JOYNER; JACK CRAFT; STEVE H. BOSWELL; JACKIE H. BOSWELL; JOE SMITH; WYNN NOBLES; JUANITA NOBLES; WANDA L. FAISON; SUE TAYLOR; O.W. BABCOCK, JR.; RUTH BABCOCK; LOUIS W. THIEL; HAZEL THIEL; WILLIAM STATON, III; SPENCER E. GAY; MEREDITH ELLIS; JANICE ELLIS; JUDY EDWARDS, PETITIONERS v. TOWN OF AYDEN, A BODY POLITIC; AND MARVIN BALDREE, MAYOR; J.J. BROWN, MAYOR PRO-TEM; STEVE TRIPP, DAVID WEBB, DON WILSON AND CARL SPEIGHT, COMMISSIONERS; AND ROBERT D. PARROTT, TRUSTEE FOR HART HEIRS, RESPONDENTS

No. COA96-660

(Filed 18 March 1997)

Zoning § 67 (NCI4th)— board of commissioners—conditional use permit—sketches did not meet ordinance requirement

A town's board of commissioners erred in granting a final conditional use permit to a developer where the town's zoning ordinance required that "complete final plans" be submitted for

final approval of a conditional use permit and the developer submitted only sketches for a proposed development.

Am Jur 2d, Zoning and Planning §§ 986-1007.

Judge WALKER concurring.

Appeal by petitioners from order filed 29 February 1996 in Pitt County Superior Court by Judge James E. Ragan, III. Heard in the Court of Appeals 19 February 1997.

Everett, Warren, Harper & Swindell, by Edward J. Harper, II and Jonathan E. Jones, for petitioner-appellants.

McLawhorn & Associates, by Charles L. McLawhorn, Jr., for respondent-appellee Parrott.

Lewis & Associates, by Christopher P. Edwards, for respondent-appellees, no brief filed.

GREENE, Judge.

Petitioners, a group of property owners in the Town of Ayden, appeal the superior court order affirming the Town of Ayden Board of Commissioners' (Board) (collectively respondents) decision to issue a conditional use permit to Robert Parrott (Parrott).

In January 1995, Parrott filed an application for "Final Approval" of a conditional use permit to construct a "multifamily development consisting of approximately 136 multifamily [sic] units" in the Town of Ayden (Town). This record reveals that the application included a statement (1) of how the development would maintain the public health, safety and general welfare; (2) that the development complied with all required regulations and standards; (3) that the development would maintain or enhance the value of "contiguous" property and was a public necessity; and (4) that the development conformed with the Town's general plan for land use. A study of the affect the development would have on traffic was also submitted with the application. Although there is some indication in the record that the application also included a "sketch plan and maps of the proposed project," this record does not include those items.

The Zoning Ordinance of the Town of Ayden (Ordinance) provides that an applicant for a conditional use permit may either request preliminary approval or may simply submit an application for final approval of a conditional use permit without first obtaining

preliminary approval. Ayden, N.C., Zoning Ordinance 93-94-22, § 155-31(C) (May 9, 1994) (hereinafter Ordinance). Parrott did not apply for preliminary approval before submitting his application for final approval. To apply for preliminary approval, an applicant must submit to the Board "preliminary plans." "The purpose of the preliminary approval phase is to allow the developer to submit plans which do not require the level of detail and expense as final plans." Ordinance § 155-31(C)(1). Preliminary approval is binding upon the Board "as long as the subsequent final plans comply with the approved proposal and the provisions of [the] Ordinance." Ordinance § 155-31(C)(1). Final approval of a conditional use permit must be "based upon complete final plans as developed by the applicant." Ordinance § 155-31(C)(2). Applications for both preliminary approval and final approval

> shall include all of the requirements pertaining to it in this section and without such information cannot be processed for consideration by the Planning Board and Board of Commissioners. Applications shall include site plans and shall be prepared to provide a full and accurate description of the proposed use, including its location, appearance and operational characteristics.

Ordinance § 155-31(B).

The Board held hearings on 8 May 1995 and 12 June 1995 to consider Parrott's application. Mr. Thomas Harwell (Harwell), testifying as an expert in engineering, testified the plans were not complete or final in many aspects, including the lack of any plans for "water, sewer, street development, or drainage or erosion control or any other drainage control." Richard Miller, a licensed general contractor who was retained by Parrott for this development, testified that the application was not "final and complete," but from his experience, to get a conditional use permit only a "sketch plan" is prepared to delineate the character and scope of the project and only after the permit is issued will the "professional staff or consultants . . . take care of all the technical engineering and meet all the state [and] local departmental requirements," as well as those conditions that the Board may require upon granting the permit.

After both parties presented their evidence, petitioners argued that the application should be dismissed because there was uncontradicted evidence that "complete final plans" had not been submitted as the Ordinance requires. The Board granted the application.

The issue is whether respondent submitted "complete final plans" upon which the Board could base its decision to issue a final conditional use permit.

Our review of a decision on an application for a conditional use permit made by a town board requires that we insure that the "procedures specified by law in both statute and ordinance are followed." *Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

Petitioners argue that the Board failed to comply with the Ordinance requirement that a conditional use permit be granted or denied based upon "complete final plans." Petitioners assert that the uncontradicted evidence is that the plans were not complete or final and therefore the Board "lacked authority to consider, much less approve, [the] conditional use permit." We agree.

Where the language of an ordinance is clear and unambiguous, there is no room for judicial construction and the courts are required to give the language its plain and definite meaning. *Utilities Comm'n v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). It is presumed that the words used in the ordinance convey "their natural and ordinary meaning." *Miller Brewing Co. v. Morgan Mechanical Contractors, Inc.*, 90 N.C. App. 310, 315, 368 S.E.2d 438, 441, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 110 (1988). To determine the common and ordinary meaning courts may resort to dictionaries for assistance. *Id.* The term "complete" means "[h]aving all necessary or normal parts, components, or steps; entire." *The American Heritage College Dictionary* 285 (3d ed. 1993). To be "final" is to be "last" or "[occur] at the end." *Id.* at 510. When something is final it is "[n]ot to be changed or reconsidered" and is "unalterable." *Id.*

In this case the Ordinance is clear and unambiguous in requiring "complete final plans" as a prerequisite for final approval of a conditional use permit. This requirement allows the Board as well as the public (who are entitled pursuant to section 155-31(B) of the Ordinance to notice and an opportunity to be heard on the issuance of the application) to intelligently respond to the application and determine whether the development is consistent with the other requirements of the Ordinance. The record reveals that Parrott submitted only sketches of the proposed development and all the testimony is that the plans were not complete or final. Thus the Board was without authority to consider final approval of the conditional use permit request. *See Signorelli v. Town of Highlands*, 93 N.C.

App. 704, 707, 379 S.E.2d 55, 58 (1989) (applicant has burden of complying with "all ordinance requirements and conditions").

We are not unaware of the expense that this requirement places upon the applicant. To avoid some of the uncertainty in this process, however, the Ordinance provides the applicant with the option of seeking preliminary approval of the conditional use permit at which time the plans are not required to have the "level of detail" required of the final plans. If the Board does not grant preliminary approval the applicant will be spared the expense of preparing detailed and final plans. If the Board does grant preliminary approval, that approval is "binding upon the Board . . . as long as the subsequent final plans comply with the [preliminarily] approved proposal."

Reversed.

Judge McGEE concurs.

Judge WALKER concurs with separate opinion.

Judge WALKER concurring.

I am unable to conclude that the applicant Parrott has complied with Section 155-31(C)(2) of the Ordinance; i.e., no site plan is included in the record. However, I do not construe the Ordinance to require the applicant to submit detailed architectural and engineering drawings. Instead, the plans and required conditions must be sufficiently complete to allow for thorough review and enable the Town to insure compliance with the conditional use permit once issued.

STATE OF NORTH CAROLINA v. HAROLD VERNARD QUICK

No. COA96-611

(Filed 18 March 1997)

1. Criminal Law § 1063 (NCI4th Rev.)— sentencing hearing—not calendered—not prejudicial

Defendant was not prejudiced by any error at his sentencing proceeding when the judge sentenced defendant on an arrested judgment for a robbery conviction without calendering or otherwise notifying defendant of the hearing where the hearing took

place immediately after defendant was sentenced to life in prison on a first-degree murder charge; the evidence supporting the only aggravating factor concerning a prior conviction was the same as that heard with regard to sentencing for the murder conviction; defendant was not deprived of an opportunity to refute or explain evidence of the prior conviction; and defendant did not argue that the aggravating factor was improper, did not object at the sentencing hearing, and did not move for a continuance to seek evidence in rebuttal.

Am Jur 2d, Criminal Law §§ 525 et seq.

2. Indigent Persons § 14 (NCI4th)— sentencing hearing—armed robbery—no appointment of counsel—representation on murder charge—absence of prejudice

An indigent defendant was not prejudiced by the trial court's failure to appoint counsel to represent him at his sentencing hearing for armed robbery where counsel was appointed to represent defendant at the sentencing hearing for first-degree murder; defendant was convicted of the murder under theories of premeditation and deliberation and felony murder; the robbery charge was the underlying felony for the felony murder charge; the evidence supporting the aggravating factor for the robbery was the same evidence heard with regard to the sentence for the murder charge; and both the murder and robbery offenses were so inextricably intertwined that representation for one was tantamount to representation for the other.

Am Jur 2d, Criminal Law § 735.

3. Criminal Law § 990 (NCI4th Rev.)— robbery conviction—arrested judgment—subsequent imposition of sentence

The trial court could properly sentence defendant for armed robbery, even though a different judge had previously arrested judgment on that charge, when defendant's death sentence on a related first-degree murder charge was set aside and a sentence of life imprisonment was imposed. Arresting a judgment does not vacate the verdict, which remains viable and intact.

Am Jur 2d, Criminal Law §§ 580 et seq.

Appeal by defendant from judgment and sentence entered 27 September 1995 by Judge William H. Helms in Richmond County Superior Court. Heard in the Court of Appeals 20 February 1997.

R. Thomas Nichols, Jr. for defendant-appellant.

Michael F. Easley, Attorney General, by Melanie L. Vtipil, Associate Attorney General, for the State.

WYNN, Judge.

In August 1987, a jury found defendant guilty of first degree murder based on both premeditation and deliberation and felony murder. The jury also returned a guilty verdict on the charge of robbery with a dangerous weapon and recommended that defendant be sentenced to death. Superior Court Judge Edward K. Washington entered a death sentence on the murder charge and arrested judgment on the robbery conviction.

On appeal, the Supreme Court of North Carolina found error in the sentencing phase of defendant's trial and remanded the case for a new sentencing hearing. After the second sentencing hearing, the jury again recommended, and the judge entered, a death sentence on the murder charge.

The defendant appealed a second time and again our Supreme Court found error and remanded for a new sentencing hearing. This time however, the jury could not agree on the sentence of death. As a result, Superior Court Judge William H. Helms, presiding over defendant's third sentencing hearing, sentenced him to life in prison for first degree murder. Thereafter, upon motion by the State, Judge Helms entered judgment on the robbery conviction for which judgment had been previously arrested and sentenced defendant to forty years to run consecutively with the life sentence. Defendant now appeals the entry of judgment and the imposition of a sentence on the robbery charge.

Defendant raises three issues on appeal: Whether the trial court erred by (I) sentencing him for armed robbery when the case was not calendared, (II) sentencing him without appointing counsel for the armed robbery conviction, and (III) sentencing him when a different judge had previously arrested judgment. We find no prejudicial error.

As a preliminary matter we note that "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Lane*,

39 N.C. App. 33, 38, 249 S.E.2d 449, 452-53 (1978) (quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)).

I.

[1] Defendant first contends that the trial court erred when it entered judgment against him on the robbery conviction without notice that it would be considered that day and where it did not appear on the court calendar for that day. We disagree.

The only case defendant cites in support of his position, is *State v. Phillips*, 88 N.C. App. 526, 532, 364 S.E.2d 196, 199-200 (1988), where this Court held that "in order to preserve a defendant's constitutional right to confrontation and cross-examination, a defendant must be given reasonable notice and knowledge of the statements that are to be used against him during the sentencing phase." *Id.* at 532, 364 S.E.2d at 199-200. Our Supreme Court, however, reversed noting that while "[t]he defendant had the right to have brought to his attention information received by the court which tended to aggravate punishment with the full opportunity to refute or explain it . . . [w]e do not believe the defendant has shown he was deprived of this right." *State v. Phillips*, 325 N.C. 222, 224-25, 381 S.E.2d 325, 326 (1989). Since defendant was shown the statements in question at the sentencing hearing and, although he objected to their admission, he failed to move for a continuance to seek evidence in rebuttal, the Court in *Phillips* held that the defendant had not been prejudiced by the sentencing hearing. *Id.* at 225, 381 S.E.2d at 327.

In the instant case, the record indicates that the only factor found in aggravation for the armed robbery conviction was that the defendant has a prior criminal conviction punishable by more than 60 days confinement. The evidence to support that aggravating factor appears to have been the same as that heard with regard to sentencing for the murder conviction. There is nothing in the record to indicate that defendant was deprived of the full opportunity to refute or explain the evidence presented at the sentencing hearing regarding his prior conviction. Moreover, defendant makes no argument that this aggravating factor was improper with regard to the murder conviction, nor did he object to this aggravating factor for armed robbery at the sentencing hearing and move for a continuance to seek evidence in rebuttal. Accordingly, assuming error on this issue, we nonetheless conclude that defendant has not shown that he was prejudiced at his sentencing hearing.

II.

[2] Defendant next contends that the entry of judgment for the armed robbery conviction was improper because he was indigent and no counsel had been appointed for that case. We disagree.

N.C. Gen. Stat. § 7A-451(a)(1) (1995) provides that an indigent person is entitled to counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged." This entitlement continues through sentencing. N.C.G.S. § 7A-451(b)(5). "The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges." *State v. Mems*, 281 N.C. 658, 673, 190 S.E.2d 164, 174 (1972).

The record in this case reveals that R. Thomas Nichols and Kelly Williams were appointed to represent defendant after his second death sentence was reversed and did, in fact, represent defendant at his third sentencing hearing. After the trial court imposed a life sentence, the following exchange took place:

> MR. BREWER [Attorney for the State]: The armed robbery sentence was stayed after the entry of the trial. There's been no entry in the armed robbery.
>
> THE COURT: Anybody care to be heard on that?
>
> MR. BREWER: I believe Your Honor heard the testimony of the prior convictions, and we'd ask you to give him the 40 year sentence to run to expiration.
>
> THE COURT: The Court finds the Defendant has a prior criminal record, punishable by more than 60 days confinement, that there are no mitigating factors.
>
> On the robbery conviction, let the Defendant be imprisoned in the State Department of Corrections for the term of 40 years.
>
> The murder conviction, let him be imprisoned for the remainder of his natural life, for the remainder of the sentence imposed for robbery, and give him credit for any time spent awaiting trial.
>
> MR. NICHOLS [Attorney for the defendant]: On the armed robbery, the sentence?

THE COURT: It will be perfected within the time provided by the rules.

MR. NICHOLS: I'll read the law.

THE COURT: I'll appoint you to represent him on the appeal. No appeal bond, no appearance bond. Credit for any time spent awaiting trial.

As the record indicates, no new evidence as to factors in aggravation was presented on the robbery charge and defendant does not contend that he was deprived of the full opportunity to refute or explain the evidence against him for this aggravating factor on the murder charge. The robbery charge in question is the underlying felony for which the jury found the defendant guilty of first degree murder based on the felony murder rule. As the State points out, both offenses are inextricably intertwined and representation for one is tantamount to representation for the other. Since nothing in our examination of the record indicates that the defendant was not adequately represented by counsel at the sentencing hearing, we hold that the defendant was not prejudiced by his sentencing hearing.

III.

[3] Defendant's final contention is that the trial court erred by sentencing him for robbery when a different judge had previously arrested judgment. He argues that the effect of the arrested judgment was to vacate the verdict and therefore, it was improper for the arrested judgment to be set aside by another judge. We disagree.

In *State v. Mahaley*, 122 N.C. App. 490, 470 S.E.2d 549 (1996), this Court considered the effect of arrested judgments in a situation surprisingly similar to the subject case. In *Mahaley*:

> Defendant was indicted for first degree murder, conspiracy to commit murder and robbery with a dangerous weapon. The jury returned guilty verdicts on all counts. The court sentenced the defendant to death for the murder conviction and arrested judgment on the other charges. Defendant appealed her murder conviction to the North Carolina Supreme Court, which upheld the conviction but vacated the sentence. On remand, defendant received a life sentence. Subsequently the State moved to set aside the judgment in arrest in the conspiracy and robbery charges and impose sentences for those convictions. On 1 May 1995 a hearing was held by Judge J.B. Allen after which he imposed consecutive sentences for the crimes.

Id. at 491, 470 S.E.2d at 550. In that case, the defendant argued that the effect of arresting a judgment was to vacate the verdict and sentence. *Id.* at 492, 470 S.E.2d at 551. The *Mahaley* court concluded that "arresting the judgments did not operate to vacate the verdicts, which remained intact and viable after defendant's death sentence was reversed" and held that "it was proper for the trial court to set aside the arrested judgments and sentence the defendant for conspiracy to commit murder and robbery with a dangerous weapon." *Id.* at 493, 470 S.E.2d at 551-52.

Since we find *Mahaley* controlling, we hold that the trial court did not err in sentencing defendant for robbery even though judgment had been previously arrested by another judge.

For the foregoing reasons, we find that the defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judges LEWIS and MARTIN, Mark D. concur.

RODNEY MELVIN, PLAINTIFF-APPELLEE v. HOME FEDERAL SAVINGS & LOAN ASSOCIATION AND ARTHUR LANE, DEFENDANT-APPELLANT

No. COA96-433

(Filed 18 March 1997)

1. Fiduciaries § 2 (NCI4th)— fiduciary relationship—absence of formal attorney-client relationship

It was not error for the trial court to find the existence of a fiduciary relationship between plaintiff and defendant-attorney where the evidence presented at trial showed defendant served as attorney for the estate of plaintiff's father, was appointed administrator of the estate, and became successor trustee of a trust in favor of plaintiff as beneficiary. The absence of a formal attorney-client relationship between plaintiff and defendant does not prohibit the finding of a fiduciary relationship.

Am Jur 2d, Attorneys at Law § 119.

2. Trusts and Trustees § 205 (NCI4th)— person acting as trustee—fiduciary duty to beneficiary

The attorney and administrator d.b.n. of decedent's estate acted as the trustee of a trust created for the benefit of decedent's illegitimate son when he received, endorsed and deposited a check for the trust funds and distributed those funds to himself and decedent's widow. Therefore, the attorney had a fiduciary obligation to the son as trust beneficiary.

Am Jur 2d, Trusts §§ 203, 216, 366.

3. Executors and Administrators § 40 (NCI4th)— administrator d.b.n.—fiduciary duty to trust beneficiary

An attorney who was the administrator d.b.n. of decedent's estate had a fiduciary duty to decedent's illegitimate son even though the son was not an heir where the attorney deposited funds of a trust established for the son's benefit into the estate account and disbursed those funds when he had been put on notice that the son was the trust beneficiary.

Am Jur 2d, Trusts §§ 203, 216, 366.

4. Executors and Administrators § 45 (NCI4th)— breach of fiduciary duty—instructions—proximate cause

The trial court's instructions in an action for breach of fiduciary duty by the attorney and administrator d.b.n. of an estate did not mislead or misdirect the jury even though they did not include an instruction on proximate cause.

Am Jur 2d, Trial §§ 1138, 1142, 1182.

5. Damages § 71 (NCI4th)—constructive fraud—punitive damages

An issue of punitive damages was properly submitted to the jury based on constructive fraud in an action for breach of fiduciary duty by the attorney and administrator d.b.n. of an estate for the distribution of funds in a trust created for plaintiff's benefit where the trial court determined that a fiduciary relationship existed, and the jury found that the attorney failed to overcome the presumption of fraud by proof that his actions were open, fair and honest.

Am Jur 2d, Attorneys at Law § 119; Fraud and Deceit §§ 15, 16.

Conduct of attorney in capacity of executor or administrator of decedent's estate as ground for disciplinary action. 92 ALR3d 655.

6. Attorneys at Law § 51 (NCI4th)— fraudulent practice by attorney—double damages

The trial court did not err by allowing double compensatory damages under N.C.G.S. § 84-13 (fraudulent practice by attorney) in an action by decedent's son against a defendant who acted as the attorney and administrator d.b.n. for decedent's estate for breach of fiduciary duty in distributing the funds of a trust established for the son's benefit to decedent's widow and to pay attorney's fees.

Am Jur 2d, Damages §§ 816, 906.

Principal's right to recover punitive damages for agent's or broker's breach of duty. 67 ALR2d 952.

Amount of attorneys' compensation in proceedings involving wills and administration of decedent's estates. 58 ALR3d 317.

Conduct of attorney in capacity of executor or administrator of decedent's estate as ground for disciplinary action. 92 ALR3d 655.

Appeal by defendant from judgment entered 11 November 1995 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 8 January 1997.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by H. Gerald Beaver and Amye Tankersley King, for plaintiff-appellee.

Harris, Mitchell & Hancox, by Ronnie M. Mitchell, for defendant-appellant.

WALKER, Judge.

Plaintiff is one of five children of Booker T. Taylor, deceased, and Ella Hines. Mr. Taylor and Ms. Hines were never married. Mr. Taylor was married to Blanche Taylor, who knew plaintiff to be the son of her husband. In 1980, Mr. Taylor executed a Discretionary Revocable Trust Agreement at defendant Home Federal Savings & Loan in favor

of plaintiff as beneficiary. The account was registered in the name of Booker T. Taylor, Trustee for Rodney Beauford Melvin.

Mr. Taylor died on 5 April 1985. Evelyn Lee was appointed as personal representative of Mr. Taylor's estate and defendant Lane was retained as attorney for the estate. On 17 September 1986, the estate was closed and Ms. Lee was discharged as personal representative.

Thereafter, Blanche Taylor contacted defendant Lane to determine whether the estate could be reopened for the purpose of distributing the funds in the Home Federal account to reimburse Mrs. Taylor for earlier expenses she had incurred on behalf of the estate. On 11 September 1991, an order was issued by the clerk of superior court allowing the reopening of the estate. Further, defendant Lane was appointed administrator de bonis non (d.b.n.) of the estate. Following his appointment, defendant Lane requested that defendant Home Federal release the trust funds to him.

Plaintiff's evidence showed that defendant Lane presented the passbook for this account and was advised by the bank that the funds could be released if the estate could be appointed successor trustee and be responsible for locating plaintiff and distributing funds to him. The evidence further showed that defendant Lane agreed to this arrangement and a check in the amount of $10,160.69 was issued to "Booker T. Taylor Estate Trustee for Rodney Beauford Melvin." Defendant Lane then endorsed the check "Arthur L. Lane Administrator Dbn" and distributed $9,000.00 to Mrs. Taylor and kept $1,160.69 in attorneys' fees.

Defendant Lane asserts he was not aware that plaintiff had any claim to these funds. Moreover, he contends that there was no mention by defendant Home Federal that the funds were to be held in trust for anyone.

Plaintiff discovered the existence of this trust account in 1991 when an interest statement for the account was found in the mailbox. Plaintiff then contacted defendant Home Federal and was informed that his trust account funds had been distributed to defendant Lane.

Plaintiff filed suit against defendant Home Federal and later amended his complaint to include defendant Lane. The trial court found that a fiduciary relationship existed and that defendant Lane had breached a fiduciary duty owed to plaintiff. The jury found in favor of plaintiff on all remaining issues, awarding plaintiff compen-

satory damages in the amount of $5,000.00 against defendant Home Federal and $10,160.69 in compensatory damages and $7,400.00 in punitive damages against defendant Lane. Pursuant to N.C. Gen. Stat. § 84-13, plaintiff elected double compensatory damages in lieu of punitive damages. Thus, judgment was entered against defendant Lane for $20,321.38 in damages. Only defendant Lane appeals.

[1] Defendant first assigns as error the trial court's entry of judgment and its denial of his motions for directed verdict and for a new trial, based on the trial court's failure to present an issue to the jury as to whether a fiduciary relationship existed between the parties, and its failure to instruct the jury as to the legal definition and standard for proximate cause.

The evidence presented at trial showed defendant acted in three capacities in relationship with plaintiff. He served as attorney for the estate of plaintiff's father, he was appointed administrator d.b.n. of the estate and he became successor trustee of the trust of which plaintiff was the beneficiary.

As attorney for the estate, defendant argues a fiduciary duty extended only to Blanche Taylor and not to the plaintiff. However, the evidence established that defendant deposited the trust funds into the Booker T. Taylor estate account and paid himself an attorney fee of $1,160.69. Furthermore, this Court has extended an attorney's obligation to others beyond those who are privy to the formal attorney-client relationship. *See Title Ins. Co. of Minn. v. Smith, Debnam, Hibbert and Pahl*, 119 N.C. App. 608, 459 S.E.2d 801 (1995); *Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E.2d 313, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). Thus, the absence of a formal attorney-client relationship between plaintiff and defendant does not prohibit the finding of a fiduciary relationship.

[2] Next, it is clear that the trustee of a trust has a fiduciary obligation to the beneficiary of the trust. N.C. Gen. Stat. § 32-25 (1996). Defendant does not dispute receiving, endorsing and depositing the check issued by defendant Home Federal made payable to "Booker T. Taylor Estate Trustee for Rodney Beauford Melvin." Thus, defendant acted as trustee for the trust created for the benefit of plaintiff when he distributed the funds of this trust to himself and to Mrs. Taylor.

[3] Finally, as to his capacity as administrator d.b.n., defendant argues that plaintiff was not an heir as there was no evidence that

plaintiff's paternity was ever acknowledged or judicially determined during decedent's lifetime or that plaintiff presented a claim for his intestate share within six months of the first notice to creditors as required by law. N.C. Gen. Stat. §§ 28A-1-1(3), 29-19 (1984). Pursuant to N.C. Gen. Stat. § 28A-13-2 (1984), a personal representative (administrator d.b.n.) is a fiduciary. Defendant deposited trust funds into the estate account and disbursed those funds when he had been put on notice that plaintiff was the beneficiary under the trust. Therefore, based on the several roles defendant assumed with respect to the administration of the estate and the trust, the trial court did not err in finding a fiduciary relationship existed.

[4] Defendant next contends that the trial court erred in entering judgment against him due to its failure to instruct the jury on the issue of proximate cause. However, "[p]ursuant to Rule 10(b)(2) of the Rules of Appellate Procedure, in order to properly preserve questions for appellate review regarding jury instructions, a party must object to the instruction before the jury retires to consider its verdict." *Lumley v. Capoferi*, 120 N.C. App. 578, 581-82, 463 S.E.2d 264 (1995). Failure to make such an objection or request prohibits a party from raising the issue on appeal. *Id.* Nevertheless, we have examined the court's instructions and conclude they did not mislead or misdirect the jury.

[5] Defendant next assigns as error the trial court's allowance of an award of punitive damages based on the contention that insufficient evidence existed to conclude that defendant had engaged in constructive fraud.

A trial court is entitled to submit the issue of punitive damages to the jury upon a showing of constructive fraud. *Bumgarner v. Tomblin*, 92 N.C. App. 571, 576, 375 S.E.2d 520, 523, *disc. review denied*, 324 N.C. 333, 378 S.E.2d 789 (1989). Constructive fraud requires that: (1) the plaintiff show by the greater weight of the evidence the existence of a fiduciary relationship between the parties; and (2) the defendant fails to prove that he acted openly, honestly and fairly. *Booher v. Frue*, 98 N.C. App. 570, 579, 394 S.E.2d 816, 821, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). As discussed above, the trial court properly determined that a fiduciary relationship existed and then the jury found that defendant failed to overcome the presumption of fraud by not proving his actions were open, fair and honest. Thus, the issue of punitive damages was properly submitted to the jury.

[6] Defendant further contends that the trial court erred in allowing plaintiff to elect between the punitive damages awarded and doubling the award of compensatory damages under N.C. Gen. Stat. § 84-13. We disagree.

N.C. Gen. Stat. § 84-13 (1995) provides, "If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages." Defendant argues that this statute should be interpreted narrowly to permit double damages only if defendant engaged in fraudulent practice while acting in his capacity as an attorney. In addition to defendant's roles as successor trustee and administrator d.b.n., he served as an attorney for the estate as evidenced by the attorney fee he paid to himself. Thus, the trial court did not err in applying N.C. Gen. Stat. § 84-13 and allowing double compensatory damages against defendant. See *Booher v. Frue*, (Constructive fraud by breach of fiduciary duty is sufficient to invoke the provisions of N.C. Gen. Stat. § 84-13.) We have carefully considered defendant's remaining assignments of error and find them to be without merit.

No error.

Judges LEWIS and MARTIN, Mark D. concur.

BENCHMARK CAROLINA AGGREGATES, INC., PLAINTIFF-APPELLANT v. MARTIN MARIETTA MATERIALS, INC., CENTRAL ROCK COMPANY, AND AMERICAN STONE COMPANY, DEFENDANTS-APPELLEES

No. COA96-327

(Filed 18 March 1997)

Corporations § 213 (NCI4th)— judicial dissolution—two companies—fifty percent interest—wholly owned subsidiary—summary judgment—forecast of evidence—management agreement

In a judicial dissolution case involving a stone company in which two corporations each owned a fifty percent interest, the trial court erred in granting summary judgment in favor of defendants where plaintiff's forecast of evidence tending to show

that a deadlock among directors concerning whether a management agreement with one corporate owner of the stone company should be terminated raised factual questions as to whether (1) the affairs of the jointly owned corporation were being conducted to the advantage of the shareholders generally; (2) liquidation was reasonably necessary for the protection of the rights or interests of the complaining shareholder; and (3) the corporate assets were being misapplied or wasted by perpetuation of the defendants' management agreement. N.C.G.S. § 55-14-30(2).

Am Jur 2d, Summary Judgment § 27.

Appeal by plaintiff from summary judgment entered 13 December 1995 by Judge Knox V. Jenkins in Wake County Superior Court. Heard in the Court of Appeals 3 December 1996.

Bugg & Wolf, P.A., by John E. Bugg and William J. Wolf, for plaintiff appellant.

Poyner & Spruill, L.L.P., by Cecil W. Harrison, Jr., for Martin Marietta Materials, Inc., and Central Rock Company, defendant appellees.

SMITH, Judge.

This case involves two companies (the principals), each of whom own a fifty-percent (50%) interest in another company. Because neither of the principals can muster a majority vote on a significant management decision involving the co-owned company, plaintiff argues N.C. Gen. Stat. § 55-14-30(2) (1990) compels judicial dissolution of the co-owned company. We disagree with plaintiff that § 55-14-30(2) *compels* dissolution. However, we do agree with plaintiff that material issues of fact exist which might prompt judicial dissolution. Accordingly, we reverse the trial court's grant of summary judgment to defendants.

The facts, in the light most favorable to plaintiff, are as follows. American Stone Company (American) was formed in 1969 for the purpose of operating a stone quarry. The current owners of American are plaintiff Benchmark Aggregates, Inc. (Benchmark or plaintiff), and defendant Central Rock Company (Central), each of whom owns fifty percent of American's stock. Originally, Central and Nello L. Teer Company (Benchmark's predecessor) were the fifty-fifty owners of the American stock. In the late 1980's Martin Marietta Materials, Inc.

(Martin) purchased Central, transforming Central into a wholly-owned subsidiary of Martin.

American was formed by the Nello L. Teer Company (Teer) and Central in 1969. Shortly after the formation of American, Central and American entered into a contract (the Management Agreement) whereby it was agreed that Central would provide management and accounting services for American. American agreed to pay Central ten cents ($.10) for each ton of stone sold by the American quarry. In 1980, Central and Teer agreed to a ten cent ($.10) raise in the management fee, raising Central's per ton fee to twenty cents ($.20). Since the 1980 fee change, there have been no further changes in the per ton rate paid Central. However, as the area surrounding Wake County, North Carolina, has grown through increased urbanization, there has been a steady increase in the tonnage sold by the quarry. This consistently increasing volume of stone sales has led to progressively increased revenue to Central (and thereby to Martin) under the Management Agreement.

In February of 1994, at an American Board of Director's meeting, Director R.R. Winchester (who is also a vice-president of Martin) made a motion to increase Central's management fee to twenty-five cents ($.25) per ton. Director Winchester's motion was tabled to allow the Benchmark affiliated directors time to study the impact of the increased fee. At American's October 1994 board meeting, Benchmark's three affiliated directors proposed and voted in favor of a motion to terminate the Management Agreement. In response, the directors affiliated with Martin/Central voted against termination. As a result of the deadlock, no action has been taken with regard to the Management Agreement as of the date of this appeal.

We note that by stipulation of the parties, American is no longer a defendant for purposes of this appeal.

To sustain summary judgment, defendant, as the moving party, is obligated to show that no material facts are in dispute and that it is entitled to judgment as a matter of law. *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904-05 (1995). In addition, the record is to be viewed in the light most favorable to the non-movant, giving him the benefit of all inferences which reasonably arise therefrom. *Id.* Evidence properly considered on a motion for summary judgment "includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of

which judicial notice may properly be taken." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

Plaintiff argues that dissolution is necessary under N.C. Gen. Stat. § 55-14-30(2) because American is not being conducted to the advantage of shareholders generally, and because dissolution is necessary for the protection of Benchmark. We believe the question of whether a § 55-14-30(2) dissolution is necessary under these circumstances presents a number of genuine issues of material fact. N.C. Gen. Stat. § 55-14-30(2) states that the superior court may dissolve a corporation

> (2) In a proceeding by a shareholder if it is established that (i) the directors or those in control of the corporation are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock . . . [and] the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, [or if] (ii) liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder . . . [or] (iv) the corporate assets are being misapplied or wasted . . . .

Section 55-14-30(2) allows the court to order an involuntary corporate dissolution due to director deadlock, without limitation as to the duration or specific effects of the deadlock. N.C. Gen. Stat. § 55-14-30(2) Official Comment n.2; Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 28-10(a) at 554 (5th ed. 1995). Such a decision by the court should "be exercised on the basis of all factors relating to whether dissolution is equitable in the particular case." *Robinson*, § 28-10(a) at 554.

Plaintiff argues that, even though there has been no showing of a discriminatory allocation of corporate dividends from American to defendant Central, Central is nevertheless using the director deadlock to perpetuate the profitable flow of fees from American to Central. The record reflects that Martin/Central enjoys an income stream of $250,000.00 in accounting and managerial fees from American. Thus, plaintiff argues, its rate of return on its fifty-percent (50%) interest in American, adjusted for the fees flowing to Central, is significantly less than Central's rate of return. These divergent rates of return are, plaintiff argues, evidence that "the business and affairs of the corporation [are] no longer be[ing] conducted to the advantage of the shareholders *generally*, because of the deadlock[.]" N.C. Gen. Stat. § 55-14-30(2)(i) (emphasis added).

Plaintiff Benchmark has also forecast evidence demonstrating that the director deadlock has deleteriously affected American's interests, and therefore Benchmark's shareholder interests, because of "American['s] [arguable ability to] obtain the same [managerial and accounting] services . . . at a lower price if Martin were required to competitively bid for the opportunity." According to plaintiff, the director deadlock prevents American from seeking the lowest (or most advantageous) cost provider for the management and accounting services it needs. Therefore, American is harmed at the expense of Benchmark, to the benefit of Martin/Central.

Plaintiff's forecast of evidence supports its assertion that the deadlock is being used to perpetuate the Management Agreement, in that "the business [of American] is being conducted to the unfair advantage of one shareholder or group of shareholders [namely, Martin/Central], or that a shareholder or group of shareholders is benefitting at the expense of the others." *Foster v. Foster Farms, Inc.*, 112 N.C. App. 700, 708, 436 S.E.2d 843, 848 (1993) (discussing grounds for application of a § 55-14-30(2)(i) judicial dissolution). Furthermore, in the context presented by plaintiff, issues of fact have been raised as to whether American's Martin/Central directors have violated their fiduciary duties to American under N.C. Gen. Stat. § 55-8-30(a)(3) (1990) by disallowing any cost/benefit analysis of Central's contract with American. If the accounting and managerial service contract between American and Central is, in fact, a "transaction [un]fair to [American]," then it would appear the deadlock might represent a director conflict of interest. N.C. Gen. Stat. § 55-8-31 (1990).

Plaintiff has raised all of these issues by its forecast of evidence. In *Meiselman v. Meiselman*, 309 N.C. 279, 307-08, 307 S.E.2d 551, 568 (1983), our Supreme Court held that directors of a corporation are quasi trustees of the property of *that* corporation for the benefit of the corporation and its shareholders. It is a director's duty to administer the trust assumed by them, not for their own profit, but for the mutual benefit of all interested parties. *Id.* In this case, it is a fair question, raised properly by plaintiff's evidence, whether the benefits of the Management Agreement serve the best interests of American or Martin/Central. A director, in the discharge of his duties as a director, may not serve two masters; his utmost duty is to the corporation to which he is entrusted, and to no other.

Plaintiff has forecast evidence tending to show that the deadlock among directors raises factual questions as to whether: (1) the affairs

of the corporation are being conducted to the advantage of the shareholders generally; (2) liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder; and (3) the corporate assets are being misapplied or wasted by perpetuation of the American/Central Management Agreement. *See* N.C. Gen. Stat. § 55-14-30(2). If, indeed, plaintiff can prove that the Martin/Central directors are, by their actions, preserving a deadlock to the detriment of American, then the questions of fiduciary responsibility discussed above also come into play.

For the reasons stated, summary judgment is reversed and remanded for trial on the merits.

Reversed.

Judges LEWIS and WALKER concur.

JOHN D. THACKER, EMPLOYEE/PLAINTIFF v. CITY OF WINSTON-SALEM, EMPLOYER/SELF-INSURED, DEFENDANT

No. COA96-680

(Filed 18 March 1997)

Workers' Compensation § 164 (NCI4th)— police officer—accident—pre-existing condition not aggravated

The Industrial Commission erred by awarding workers' compensation benefits to plaintiff, a police officer who was injured in a car accident while working, where there was no causal relationship between plaintiff's pre-existing back condition and his accident. The evidence presented at the hearing suggested that plaintiff had a degenerative back condition that was expected to deteriorate over time, ultimately resulting in surgery to relieve plaintiff's pain; plaintiff had begun to experience increased pain several months prior to his accident; and the accident did not aggravate plaintiff's back condition.

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

Appeal by defendant from Opinion and Award of the Full Commission entered 26 March 1996. Heard in the Court of Appeals 20 February 1997.

Randolph M. James, P.C., by Randolph M. James and Steven S. Long, for plaintiff-appellee.

Bennett & Blancato, L.L.P., by Sherry R. Dawson, for defendant-appellant.

WYNN, Judge.

In August 1992, plaintiff, a Winston-Salem police officer, suffered a violent coughing attack and blacked out after placing his car in drive to leave the parking lot where he had stopped to talk to another officer. His patrol car then travelled down an embankment, knocked over a fire hydrant and came to rest in the median of an adjacent road. Doctors at Forsyth Memorial Hospital treated and released plaintiff for facial bruises. Both the Forsyth County EMS record and the hospital's Emergency Department Nurse's Sheet indicate that plaintiff complained of neck pain. The emergency room record further notes that plaintiff had a past medical history of bone spurs.

In June 1990, two years prior to the accident, plaintiff consulted a neurosurgeon, Dr. Ernesto de la Torre, for neck pain which radiated to his shoulder and arm. Dr. de la Torre diagnosed radiculopathy due to cervical arthritis known as cervical spondylosis, a condition he explained to be generally caused by "the wear and tear of life," but can also be caused by chronic, repeated trauma to the cervical spine. Dr. de la Torre decided on a conservative course of treatment, without surgery, as long as plaintiff could tolerate the pain, and anticipated that surgery would be necessary to remove the bone spurs as his condition worsened over time and the pain increased.

A month after the subject accident, plaintiff again consulted Dr. de la Torre and told him that for the past five or six months the original pain going from the neck to the arms had increased. In October 1992, Dr. de la Torre operated on plaintiff and removed the bone spurs which were causing his pain.

In February 1993, plaintiff filed a claim for workers' compensation benefits and defendant City of Winston-Salem denied liability. Following a hearing, Deputy Commissioner Jan N. Pittman awarded plaintiff temporary total disability benefits and medical expenses. Upon appeal, the Full Commission affirmed the Deputy Commissioner's award concluding that "plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer which resulted in multiple abrasions and an

aggravation of plaintiff's pre-existing back condition." Defendant appeals from the Opinion and Award of the Full Commission.

On appeal, defendant asks this Court to consider whether the Full Commission erred by awarding workers' compensation benefits when none of the expert medical evidence supported the inference that the August 1992 accident caused plaintiff's back condition and subsequent surgery. Defendant argues that the evidence before the Commission was insufficient, as a matter of law, to support its findings of fact and conclusion of law that the accident aggravated plaintiff's back condition or caused his surgery, and the opinion and award based thereon. We agree.

As a preliminary matter, we note that "[w]hen reviewing appeals from the Industrial Commission, the Court is limited in its inquiry to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the Commission's findings of fact justify its legal conclusions and decision." *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 120-21, 334 S.E.2d 392, 394 (1985).

In the workers' compensation appeal of *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980), our Supreme Court addressed the quantum and quality of the evidence required to establish *prima facie* the causal relationship between the accident in question and the injury. The Court acknowledged that there will be "many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." *Id.* at 167, 265 S.E.2d at 391 (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965)). Correspondingly, the Court recognized: "On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Id.* The case before us falls into the latter category. *See also*, *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942) (To establish the necessary causal relationship, "the evidence must be such as to take the case out of the realm of conjecture and remote possibility.")

Our examination of the record in the instant case reveals insufficient medical evidence to support the Commission's finding that the

accident aggravated plaintiff's back condition. All the medical evidence corroborates Dr. de la Torre's testimony regarding his examination of plaintiff in September 1992, following the accident:

> Q. Do you recall now whether the x-rays showed a worsening of the cervical spondylosis since 1990?
>
> A. I don't recall. Let me see if I wrote something about that. (Witness examining paper writings.) I wrote this: "X-rays were seen today. He does have the same cervical spondylosis—C-5 and C-6—like previously. He has narrowing of the frame in all levels signifying some generalized arthritic process." So, obviously, I have the impression by reading my own notes that he looked as bad as he was before but not necessarily worse objectively.
>
> Q. So his condition that you had seen him for in 1990 had continued to exist since that time?
>
> A. Yeah. Uh-huh (yes). Correct.
>
> Q. Looking at the addendum to your letter—
>
> A. Uh-huh (yes).
>
> Q. —did he ask you at that time whether the spondylosis he presented for on September the 22nd, 1992, could have been produced by the automobile accident he had in August of '92?
>
> A. Yeah. Well, I told him that the spondylosis was present long before that—probably a few years before and the accident itself had nothing to do with the production of cervical spondylosis.
>
> Q. Do you remain of that same opinion today?
>
> A. Yeah. I think that cervical spondylosis was existing there for years before he had the accident.
>
> Q. In light of the fact that Mr. Thacker told you that he had worsening pain in his neck for the past five or six months—that would have been back to—let's see—April or May of 1992—do you have any reason to believe that the spondylosis was made worse by the accident that occurred in August of '92?
>
> A. Well, it looked, to me, like the worsening had been occurring already before the accident.
>
> . . . .

Q. (By Ms. Dawson) Dr. de la Torre, based on your findings and examination of Mr. Thacker in 1990 based on what he told you when he came back to you in 1992 about his symptoms and your findings at that time, do you have an opinion as to whether the surgery you performed in October of 1992 would have been necessary if Mr. Thacker had not had the automobile accident in August of 1992?

A. Oh, I can't say that for sure; but many of these people with cervical spondylosis eventually end up in surgery whether they have accidents or not. But, also, it is also well known that automobile accidents and trauma can increase the pain of a previously existing problem like cervical spondylosis and increase the pain to the point that it requires surgery.

So, he might have required surgery whether he has [sic] had the accident or not; but, certainly, having had an accident would have been a factor in increasing his possibilities of pain.

Q. Can you say that the accident was the reason he had to have the surgery in October, 1992?

A. No. No, I could not say that.

Plaintiff argues that Dr. de la Torre's testimony in response to a hypothetical question supports the Commission's findings. Plaintiff's counsel asked Dr. de la Torre to assume that in the accident, the impact of the vehicle as it went over the embankment propelled him into the roof of the car and he struck his head on the roof. He then asked, "Would that fact, if it were true, bolster an opinion that Mr. Thacker may have aggravated his pre-existing condition by virtue of the collision?" Dr. de la Torre responded, "Yes, I have an opinion about that. I think that it is quite possible that injuries of that kind in an accident such as what he had could have produced a definite worsening of his symptoms." However, we find that this evidence elicited by plaintiff's hypothetical question was not competent because it required Dr. de la Torre to assume the truth of facts that the record does not support, namely that plaintiff hit his head on the roof of the car in the accident, and thus, the doctor's response was entirely based on conjecture. In fact, the record contains a letter from Dr. William A. Brady, the doctor to whom plaintiff was referred for nerve conduction studies, to Dr. Walter Wray, plaintiff's family physician, which suggests that plaintiff's injuries were to his lower face and thus are not consistent with hitting his head on the roof of the

car. Dr. Brady wrote: "He damaged the car and apparently received facial trauma with bleeding of his nose and edema in his mouth region. He had no lacerations over his scalp."

Thus, the record is replete with medical evidence which suggests that plaintiff's cervical spondylosis was a degenerative condition that was expected to deteriorate over time ultimately resulting in surgery to remove the bone spurs causing the pain; that plaintiff had begun to experience increased pain several months prior to the accident; and that the accident did not aggravate his back condition and necessitate surgery, rather the progression of his back condition resulted in surgery. Moreover, the record is devoid of any medical evidence to establish the necessary causal relationship without conjecture and remote possibility. Therefore, since we find the competent evidence insufficient to support the Commission's findings and conclusion that plaintiff's accident aggravated his pre-existing back condition, we must reverse.

Reversed.

Judges LEWIS and MARTIN, Mark D. concur.

STATE OF NORTH CAROLINA v. CLIFTON HAROLD PEARSON, JR.

No. COA96-365

(Filed 18 March 1997)

1. Searches and Seizures § 82 (NCI4th)—"pat-down" search—routine traffic stop

Officers had a reasonably articulable suspicion that defendant might be armed and dangerous so that the officers could make a pat-down search of defendant for weapons during a routine traffic stop where defendant had an odor of alcohol and acted nervous and excited while in the first officer's patrol car; defendant continued to act nervous and excited after a second officer arrived on the scene; and there were inconsistencies in defendant's statements and his passenger's statements concerning their whereabouts on the previous evening.

Am Jur 2d, Searches and Seizures §§ 51, 78, 172, 191.

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

Furtive movement or gesture as justifying police search. 45 ALR3d 581.

2. Searches and Seizures § 58 (NCI4th)— pat-down search—discovery of drugs—immediately apparent rule—not invasion of privacy

There was no invasion of defendant's privacy beyond that authorized by an officer's pat-down search of defendant for weapons during a traffic stop where the officer felt a hard object in defendant's crotch area which was not a part of his anatomy; the officer immediately concluded that the object was narcotics based on his experience and training, defendant's nervousness, and defendant's response that he did not know what the object was; and the search was no more intrusive than necessary as the object and its location made its identity immediately apparent.

Am Jur 2d, Searches and Seizures § 51.

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

Furtive movement or gesture as justifying police search. 45 ALR3d 581.

Appeal by defendant from judgment entered 22 January 1996 by Judge Melzer A. Morgan, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 15 January 1997.

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

Walter L. Jones for defendant-appellant.

WALKER, Judge.

Defendant was indicted on charges of trafficking in cocaine by possession of 28 or more grams but less than 200 grams, possessing with intent to sell and deliver cocaine, possessing cocaine and trafficking in cocaine by transporting 28 or more grams but less than 200 grams. Defendant pled guilty to all charges pursuant to a plea arrangement which provided for the dismissal of the charges of possession with intent to sell and deliver cocaine and possession of cocaine.

Two witnesses testified for the State at defendant's suppression hearing. The first witness was Patrolman Timmy Cardwell, who testified to the following: On 12 October 1994 he was traveling south on Interstate 85 in Greensboro, when he noticed an automobile drifting back and forth within its lane and traveling below the posted speed limit. He stopped the vehicle as a result of these observations. When Cardwell approached the vehicle, he found it to be operated by defendant and also occupied by a female, later determined to be defendant's fiancee. Defendant presented him with a North Carolina driver's license and registration identifying defendant as owner of the vehicle. He then asked defendant to exit the vehicle and come back to the patrol car with him.

Cardwell detected an odor of alcohol on defendant, who admitted he had consumed a couple of beers. After observing defendant, Cardwell concluded that defendant was not impaired by alcohol and described his demeanor as "a little nervous."

Defendant advised Cardwell that he and his fiancee were having some problems and had left Charlotte the previous night to spend time with defendant's family near the Virginia state line. Cardwell then left defendant in his patrol car and went to speak with defendant's fiancee. She told Cardwell that they had been to New York the previous night, had spent one night with defendant's parents, and were on their way home.

Cardwell then returned to his patrol car where he contacted Trooper W.J. Gray and asked him to come to the scene. Cardwell then issued defendant a warning ticket and asked defendant if he could search the vehicle. Defendant agreed and signed a consent to search form. When Gray arrived, Cardwell explained to Gray what was going on and asked Gray to pat down defendant for any weapons. While beginning to search the vehicle, Cardwell was alerted by Gray that he had discovered a hard object, foreign to defendant's anatomy, in defendant's crotch area. He observed Gray remove the object which was later determined to be 134.4 grams of crack cocaine and 5 grams of marijuana.

Trooper Gray testified to the following: On 12 October 1994, he responded to Cardwell's call to meet him at the scene. When he arrived, Cardwell told him that he was going to search the vehicle and asked Gray to frisk defendant for weapons. Defendant appeared to be very nervous and excited. During the pat down search, Gray felt a large object foreign to defendant's anatomy in the crotch area and

immediately suspected some type of narcotics. Defendant continued to act very excited and Gray requested Cardwell's assistance. Based on his experience, Gray knew it was common for males to transport drugs in their crotch areas.

The trial court denied defendant's motion to suppress and he now argues that the trial court erred by finding that his consent to search his vehicle also included consent to search his person outside the vehicle.

[1] Although a routine traffic stop does not justify a protective search for weapons in every instance, a police officer is permitted "to conduct a 'pat-down' for weapons once the defendant is outside the automobile, and if the circumstances give the police reasonable grounds to believe that the defendant may be 'armed and dangerous.' " *State v. McGirt*, 122 N.C. App. 237, 239, 468 S.E.2d 833, 835 (1996) (*quoting Pennsylvania v. Mimms*, 434 U.S. 106, 112, 54 L. Ed. 2d 331, 337 (1977)). As in *McGirt*, the sufficiency of the nature of the stop has not been raised by defendant as a basis to support his motion to suppress. Further, this Court in *State v. Sanders*, 112 N.C. App. 477, 481, 435 S.E.2d 842, 845 (1993) (*quoting State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982)), stated:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous...he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him.

Here, the trial court found that defendant had an odor of alcohol, acted nervous and excited while in the patrol car with Cardwell, and continued to act nervous and excited after Gray arrived on the scene. The trial court also found inconsistencies in the statements between defendant and the passenger concerning their whereabouts on the previous evening. As such, the totality of these circumstances were sufficient to support a reasonably articulable suspicion on the part of the two officers that defendant may be armed and dangerous and were sufficient to justify a pat down search of his person.

[2] We must further consider whether there was an invasion of defendant's privacy beyond that authorized by the search for

weapons. In *Minnesota v. Dickerson, 508* U.S. 366, 375, 124 L. Ed. 2d 334, 346 (1993), the Supreme Court stated:

> If a police officer pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Further, this Court noted that our Supreme Court in *State v. White*, 322 N.C. 770, 370 S.E.2d 390, *cert. denied*, 488 U.S. 958, 102 L. Ed. 2d 387 (1988), held that in the context of the plain view exception the term "immediately apparent" is satisfied if the officer has probable cause to believe that what he has come upon is evidence of criminal conduct. *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389-90 (1993).

While conducting the pat down for weapons, Trooper Gray felt a hard object in defendant's crotch area which was not part of his anatomy. Based on his experience and training, defendant's nervousness, and his response that he did not know what the object was, Gray immediately concluded that the object was narcotics. Under these circumstances, Gray had probable cause to believe that the object was narcotics and his search was no more intrusive than necessary as the object and its location made its identity immediately apparent. *See also*, *State v. Whitted*, 112 N.C. App. 640, 436 S.E.2d 275 (1993) (Upholding the search of an individual when officer felt a "pebble" during the pat down frisk of defendant, and because of the surrounding circumstances believed it to be crack cocaine.)

Having determined that sufficient reasons existed to pat down defendant which led to the discovery of the cocaine and marijuana, we need not reach the question of whether defendant's consent to a search of his vehicle extended to a search of his person.

We find the trial court correctly denied defendant's motion to suppress.

Affirmed.

Judges LEWIS and MARTIN, Mark D. concur.

STATE OF NORTH CAROLINA v. RUFUS GENE BANKS, JR.

No. COA96-646

(Filed 18 March 1997)

1. Evidence and Witnesses § 1426 (NCI4th)— destruction of rape kit—not due process violation

A rape defendant's due process rights were not violated by the police department's destruction of a rape kit where the exculpatory value of DNA testing of seminal material in the kit was highly speculative; there was no reason to conclude that the police believed the rape kit had any exculpatory value at the time of the destruction; and the evidence supported the trial judge's finding that the rape kit was accidentally destroyed. N.C.G.S. § 15-11.1(a); U.S. Const. amend. XIV; N.C. Const. art. I, §§ 19, 23.

Am Jur 2d, Evidence § 244.

2. Criminal Law § 433 (NCI4th Rev.)— closing arguments—prosecutor's statements—defendant's decision not to testify

The prosecutor's statements to the jury that defendant had the same subpoena powers as the State to call additional witnesses, and that they could infer from defendant's failure to call witnesses that such individuals would have nothing to add was directed at defendant's failure to produce rebuttal evidence and did not constitute an indirect reference to defendant's decision not to testify on his own behalf.

Am Jur 2d, Trial §§ 590-604.

Appeal by defendant from judgment entered 11 September 1995 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 February 1997.

The State presented uncontroverted evidence tending to show that in or about January 1993, defendant, age twenty-four, and the victim, age seventeen, began a dating relationship that lasted approximately three months. At trial, the victim testified that she ended the relationship with defendant because he became possessive and frightened her.

On 9 July 1993, the victim was alone in her Charlotte apartment when she heard a knock at her back door. Believing it was her sister, she opened the door, and defendant forced his way into the kitchen. Defendant threatened the victim, they struggled, and he raped her.

The victim told defendant to leave, and when he refused she tried to reach for the phone to call the police. When defendant threatened to shoot her, she hit him over the head with an iron. Defendant grabbed the iron and struck the victim and they continued to struggle. The victim threatened defendant with a knife, and he pulled out a gun and again threatened to shoot her. Defendant pointed the gun at the victim's head and pulled the trigger. The victim testified that the gun clicked, but did not fire, and then defendant left the apartment.

Later the same day, defendant telephoned the victim, and after learning that she planned to go to the hospital, he threatened her again. The victim went to the hospital, was examined by a doctor, and gave her account of the incident to a nurse. The nurse collected evidence from the victim's body, prepared a standard rape kit, and delivered it to the police. Prior to defendant's arrest, the police inadvertently destroyed the rape kit.

On 12 July 1995, defendant filed a motion to dismiss and for sanctions against the State for failure to properly preserve the rape kit as potentially useful evidence. On 16 August 1995, Judge Claude S. Sitton entered an order imposing sanctions and prohibiting the State from calling as a witness the serologist who conducted laboratory testing on the contents of the rape kit. The court also stripped the State of two peremptory challenges and allowed defendant the right to final argument before the jury, regardless of whether he offered evidence in his defense.

Defendant presented no evidence at trial, he was found guilty by a jury of second degree rape, and sentenced to twenty-two years imprisonment. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Sue Y. Little, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant first argues that his conviction should be vacated and the charges dismissed because the police department's destruction of the rape kit violated his constitutional and statutory rights to a fair trial. This argument fails.

Defendant's argument is based on the theory that the victim fabricated the story that he raped her. He contends therefore, that DNA testing could have exonerated him by excluding him as the source of semen collected by the hospital nurse and placed in the destroyed rape kit.

Without question, the State violated the rules concerning the safekeeping of potential evidence in this case. Whenever a law enforcement officer seizes potential evidence, he must "safely keep the property under the direction of the court . . . as long as necessary to assure that the property . . . may be used as evidence [at] trial." N.C. Gen. Stat. § 15-11.1(a) (1983 & Supp. 1996). "A violation of this section does not, however, mandate dismissal of the charges against defendant." *State v. Mlo*, 335 N.C. 353, 372, 440 S.E.2d 98, 108, *cert. denied*, — U.S. —, 129 L. Ed. 2d 841 (1994).

In considering the effect, if any, of the destruction of the rape kit, focus must be "on the question of whether defendant was thereby deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution." *Id.*

The constitutional duty imposed on the State to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *California v. Trombetta*, 467 U.S. 479, 488, 81 L. Ed. 2d 413, 422 (1984). The evidence must (1) possess an exculpatory value that was apparent before the evidence was destroyed and (2) be of such character that defendant would be unable to obtain comparable evidence. *Id.* at 489, 81 L. Ed. 2d at 422.

Evidence presented at the hearing on defendant's motions to dismiss and for sanctions indicates that the exculpatory value of possible DNA testing was highly speculative. At the pre-trial hearing, the state serologist testified that although vaginal swabs and slides taken from the victim established the presence of semen, the results of standard laboratory testing were inadequate to exclude defendant as a suspect. She also testified that in her opinion, the swabs contained insufficient seminal material for effective DNA analysis.

Although on cross examination the state serologist conceded that DNA testing "could have been" conducted on the seminal material, her overall testimony indicated that the exculpatory value of any testing would be meaningless.

Even if the evidence contained in the rape kit were material to defendant's case, in the absence of a showing of "bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law" under either the Fourteenth Amendment of the United States Constitution or Article I, Sections 19 and 23 of our State Constitution. *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. E. 2d 281, 289 (1988), *rehr'g denied*, 488 U.S. 1051, 102 L. Ed. 2d 1007 (1989); *Mlo*, 335 N.C. at 373, 440 S.E.2d at 108; *State v. Graham*, 118 N.C. App. 231, 236, 454 S.E.2d 878, 881, *cert. denied*, 340 N.C. 262, 456 S.E.2d 834 (1995).

For purposes of due process, the presence or absence of bad faith by the police turns on whether the police had knowledge of the exculpatory value before the evidence was destroyed. *Youngblood*, 488 U.S. at 56, 102 L. Ed. 2d at 288. In light of the results of the laboratory testing conducted on the victim's rape kit, there is no reason to conclude the police believed the rape kit had any exculpatory value at the time of its destruction. A careful examination of the record supports the finding of the trial judge that the rape kit was accidentally destroyed.

[2] Defendant's remaining assignments of error take exception to statements made during the prosecutor's closing arguments. He claims that the prosecutor made indirect references to his decision not to testify.

Counsel are given wide latitude in making arguments to the jury. *State v. Roberts*, 243 N.C. 619, 621, 91 S.E.2d 589, 591 (1956). "While it is true that the prosecution may not comment on defendant's failure to take the stand, 'the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument.' " *State v. Thompson*, 110 N.C. App. 217, 225, 429 S.E.2d 590, 594-5 (1993) (quoting *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982)).

During closing argument, the prosecutor suggested that defense counsel might argue that the State did not call certain witnesses because they would be harmful to the State's case. The prosecutor

informed the jury that defendant had the same subpoena power as the State to call witnesses, and that they could infer from defendant's failure to call additional witnesses that such individuals would have nothing to add. The prosecution's statements were directed at defendant's failure to produce rebuttal evidence, not at his failure to testify on his own behalf.

We have examined defendant's remaining assignments of error and find

No error.

Judges MARTIN, JOHN C., and TIMMONS-GOODSON concur.

CINDY JO BATTEN, ADMINISTRATRIX OF THE ESTATE OF BILLY GENE BATTEN, DECEASED, PLAINTIFF v. BETTY LEE BATTEN, DEFENDANT

No. COA96-418

(Filed 18 March 1997)

Descent and Distribution § 10 (NCI4th)— inheritance rights—separation agreement—divorce—remarriage

The trial court committed reversible error by granting plaintiff's summary judgment motion that pursuant to a separation agreement defendant was not entitled to inherit real property from her deceased husband's estate where the two had entered into a separation agreement, divorced, and remarried. Under N.C.G.S. §§ 29-14(a)(2) and (b)(2), when defendant remarried the deceased, the subsequent remarriage negated the terms of the separation agreement.

Am Jur 2d, Divorce and Separation §§ 680, 851, 882.

Remarriage as affecting right to appeal from divorce decree. 29 ALR3d 1167.

Effect of remarriage of spouses to each other on permanent alimony provisions in final divorce decree. 52 ALR3d 1334.

Effect of custody and support provisions upon remarriage of spouses to each other. 26 ALR4th 325.

Appeal by defendant from order entered 20 December 1995 by Judge William C. Gore, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 8 January 1997.

David S. Tedder for plaintiff-appellee.

Marvin J. Tedder for defendant-appellant.

WALKER, Judge.

On 19 August 1983, defendant Betty Lee Batten married Billy Gene Batten, now deceased. The Battens separated on 19 September 1984 and executed a deed of separation whereby each relinquished all rights of inheritance bestowed on them by virtue of their marriage. In accordance with the deed of separation, defendant quitclaimed to Mr. Batten her interest in all real property owned by him at the time of the separation in exchange for $3,000.00. The Battens were divorced on 20 February 1987.

On 31 December 1987, the Battens remarried and lived together as husband and wife until Mr. Batten's death on 4 May 1995. Mr. Batten died intestate survived by defendant and three daughters from a previous marriage.

On 14 November 1995, Cindy Jo Batten, one of Mr. Batten's daughters and the administratrix of his estate, filed a petition for a declaratory judgment seeking to determine defendant's inheritance rights. Defendant responded and asserted her rights as a surviving spouse pursuant to N.C. Gen. Stat. § 29-14(a)(2) and (b)(2) (1984). The trial court held that defendant was entitled to inherit from Mr. Batten's personal property, but was not entitled to inherit from his real property. The court concluded:

> That the Deed of Separation in Book 359, page 624, Quitclaim Deed in Book 359, page 628, and receipt in Book 368, page 853, created a release and surrender by Betty Lee Batten of the real property of the decedent; that the deed she executed and recorded in Book 359, page 628 was made for a valuable consideration, was an "executed" provision and is valid and binding under G.S. 52-10 and the principles espoused in Tucci.

(T. at 29). Both parties appealed the trial court's decision.

On appeal, defendant argues that the trial court erred in determining that she is not entitled to inherit from Mr. Batten's real property. In addition, plaintiff argues that the trial court erred in deter-

mining that defendant is entitled to recover from Mr. Batten's personal property.

In its order, the trial court relied on the case of *In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989), *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990), which plaintiff contends is controlling here. In that case, Mr. and Mrs. Tucci married in 1978 and separated in 1983. *Id.* at 429, 380 S.E.2d at 783. The Tuccis executed a "separation/property settlement agreement," whereby they released each other from the duty of support and from other rights arising by virtue of their marriage, including Mr. Tucci's right to inherit from his wife. *Id.* at 430, 380 S.E.2d at 783. The agreement also provided that "should at any time in the future the parties resume marital cohabitation in any respect that the provisions of the Separation Agreement and Property Settlement are and shall remain valid and fully enforceable, and of full legal force and effect." *Id.* In December of 1983, the Tuccis reconciled and cohabited until September 1985. *Id.* Thereafter, the couple entered a consent judgment for divorce from bed and board, which was subsequently set aside as void. *Id.*

In March of 1986, Mrs. Tucci died. *Id.* After her will was probated, Mr. Tucci filed a notice of dissent. *Id.* The clerk of superior court concluded that the Tuccis' reconciliation rescinded the terms of the separation agreement, and that because Mr. Tucci's right to dissent was executory, he could lawfully dissent from Mrs. Tucci's will. *Id.* at 431-32, 380 S.E.2d at 784. The trial court affirmed the clerk's order. *Id.* at 432, 380 S.E.2d at 784.

Mrs. Tucci's estate appealed and this Court held that the Tucci's reconciliation did not rescind the separation agreement because the property settlement provisions of the agreement were not conditioned on the Tucci's continued separation. *Id.* at 437, 380 S.E.2d at 787. Because the agreement specifically stated that it was to remain in effect in the event that the Tuccis reconciled, and because there was no evidence of rescission of the agreement, Mr. Tucci was barred from dissenting from his wife's will. *Id.*

We find *Tucci* to be distinguishable from the present case. First, the Tucci's agreement specifically stated that it was to remain in force in the event that the Tuccis reconciled. Here, there is no such provision in the agreement or any other evidence indicating an intent for the agreement to remain in force in the event that the Battens reconciled. In addition, the Tuccis never divorced, they simply separated for a period of time and subsequently resumed cohabitation. In our

case, the Battens divorced and then remarried, creating a new marriage contract and legal status. Therefore, *Tucci* is inapplicable to the facts of the present case.

Notwithstanding the fact that the Battens entered into a separation agreement during their first marriage, upon their subsequent remarriage, the provisions of the agreement were no longer effective. Unless there is evidence to the contrary, when a married couple enters into a separation agreement, later divorces, and then remarries, each party to the marriage regains all rights and privileges incident to marriage. Since there is no evidence that the Battens intended for the separation agreement to remain in effect in the event that they reconciled or remarried, defendant obtained the rights of a surviving spouse under N.C. Gen. Stat. § 29-14(a)(2) and (b)(2) when she remarried Mr. Batten and is entitled to inherit from his real property. It follows as a matter of law that if the Battens' subsequent remarriage negated the terms of the separation agreement regarding Mr. Batten's real property, their remarriage also negated the terms regarding his personal property. Thus, the trial court erred when it concluded that defendant was not entitled to inherit from Mr. Batten's real property.

Reversed and remanded.

Judges LEWIS and MARTIN, Mark D. concur.

TOWN OF VALDESE AND TOWN OF RUTHERFORD COLLEGE, PLAINTIFFS V. BURKE, INC., DEFENDANT

No. COA96-471

(Filed 18 March 1997)

Municipal Corporations § 20 (NCI4th)— voluntary annexation—interstate right-of-way annexed by another town—land not contiguous

A parcel of land located on the opposite side of Interstate 40 from the existing limits of the Town of Valdese was not contiguous to the Town of Valdese's existing limits and could not be annexed by the Town of Valdese under the voluntary annexation

statute, N.C.G.S. § 160A-31, where this portion of the Interstate 40 right-of-way had previously been annexed into the Town of Rutherford by legislative enactment. N.C.G.S. § 160A-31(f).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 55 et seq.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR3d 589.

Appeal by Town of Rutherford College from judgment entered 19 December 1995 by Judge Julia V. Jones in Burke County Superior Court. Heard in the Court of Appeals 14 January 1997.

On 13 August 1990, defendant Burke, Inc., ("Burke") petitioned the Town of Valdese pursuant to G.S. 160A-31 seeking to have its property voluntarily annexed into the Town of Valdese. Thereafter, by municipal ordinance effective 1 January 1991, the Town of Valdese annexed the Burke property. The dispute leading to the instant appeal arose because the annexed parcel is located on the opposite side of Interstate 40 from the existing limits of the Town of Valdese.

By local act of the General Assembly dated 21 June 1989, this portion of the interstate right-of-way separating the Town of Valdese proper from the Burke property had been previously annexed into the Town of Rutherford College. 1989 N.C. Sess. Laws ch. 387. Because the intervening portion of the interstate right-of-way had been annexed into the Town of Rutherford College by legislative enactment, the Town of Rutherford College determined that the Town of Valdese's annexation of the Burke property must be void since the Burke property could not be considered contiguous to the Town of Valdese's existing limits. Consequently, on 4 February 1991, the Town of Rutherford College enacted an ordinance involuntarily annexing the Burke property and recognizing that, at all times relevant, the Burke property has been contiguous to the Town of Rutherford College's existing limits.

Both municipalities having purported to annex the same piece of property, the Town of Valdese and the Town of Rutherford College jointly filed a declaratory judgment action on 12 April 1995 in the Burke County Superior Court. After hearing the matter on 6 November 1995, the trial court determined that the property was contiguous to the Town of Valdese within the meaning of G.S. 160A-31(f), and that the Town of Valdese's annexation must therefore be upheld

and the Town of Rutherford College's purported annexation be declared invalid.

The Town of Rutherford College appeals.

Kuehnert & Ayers, P.L.L.C., by Daniel A. Kuehnert and James R. Ayers, for appellant Town of Rutherford College.

Mitchell, Blackwell & Mitchell, P.A., by Marcus W.H. Mitchell, Jr., and Keith W. Rigsbee, for appellee Town of Valdese.

EAGLES, Judge.

The dispositive issue here on appeal is whether, at the time the Town of Valdese purported to annex defendant Burke's property, the Burke property was "contiguous" to the Town of Valdese's then existing corporate limits within the meaning of G.S. 160A-31(f). We hold that it was not and accordingly reverse the order of the trial court.

G.S. 160A-31(a) allows the "governing board of any municipality [to] annex by ordinance any area contiguous to its boundaries upon presentation to the governing board of a petition signed by the owners of all the real property located within such area." G.S. 160A-31(a) (1990). There is no dispute that the property owners here presented a proper petition, the only question is with regard to contiguity. Subsection (f) of G.S. 160A-31 defines the contiguity requirement and provides in pertinent part:

> For purposes of this section, an area shall be deemed "contiguous" if, at the time the petition is submitted, such area either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, or the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina. In describing the area to be annexed in the annexation ordinance, the municipal governing board may include within the description any territory described in this subsection which separates the municipal boundary from the area petitioning for annexation.

G.S. 160A-31(f) (1990).

Under the plain language of this statute, were it not already annexed into the Town of Rutherford College, the intervening interstate right-of-way would not impede the Town of Valdese's ability to

annex the Burke property. We conclude, however, that where, as here, the intervening right-of-way has already been annexed into another municipality, the contiguity requirement embodied in G.S. 160A-31(f) is violated.

Our statutory construction here is bolstered by the language of G.S. 160A-48(b)(3) which provides in pertinent part that "[n]o part of the area [to be annexed] shall be included within the boundary of another incorporated municipality . . . ." G.S. 160A-48(b)(3) (1994). Allowing one municipality to skip over an incorporated portion of another and annex property on the other side would place the statutory prohibition embodied in G.S. 160A-48(b)(3) in conflict with the language of G.S. 160A-31(f) allowing an annexing municipality to include within the lands annexed the "territory described in [subsection (f)] which separates the municipal boundary from the area petitioning for annexation." G.S. 160A-31(f). According to the plain language of G.S. 160A-31(f), when a municipality skips over public lands or rights-of-way in the course of annexing taxable and serviceable property on the other side, the annexing municipality, in effect, annexes the intervening public lands and rights-of-way. As we have recognized, the effect of G.S. 160A-31(f) would be at odds with the clear prohibition established in G.S. 160A-48(b)(3) if G.S. 160A-31(f) were read to allow municipalities to skip over incorporated portions of other municipalities.

Lastly, we note that the parties direct our attention to G.S. 160A-58.1 (1990), which governs the annexation of satellite corporate limits not contiguous with a municipality's existing corporate limits. We do not believe that this statutory provision is applicable here. Accordingly, the order of the trial court is reversed and the cause is remanded for entry of an order declaring invalid the Town of Valdese's attempted annexation and upholding the annexation completed by the Town of Rutherford College.

Reversed and remanded.

Judges GREENE and MARTIN, John C., concur.

TOWN OF SEVEN DEVILS v. VILLAGE OF SUGAR MOUNTAIN

No. COA96-539

(Filed 18 March 1997)

Municipal Corporations § 117 (NCI4th)— standing to challenge annexation—another municipality

Plaintiff municipality did not have standing to challenge the validity of an annexation ordinance of defendant municipality. Assuming that N.C.G.S. § 160A-58.1(b)(2) grants a municipality standing to contest the annexation of noncontiguous property that is closer to its corporate limits than it is to the corporate limits of the annexing municipality, this statute was inapplicable where the annexed properties had a common boundary with a previously annexed ten-foot-wide strip of land and thus were contiguous to the annexing municipality.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 70.

Standing of municipal corporation or other governmental body to attack zoning of land lying outside its borders. 49 ALR3d 1126.

Right of one governmental subdivision to challenge annexation proceedings by another such subdivision. 17 ALR5th 195.

Appeal by plaintiff from order entered 5 March 1996 in Avery County Superior Court by Judge Loto G. Caviness. Heard in the Court of Appeals 28 January 1997.

David R. Paletta for plaintiff-appellant.

Joseph W. Seegers for defendant-appellee.

GREENE, Judge.

The Town of Seven Devils (plaintiff) appeals from the dismissal pursuant to N.C. Gen. Stat. § 1A, Rule 12(b)(6) of its complaint seeking a declaration that certain annexations by the Village of Sugar Mountain (defendant) were null and void.

The allegations of the complaint reveal that on 30 March 1995 the North Carolina Wilderness Limited Partnership (N.C.W.L.), the owner

of a tract of land in Avery County, North Carolina referred to as Linville Ridge, submitted a petition for voluntary annexation to the defendant, a municipal corporation chartered under the laws of North Carolina. On 25 April 1995 the defendant adopted an ordinance annexing the N.C.W.L. property. On 25 April 1995 Wilmor Corporation (Wilmor), Douglas V. and Lillian Coffey (Coffey), and Carroll and Gayle Garland (Garland) petitioned the defendant for annexation. On 9 May 1995 the defendant adopted an ordinance annexing the Wilmor, Coffey and Garland properties. The N.C.W.L. annexation consists of a strip of land ten feet wide extending from the 25 April 1995 corporate limits of the defendant to the Wilmor, Coffey and Garland properties, which were not contiguous (prior to the N.C.W.L. annexation) to the defendant's corporate limits.

Plaintiff, a municipal corporation chartered under the laws of North Carolina, is located across a roadway from the Wilmor, Coffey and Garland properties. The boundaries of these properties, prior to 25 April 1995, were "closer to the corporate limits" of plaintiff than they were to the corporate limits of the defendant.

The dispositive issue is whether plaintiff has standing to challenge the validity of the defendant's annexation of the properties.

The North Carolina Declaratory Judgment Act (Act) provides that "[a]ny person [including a municipal corporation] interested . . . , whose rights, status or other legal relations are affected by a . . . municipal ordinance," may "obtain a declaration of rights." N.C.G.S. § 1-254 (1996); N.C.G.S. § 1-265 (1996).

The plaintiff argues that it is an "interested" party and thus has the right to contest the defendant's annexation of the N.C.W.L., Wilmor, Coffey and Garland properties and the trial court therefore erred in granting the defendant's Rule 12(b)(6) motion to dismiss. We disagree.

Except where an annexation ordinance is void and except where there is "specific statutory authority [authorizing a party to] attack, collaterally or directly, the validity of proceedings extending the corporate limits of a municipality," the State is the only party authorized to prosecute such an action. *Taylor v. City of Raleigh*, 290 N.C. 608, 617, 227 S.E.2d 576, 581-82 (1976). Our legislature has provided that "any person owning property in the annexed territory" may challenge an annexation in court. N.C.G.S. § 160A-38(a) (1994); N.C.G.S.

§ 160A-50(a); *Joyner v. Town of Weaverville*, 94 N.C. App. 588, 590, 380 S.E.2d 536, 537 (1989).

In this case there is no contention that the annexation is void. The plaintiff does not argue that the legislature has promulgated any statute that expressly authorizes one municipality to challenge the annexation ordinance of another municipality and we have found no such statute. Plaintiff does argue, however, that section 160A-58.1(b) implicitly vests it with standing to contest the annexation at issue because its corporate limits are closer to the Wilmor, Coffey and Garland properties than the corporate limits of the defendant. This statute does preclude the annexation of a noncontiguous area if any "point on the proposed satellite corporate limits [is] closer to the primary corporate limits of another city than to the primary corporate limits of the annexing city." N.C.G.S. § 160A-58.1(b)(2) (1994). Assuming this statute does grant a municipality standing to contest the annexation of noncontiguous property that is closer to its corporate limits than it is to the corporate limits of the annexing municipality, the statute is of no help to the plaintiff in this case. At the time the defendant annexed the Wilmor, Coffey and Garland properties, those properties were contiguous areas, as they had a common boundary with the N.C.W.L. properties which were within the defendant's corporate limits. Thus section 160A-58.1(b) has no applicability to this proceeding.

Because there is no statutory authority granting plaintiff standing to challenge the questioned annexations, the trial court correctly dismissed the complaint.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. FRED THOMAS WARE

No. COA96-290

(Filed 18 March 1997)

Constitutional Law § 309 (NCI4th)— ineffective assistance of counsel—concession of guilt of lesser offenses—consent by defendant—failure of record to show—question not addressed

The Court of Appeals could not address defendant's assignment of error that he received ineffective assistance of counsel in his trial for first-degree rape and first-degree kidnapping because his counsel conceded, contrary to defendant's testimony, his guilt of two lesser offenses where the Court could not determine from the record on appeal whether these statements by defense counsel were made without defendant's consent. To properly advance this argument, defendant should move for appropriate relief in the trial court.

Am Jur 2d, Appellate Review §§ 497, 546, 690.

Adequacy of defense counsel's representation of criminal client regarding argument. 6 ALR4th 16.

Appeal by defendant from judgment and commitment entered 3 August 1995 by Judge J. Herbert Small in Lee County Superior Court. Heard in the Court of Appeals 7 January 1997.

On 13 March 1995, the State indicted defendant Fred T. Ware on charges of first degree rape, first degree kidnapping and as an habitual felon. After trial, the jury returned its verdict finding the defendant guilty of felonious restraint and assault on a female, and finding that the defendant is an habitual felon. The trial court entered judgment accordingly on 25 August 1995.

At trial, the State presented the following evidence. The alleged victim, an ex-girlfriend of defendant's, testified that on the evening of 13 March 1995 defendant met her unexpectedly in the parking lot of the K-Mart at which she works. There, defendant told her he had a gun and demanded that she drive him to an unspecified location. She testified that he ultimately directed her to a secluded location known as "Leek's Place." There, after directing her to park the vehicle out of sight of the passing roadway, defendant proceeded to threaten, physically assault, and ultimately rape the victim.

The victim testified that defendant then directed her to drive him to his sister's house. On the way to defendant's sister's house, the victim stopped at a convenience store to use the restroom and then was stopped along the roadside by Fort Bragg military police. She testified that she did not seek help on either of these occasions because of defendant's threats.

Defendant's testimony directly contradicted that of the alleged victim. He admitted to engaging in sexual intercourse with the victim, but contended that the intercourse was consensual and was, in fact, initiated by the alleged victim. Defendant denied ever telling the victim he had a weapon, threatening to harm her or in any way assaulting the alleged victim. In his testimony, defendant denied restraining the alleged victim in any way.

In his closing argument before the jury, counsel for defendant made numerous statements seeming to admit at least a measure of guilt on defendant's part. These statements were clearly made in an attempt to avoid conviction for the more serious offenses (first degree rape and kidnapping) by persuading the jury that defendant was guilty only of the lesser included charges (assault on a female and felonious restraint). The statements by defense counsel did, however, directly contradict defendant's own testimony in which he consistently maintained his innocence of any illegal restraint or sexual offense. After closing arguments were completed, the trial court instructed the jury and the jury retired to begin its deliberations. Four hours later, the jury returned with a verdict that the defendant was guilty of felonious restraint and assault on female.

The trial court denied defendant's motions to set aside the verdicts as inconsistent with the evidence and the State proceeded with the habitual felon indictment. As an habitual felon, the defendant was sentenced to a minimum term of one-hundred months and a maximum term of one-hundred twenty-nine months.

Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General E. Burke Haywood, for the State.

Harrington, Ward, Gilleland & Winstead, by Eddie S. Winstead III, for defendant-appellant.

EAGLES, Judge.

The sole issue raised by defendant here on appeal is whether he was afforded effective assistance of counsel at trial. Defendant argues that he was not afforded effective assistance of counsel because his counsel conceded, contrary to defendant's own trial testimony, that defendant must be guilty of two lesser included charges. The following statements by defense counsel form the primary basis of defendant's objection:

> These sexual acts were happening between them, and when he was restraining her—I'll admit it, she was restrained against her will . . . . She certainly did not consent . . . .

We recognize that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which defendant's counsel admits the defendant's guilt without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). We cannot address defendant's assignments of error here, however, because we cannot determine from the record on appeal that these statements by defense counsel were made without defendant's consent. To properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415 (1981 & Supp. 1995) and G.S. 15A-1420 (1977 & Supp. 1995). This motion must be accompanied by affidavits or other documentary evidence necessary to support defendant's contention that defense counsel's arguments were made without his consent. G.S. 15A-1420(b)(1). Upon the filing of a motion for appropriate relief, the trial court will determine the motion and make appropriate findings of fact.

Dismissed.

Judges GREENE and MARTIN, John C., concur.

MICHAEL T. BESS, PLAINTIFF-EMPLOYEE v. TYSON FOODS, INCORPORATED, SELF-INSURED, DEFENDANT-EMPLOYER

No. COA96-137

(Filed 18 March 1997)

Workers' Compensation § 246 (NCI4th)— permanent loss of senses of taste and smell—attributable to olfactory organ—single injury

The Industrial Commission's finding that plaintiff's permanent loss of his senses of taste and smell was compensable as a single injury pursuant to N.C.G.S. § 97-31(24) was proper where the evidence indicated that defendant's loss of his senses of taste and smell was attributable to damage to one organ—the olfactory organ.

Am Jur 2d, Damages § 275.

Loss of enjoyment of life as distinct element or factor in awarding damages for bodily injury. 34 ALR4th 293.

Appeal by plaintiff from Opinion and Award entered 12 October 1995 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 October 1996.

Law Office of Keith M. Stroud, by Jerry W. Whitley, for plaintiff-appellant.

McElwee & McElwee, by Karen Inscore McElwee, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals an Opinion and Award of the North Carolina Industrial Commission (the Commission), contending the Commission should have treated his permanent loss of the sense of taste and the sense of smell as two separate compensable injuries under G.S. § 97-31(24) (1991). We affirm the Commission.

Pertinent facts and procedural information are as follows: Plaintiff was injured in the course of employment with defendant when struck by a forklift and thrown against a concrete floor. Plaintiff's left ankle was fractured and he suffered multiple fractures of his facial skeleton, the latter requiring surgery. As a result either of the facial injury or the corrective surgery, plaintiff sustained damage

to his olfactory organ causing permanent loss of the senses of taste and smell. Plaintiff subsequently returned to full employment with defendant.

Upon hearing and order by a deputy commissioner and review by the full Commission, plaintiff was awarded benefits based upon a three percent permanent partial disability to his left foot, and also received $20,000 for "loss of an important organ." The latter amount was granted pursuant to N.C.G.S. § 97-31(24), which provides:

> In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000).

Our task in reviewing the decision of the Commission is twofold. First, we determine whether there is any competent evidence in the record to support the Commission's findings of fact; if so, we then must decide whether such findings are legally sufficient to support the Commission's conclusions of law. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 129, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). In the former regard, we must bear in mind that the Commission, and not this Court, adjudges the credibility of witnesses and assigns the weight to be given their testimony. *Id.*

The Commission found as a fact that plaintiff's loss of his senses of taste and smell was caused by permanent damage to his olfactory organ. Competent evidence in the record supports this finding. Plaintiff's physician, Dr. Erwin R. Elber (Dr. Elber), testified by deposition that plaintiff's loss of the sense of smell was due entirely to damage to his olfactory organ, and stated in an 11 October 1993 letter introduced into evidence that "the loss of [plaintiff's] sense of taste is basically the result of his loss of sense of smell." Dr. Elber defined the olfactory organ as

> all the structures collectively concerned with the perception of odors comprising the olfactory epithelium, the olfactory nerve, the olfactory center, and the brain.

The physician further indicated that while loss of taste could also be due to damage to the lingual nerve, he did not know whether plaintiff's loss was due to such damage.

Competent evidence in the record therefore supports the Commission's finding that plaintiff's loss of the senses of taste and smell was attributable to damage to one organ—the olfactory organ. That finding likewise supports, under the terms of G.S. § 97-31(24), the Commission's conclusion of law that "plaintiff sustained the permanent . . . loss of an important organ for which no compensation is payable under any other subdivision" of the statute. *See Pittman*, 122 N.C. App. at 129, 468 S.E.2d at 286.

We note this Court has stated, "[w]e believe the loss of sense of taste and smell is compensable as the loss of *an* important internal organ." *Cloutier v. State*, 57 N.C. App. 239, 245, 291 S.E.2d 362, 366, *cert. denied*, 306 N.C. 555, 294 S.E.2d 222 (1982) (emphasis added). While defendant maintains *Cloutier* has foreclosed a holding by this Court that loss of the senses of taste and smell may be separately compensated under G.S. § 97-31, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (where Court of Appeals has decided same issue, subsequent panel in different case is bound by that precedent unless it has been overturned by a higher court), we do not believe the case *sub judice* requires such a determination.

In sum, the Commission's pertinent finding of fact being supported by competent evidence and in turn supporting its applicable legal conclusion, the single award of $20,000 to plaintiff is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

LIBERTY MUTUAL INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PLAINTIFFS V. PATRICIA E. DITILLO, EXECUTRIX OF THE ESTATE OF JOHN JOSEPH DITILLO; PAULA C. BURGOON, ADMINISTRATRIX OF THE ESTATE OF RALPH JEAN CLARK; DONNA T. STILWELL, ADMINISTRATRIX OF THE ESTATE OF CHARLES BRUCE STILWELL; RELIANCE INSURANCE COMPANY; AND DAY & ZIMMERMAN, INC., DEFENDANTS

No. COA96-487

(Filed 1 April 1997)

1. Workers' Compensation § 86 (NCI4th)— uninsured motorist benefits—lien by compensation carrier

Pursuant to N.C.G.S. § 97-10.2, a workers' compensation carrier had a right to a lien on uninsured motorist benefits paid to employees.

Am Jur 2d, Workers' Compensation §§ 474, 475, 478.

2. Insurance § 515 (NCI4th)— automobile accident—UM coverage—exclusion upon benefit to compensation carrier—enforceable against noninsureds

Passengers in a rental car provided by their employer to the driver were not "persons insured" under the driver's personal automobile policy where the rental car was not listed as an insured vehicle in the driver's policy, and the passengers were not named insureds, residents of the driver's household, or passengers in a vehicle insured by the policy. Therefore, provisions of the driver's policy limiting and excluding uninsured motorist coverage to the extent a workers' compensation carrier would benefit do not conflict with the Motor Vehicle Safety and Financial Responsibility Act and are enforceable against the employee-passengers.

Am Jur 2d, Automobile Insurance §§ 293, 294.

Uninsured motorist coverage: validity of exclusion of injuries sustained by insured while occupying "owned" vehicle not insured by policy. 30 ALR4th 172.

3. Insurance § 515 (NCI4th)— automobile insurance—UM coverage—exclusion upon benefit to compensation carrier— unenforceable against first class insured

Provisions of personal automobile policies limiting and excluding uninsured motorist coverage to the extent a workers' compensation carrier would benefit were unenforceable against

first class insureds under the policies even as to uninsured motorist coverage above the statutory minimum because N.C.G.S. § 20-279.2(b)(3) requires mandatory uninsured motorist coverage equal to the policy's general liability coverage.

Am Jur 2d, Automobile Insurance §§ 293, 294.

Uninsured motorist coverage: validity of exclusion of injuries sustained by insured while occupying "owned" vehicle not insured by policy. 30 ALR4th 172.

4. Workers' Compensation § 85 (NCI4th)—UM insurance proceeds—judgment proof tortfeasor—apportionment between compensation carrier and insureds—trial court without authority

The trial court correctly held that it did not have the discretion to apportion uninsured motorist proceeds, pursuant to N.C.G.S. § 97-10.2, between the workers' compensation carrier and the estates of the first class insureds because there was not a "judgment" insufficient to satisfy the compensation carrier's lien even though the parties stipulated that the uninsured motorist was judgment proof.

Am Jur 2d, Workers' Compensation § 451.

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

Judge GREENE concurring in part and dissenting in part.

Appeal by defendants from judgment entered 1 February 1996 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 14 January 1997.

On 31 January 1991 Charles Bruce Stilwell (Stilwell), John Joseph Ditillo (Ditillo), and Ralph Jean Clark (Clark) died in a motor vehicle accident on U.S. Highway 601 in Union County, North Carolina. The personal representatives of Stilwell, Ditillo, and Clark brought a wrongful death action against the owners and operators of the other vehicles involved in the accident which included Francisco Landaverde Covarrubias, also known as Francisco Landaverde Cobarruvias (Covarrubias). By jury verdict of the Superior Court of Union County, the court found that the negligence of Covarrubias

was the sole proximate cause of the collision which resulted in the deaths of Stilwell, Ditillo, and Clark. Covarrubias is judgment proof and was an uninsured motorist as defined by G.S. 20-279.21 and was operating an uninsured vehicle at the time of the accident.

At the time of the accident Stilwell, Ditillo and Clark were employees of Day & Zimmerman, Inc. (Day & Zimmerman) and were acting in the course and scope of their employment. Day & Zimmerman leased a 1991 Dodge automobile for Stilwell's use. At the time of the accident Stilwell was driving and Ditillo and Clark were riding in the 1991 Dodge. Under the Liberty Mutual and State Farm policies, the Dodge automobile was not listed as an insured vehicle. Reliance Insurance Company (Reliance) insured Day & Zimmerman for workers' compensation claims.

Day & Zimmerman and Reliance filed with the North Carolina Industrial Commission written admissions of liability for the deaths of Stilwell, Ditillo, and Clark. Under the Workers' Compensation Act, Day & Zimmerman and Reliance are liable to the Donna T. Stilwell, Patricia E. Ditillo, and the three daughters of Ralph Jean Clark in the amounts of $162,400.00, $162,400.00, and $130,997.62 respectively.

Prior to the accident Liberty Mutual Insurance Co. (Liberty Mutual) had issued and delivered to Mr. and Mrs. Stilwell, named insureds, its policy of personal automobile insurance (Liberty Mutual policy). The Liberty Mutual policy provided for uninsured liability limits of $100,000.00 per person and $300,000.00 per accident. Also, prior to the accident State Farm had issued and delivered to Ralph Jean Clark, named insured, its policy of personal automobile insurance (State Farm policy). The State Farm policy provided for uninsured liability limits of $100,000.00 per person and $300,000.00 per accident. It is not disputed that at all pertinent times both the Liberty Mutual and State Farm policies were in full force and effect and there has been full compliance by the insureds with all terms of the policies.

On 2 March 1993 plaintiffs filed a complaint seeking a declaratory judgment of their legal obligations under their respective policies. On 1 February 1996 the trial court entered judgment denying coverage to the Ditillo and Clark estates under the Liberty Mutual policy. Also, the trial court found that the Stilwell and Clark estates were each entitled to coverage in the amount of $25,000.00, the mandatory coverage set forth in the Financial Responsibility Act, from their respective insurers; however, the trial court found that Reliance was entitled to a

workers' compensation lien against the independent $25,000.00 recoveries of the Stilwell and Clark estates pursuant to G.S. 97-10.2(f) (1991). Defendants appeal from this judgment.

Dean & Gibson, L.L.P., by Rodney Dean and D. Christopher Osborn for plaintiff-appellee Liberty Mutual Insurance Company.

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Harvey L. Cosper, Jr. and Scott A. Beckey for plaintiff-appellee State Farm Mutual Automobile Insurance Company.

Kennedy, Covington, Lobdell & Hickman, by Wayne Huckel for defendant-appellant Reliance Insurance Company and Day & Zimmerman, Inc.

J. Jerome Miller for defendant-appellant Patricia E. Ditillo.

John E. Hodge, Jr. for defendant-appellant Donna T. Stilwell.

Ronald H. Cox for defendant-appellant Paula C. Burgoon.

EAGLES, Judge.

We note that Reliance failed to file their notice of appeal within thirty days from the judgment as required by N.C.R. App. P. 3. However, in our discretion and pursuant to N.C.R. App. P. 2, 21, we treat Reliance's appeal as a petition for writ of certiorari and allow the petition in the interest of justice.

[1] We first consider whether the trial court erred in its conclusion that defendant-employees' potential uninsured motorist benefits were subject to a lien in favor of the workers' compensation carrier, Reliance, pursuant to G.S. 97-10.2. While applying G.S. 97-10.2, decisions in North Carolina have consistently upheld the workers' compensation carrier's right to a lien on uninsured motorist benefits paid to the employee by or on behalf of a third party as a result of the employee's injury. *Creed v. R.G. Swain & Son*, 123 N.C. App. 124, 472 S.E.2d 213 (1996); *Martinez v. Lovette*, 121 N.C. App. 712, 468 S.E.2d 251 (1996); *Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 47, 434 S.E.2d 625 (1993); *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990). Defendant-employees here have advanced no new arguments or authorities. Accordingly, we respectfully decline to address this issue again here and conclude that the workers' compensation car-

rier, Reliance, has a right to a lien on employee-defendants' potential uninsured motorist benefits.

[2] We next consider whether the trial court correctly concluded that the limitations and exclusions of the Liberty Mutual and State Farm policies denying uninsured motorist coverage are enforceable against employee-defendants. The estates of Stilwell, Ditillo and Clark contest the enforceability of the limitations and exclusions of the Liberty Mutual policy, only the Clark estate contests the enforceability of the limitations and exclusions of the State Farm policy. However, because the provisions at issue of the State Farm and Liberty Mutual policies are identical, we will discuss them together.

> The uninsured motorist limitation of liability provision provides,
>
> Any amount otherwise payable for damages under this coverage shall be reduced by all sums:
>
> . . . .
>
> 2. Paid or payable because of the **bodily injury** under any of the following or similar law:
>
> a. workers' compensation law; . . . .

Similarly, the exclusionary provision provides:

> C. This coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar law:
>
> 1. workers' compensation law; . . . .

In essence, both of these provisions deny coverage to the extent that coverage may benefit a workers' compensation carrier. Plaintiffs attempt to distinguish the application of appellate decisions on the grounds that one provision is a limitation of liability and the other is an exclusion; however, we treat them the same because they have the same practical effect. Moreover, even though the exclusionary language above has not previously been brought to the attention of this court, the exclusionary language did exist in policies where this Court previously has addressed the enforceability of identical limitation of liability provisions. *See Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 47, 54-55, 434 S.E.2d 625, 630 (1993); *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 506, 435 S.E.2d 826, 828 (1993).

In our recent decision, *McMillian v. N.C. Farm Bureau Mutual Ins. Co.*, 125 N.C. App. 247, 480 S.E.2d 437 (1997), this Court encountered an issue almost identical to the one presented here. The *McMillian* Court found exclusionary language of a private automotive insurance policy that reduced the insured's coverage to the extent that it would benefit a workers' compensation carrier was unenforceable where the exclusionary language conflicted with the Motor Vehicle Safety and Financial Responsibility Act of 1953. *See Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 133, 392 S.E.2d 647, 649, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990). Relying on one North Carolina Supreme Court decision, *Manning v. Fletcher*, 324 N.C. 513, 517, 379 S.E.2d 854, 856, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 517 (1989), and several decisions by this Court, *Bailey v. Nationwide Mutual Ins. Co.*, 112 N.C. App. at 54-55, 434 S.E.2d at 630, *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. at 506, 435 S.E.2d at 828), *Ohio Casualty Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990), *Sproles v. Green*, 100 N.C. App. 96, 105-07, 394 S.E.2d 691, 697-99 (1990), *reversed in part on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991), the *McMillian* Court reasoned that because (1) the uninsured motorist policies are personal automobile policies not purchased by the employer, (2) the insureds will not obtain a double recovery, and (3) the worker's compensation policy and uninsured motorist policy are not issued by the same entity, the insureds were entitled to recover the uninsured motorist policy limits despite policy provisions denying coverage to the extent any proceeds would benefit a workers' compensation carrier. 125 N.C. App. at —, 480 S.E.2d at 440-41. However, the *McMillian* Court did not encounter the same arguments presented here.

The estates of Ditillo and Clark argue that the trial court erred in concluding that Ditillo and Clark did not meet the definition of a person for whom the Motor Vehicle Safety and Financial Responsibility Act would require coverage beyond the terms of the policy. The Ditillo and Clark estates contend that the Financial Responsibility Act does apply to them, and therefore, because the provisions of the Financial Responsibility Act conflict with the limitations and exclusions of the Liberty Mutual policy, they are entitled to recover. *See Ohio Casualty Group*, 99 N.C. App. at 133, 392 S.E.2d at 649.

In order for the Financial Responsibility Act to apply to the Ditillo and Clark estates under the Liberty Mutual policy they must be "persons insured" for purposes of the act. G.S. 20-279.21(b)(3) (1993) provides:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

As the North Carolina Supreme Court explained in *Smith v. Nationwide*, 328 N.C. 139, 143, 400 S.E.2d 44, 47 (1991) a "person insured" pursuant to G.S. 20-279.21(b)(3) is divided into two classes:

> "In essence, N.C. Gen. Stat. 20-279.21(b)(3) establishes two 'classes' of 'persons insured': (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle." Members of the second class are "persons insured" for the purposes of UM and UIM coverage only when the insured vehicle is involved in the insured's injuries. Members of the first class are "persons insured" even where the insured vehicle is not involved in the insured's injuries.

328 N.C. at 143, 400 S.E.2d at 47 (quoting *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 130, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986)) (citations omitted). While Stilwell and Clark fit into the first class of persons insured with regard to their respective policies, Ditillo and Clark do not fit into either class of "persons insured" with regard to the Liberty Mutual policy pursuant to G.S. 20-279.21(b)(3). Ditillo and Clark were neither named insureds on the Liberty Mutual policy, residents of the Stilwell household, nor passengers in any vehicle insured by the Liberty Mutual policy. The vehicle in which Stilwell, Ditillo and Clark were riding at the time of the accident was a rental car provided by Day & Zimmerman for a company business trip and was not listed as an insured vehicle on the declarations page of the Liberty Mutual policy. Accordingly, we hold the trial court correctly concluded that the Financial Responsibility Act did not apply to Ditillo and Clark under the Liberty Mutual policy, and therefore, the provisions of the Liberty Mutual policy limiting and excluding coverage to the extent a workers' compensation carrier would benefit were enforceable.

[3] With regard to Stilwell and Clark as first class insureds under their respective policies, plaintiffs argue that to the extent the insurance coverage is above the minimum limits of the Financial Responsibility Act, it is voluntary, and therefore, the exclusionary language of the policy is enforceable as to that voluntary coverage. *See Government Employees Insurance Co. v. Herndon*, 79 N.C. App. 365, 367, 339 S.E.2d 472, 473 (1986). In support of their position, plaintiffs cite *Government Employees Insurance Co. v. Herndon* in which this Court commented, "[T]o the extent the coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by the statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract." 79 N.C. App. at 367, 339 S.E.2d at 473. However, plaintiffs admit that the North Carolina Supreme Court recently concluded in *Bray v. North Carolina Farm Bureau*, 341 N.C. 678, 462 S.E.2d 650 (1995) that G.S. 20-279.21(b)(3) provided for mandatory uninsured motorist coverage equal to the policy's general liability coverage, not the $25,000.00 statutory minimum. Nevertheless, plaintiffs argue that in *Bray* the Supreme Court interpreted an amended version of G.S. 20-279.21(b)(3) that was not in effect at the time of the accident here. After careful review of the version of G.S. 20-279.21(b)(3) that was in effect at the time of the accident here, we conclude that the Supreme Court's analysis in *Bray* of the amended G.S. 20-279.21(b)(3) is equally applicable to its predecessor statute. Accordingly, we conclude that the limiting and exclusionary provisions of the Liberty Mutual and State Farm policies that reduce coverage to the extent a workers' compensation carrier may benefit are unenforceable because they conflict with the Motor Vehicle Safety and Financial Responsibility Act as in our recent decision in *McMillian v. N.C. Farm Bureau Mutual Ins. Co.*

[4] We next consider whether the trial court erred in its determination that it did not have discretion to apportion the uninsured motorist coverage between the workers' compensation carrier, Reliance, and the estate of the first class insureds, Stilwell and Clark, pursuant to G.S. 97-10.2(j), because there was not a judgment insufficient to satisfy the workers' compensation lien. The trial court based its holding on the parties' stipulation that "[i]n determining the extent of insurance coverage liability, the court may treat each case as though a judgment was entered against the uninsured driver in an amount in excess of the combination of all applicable insurance coverages under these policies plus the amount of any applicable work-

ers' compensation benefits." The estates of Stilwell and Clark contend that because the parties have also stipulated that the uninsured motorist, Covarrubias, is judgment proof then any "judgment" would be insufficient to satisfy the subrogation claim of Reliance. The estates of Stilwell and Clark urge that because it would be impossible to obtain proceeds from a judgment against Covarrubias that would satisfy the subrogation lien of Reliance, then the trial court is authorized to apportion the coverage from the Liberty Mutual and State Farm policies between the estates of Stilwell and Clark and Reliance. However, the North Carolina Supreme Court, in *Hieb v. Lowery*, 344 N.C. 403, 474 S.E.2d 323 (1996), recently held that "judgment" pursuant to G.S. 97-10.2(j) does not mean available proceeds. Accordingly, we conclude that the trial court correctly held that it did not have the discretion to apportion the uninsured motorist coverage pursuant to G.S. 97-10.2, because there was not a judgment insufficient to satisfy the workers' compensation carrier's lien.

In conclusion, as to employee-defendants' assignments of error that the trial court erred in concluding that there was a workers' compensation lien, we overrule these assignments of error. As to Ditillo and Clark's assignments of error that the trial court erred in holding that they were not entitled to uninsured motorist coverage under the Liberty Mutual policy, we overrule these assignments of error. As to Stilwell and Clark's assignments of error that the trial court erred in holding that the exclusions and limitations of the Liberty Mutual and State Farm policies reduced the uninsured motorist coverage to $25,000.00, we sustain these assignments of error. As to Stilwell and Clark's assignments of error that the trial court erred in holding that it did not have discretion to apportion the uninsured motorist coverage between their estates and the workers' compensation carrier, Reliance, pursuant to G.S. 97-10.2(j), we overrule these assignments of error.

Affirmed in part, reversed in part.

Judge MARTIN, John C., concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part:

I agree with the majority that the workers' compensation carrier (Reliance) has a lien (subject to section 97-10.2(j)) on uninsured

motorist benefits paid to the estates of Ditillo, Clark and Stilwell (employees of Day & Zimmerman). I agree that Ditillo and Clark are not "persons insured" within the meaning of the Financial Responsibility Act (Act) and were properly denied uninsured benefits under the Liberty Mutual policy.

Policy Provisions

I also agree that neither the "limitation of liability" or "exclusionary" provisions of the State Farm and Liberty Mutual policies are effective to preclude payment of uninsured benefits. This Court has consistently held that a "limitation of liability" clause contained in a personal automobile policy is inconsistent with the Act and not enforceable, *e.g.*, *McMillian v. N.C. Farm Bureau Mut. Ins. Co.*, 125 N.C. App. 247, —, 480 S.E.2d 437, — (1997), to the extent of the mandatory minimum coverage required by the Act. *See Government Employees Ins. Co. v. Herndon*, 79 N.C. App. 365, 367, 339 S.E.2d 472, 473 (1986) (coverage above mandatory minimum is voluntary and governed by terms of policy). Although our courts have not addressed the validity of an "exclusionary" clause of the type contained in these policies, the rationale for rejecting the viability of the "limitation of liability" clause applies equally well to the "exclusionary" clause. In both instances the effect is to eliminate uninsured coverage if there is workers' compensation coverage for the injuries.

In this case at the time the policies were issued the insurance companies had no obligation to provide uninsured coverage in excess of the minimum limits of $25,000. N.C.G.S. § 20-279.21(b)(3) (1961)[1]; N.C.G.S. § 20-279.5(c) (1993). Thus any uninsured coverage in excess of the mandatory $25,000 was voluntary and controlled by the "limitations of liability" and "exclusionary" provisions. I therefore agree with the trial court that the Stilwell and Clark uninsured claims must be limited to $25,000, as any additional uninsured coverage is barred by both the "limitation of liability" and "exclusionary" provisions

1. This statute was amended in 1992 and now provides that if the insured named in the policy "does not reject uninsured motorist coverage and does not select different coverage limits, the amount of uninsured motorist coverage shall be equal to the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy." N.C.G.S. § 21-279.21(b)(3) (1993). Under this statute the uninsured coverage is mandatory, at least to the extent the insured does not reject uninsured coverage and does not select an amount of uninsured coverage in excess of "the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy." *Id.; see Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 685, 462 S.E.2d 650, 654 (1995).

because of the workers' compensation payments to the Stilwell and Clark estates.

Section 97-10.2(j)

I also do not agree that the trial court did not have the discretion to determine the amount of the workers' compensation lien on the uninsured benefits. Section 97-10.2(j) grants the trial court the authority to exercise its discretion in determining the amount of the workers' compensation lien if the "judgment" against the negligent party is "insufficient to compensate the subrogation claim" of the workers' compensation carrier. N.C.G.S. § 97-10.2(j) (1991). The amount of the "judgment" is determined by reducing the verdict by "the amount of the workers' compensation benefits received" by the injured party. *Hieb v. Lowery*, 344 N.C. 403, 410, 474 S.E.2d 323, 327 (1996). In this case, there is no jury verdict and the parties stipulated that the trial court was to "treat" the case as though a judgment had been entered against the uninsured driver in an amount in excess of the combination of all uninsured and workers' compensation benefits. In the Clark case the uninsured benefits (under the State Farm policy) are $25,000 and the workers' compensation benefits (paid through the date of the trial) are $130,997.62 for a total of $155,997.62. In other words, in the Clark case the parties have stipulated to a verdict of $156,000 (an amount reasonably in excess of $155,997.62). The "judgment" (within the meaning of section 97-10.2(j) and *Hieb*) in the Clark case is therefore $25,002.38, determined by subtracting the amount of the workers' compensation benefits ($130,997.62) from the amount of the verdict ($156,000). The judgment (in the Clark case) thus is "insufficient to compensate the subrogation claim" of the workers' compensation carrier (Reliance) and the trial court had discretion to determine the amount of the workers' compensation lien. In the Stilwell case, the record does not reveal the amount of workers' compensation benefits received by the estate prior to the date of the trial. It is thus impossible to determine whether the "judgment" is sufficient or insufficient to compensate the workers' compensation carrier. I would therefore remand the Stilwell case for a determination of the amount of workers' compensation benefits received by the Stilwell estate as of the date of the declaratory judgment hearing before Judge Helms. After that amount is determined the trial court shall then apply the same formula utilized above (in the Clark case) to determine if the "judgment" is sufficient to compensate the subrogation claim of the workers' compensation carrier.

Summary

In summary, I would affirm the trial court's order denying Ditillo and Clark's claims under the Liberty Mutual policy. I would affirm the order of the trial court that Stilwell and Clark are entitled to uninsured benefits under their respective policies (Liberty Mutual and State Farm) in the amounts of $25,000. I would reverse the finding of the trial court that it did not have discretion to apportion the uninsured proceeds pursuant to section 97-10.2(j) and would remand for the exercise of that discretion.

BRENDA M. JORDAN AND BECKY M. WITHERS, HEIRS OF SARAH LEE MOORE, PLAINTIFFS v. W. LUNSFORD CREW, DEFENDANT

No. COA96-169

(Filed 1 April 1997)

1. **Appeal and Error § 418 (NCI4th)— attorney malpractice—drafting of deeds—statute of limitations—affidavit not renewal of original negligence**

In a malpractice action against an attorney who drafted deeds for plaintiffs' grandfather, plaintiffs' argument that defendant's filing of an allegedly false affidavit, almost fourteen years after drafting the deed, renewed and revived defendant's liability for his original negligence was deemed abandoned where plaintiffs cited no authority to support this argument.

Am Jur 2d, Appellate Review § 554.

2. **Limitations, Repose, and Laches § 26 (NCI4th)— attorney—negligent drafting of deed—failure to show continuing relationship—statutes of limitation and repose**

The three-year statute of limitations and four-year statute of repose barred plaintiffs' cause of action against defendant attorney for negligently drafting deeds for plaintiffs' grandfather where plaintiffs failed to show a continuing relationship between defendant and plaintiffs' grandfather and defendant drafted and delivered the deeds over fourteen years prior to plaintiffs' filing a claim. N.C.G. S. § 1-5(c).

Am Jur 2d, Attorneys at Law § 221.

When statute of limitations begins to run upon action against attorney for malpractice. 32 ALR4th 260.

3. **Registration and Probate § 83 (NCI4th)— minor errors in deeds—attorney's failure to correct—no continuing duty—no breach of duties**

Assuming arguendo N.C.G.S. § 47-36.1, which allows for the correction of obvious typographical or other minor errors in deeds, was applicable in this malpractice case, there was no merit to plaintiffs' arguments that (1) the statute created a continuing duty on the part of the drafting attorney to make corrections and (2) defendant attorney's failure to correct the errors pursuant to the statute constituted a breach of his duties.

Am Jur 2d, Attorneys at Law § 221; Negligence § 921.

When statute of limitations begins to run upon action against attorney for malpractice. 32 ALR4th 260.

4. **Estoppel § 20 (NCI4th)— legal malpractice—mistakes in deeds—absence of detrimental reliance—equitable estoppel not applicable**

In an action for legal malpractice against defendant attorney who drafted the deeds for plaintiffs' grandfather, equitable estoppel did not bar defendant from asserting statutes of limitations and repose as defenses where plaintiffs did not allege that misrepresentations by defendant prevented plaintiffs from timely filing an action against defendant.

Am Jur 2d, Estoppel and Waiver §§ 33, 76, 164.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations. 44 ALR3d 760.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations. 45 ALR3d 630.

5. **Fraud, Deceit and Misrepresentation § 28 (NCI4th)— plaintiffs not deceived by misrepresentation—no fraud or constructive fraud**

The trial court properly dismissed plaintiffs' claims for fraud and constructive fraud against the attorney who drafted deeds for plaintiffs' grandfather based on the attorney's refusal to correct mistakes in the deeds and his submission of an allegedly

false affidavit concerning the grantor's intention where the complaint showed that plaintiffs were not deceived by the attorney's failure to correct the errors or by the filing of his affidavit.

Am Jur 2d, Estoppel and Waiver § 76.

Appeal by plaintiffs from order entered 29 November 1995 by Judge Louis B. Meyer in Wake County Superior Court. Heard in the Court of Appeals 22 October 1996.

Plaintiffs brought this action alleging defendant W. Lunsford Crew, an attorney, negligently drafted two deeds conveying certain properties, known respectively as "the homeplace" and "the rental property," from plaintiffs' grandfather to plaintiffs' aunt and mother on 16 September 1980. Plaintiffs' grandfather, still living at the time this action was filed, retained a life estate in both properties. Plaintiffs alleged the defendant "negligently and carelessly" switched the lot numbers for the properties in the deeds so that the lot numbers and the descriptions of the two properties in the deeds did not match. Based on this discrepancy, in February 1992, plaintiffs' aunt claimed ownership of the property known as the homeplace, which plaintiffs alleged had been deeded to their mother, now deceased. Plaintiffs alleged they contacted defendant by phone and letter in February and September 1992, asking him to "correct his errors and clear the cloud from Plaintiffs' title." However, defendant "refuse[d] and reject[ed] at least four formal requests that he acknowledge his errors and act to correct them."

Early in 1994, plaintiffs filed an action against their aunt seeking to quiet title to the property. Defendant filed an affidavit in that case testifying to plaintiffs' grandfather's capacity and competency to execute legal documents. The affidavit also contained the following statement:

> It has come to the attention of the affiant that a discrepancy has arisen concerning the reversal of the house numbers on the deeds prepared for Tommie Williams [plaintiffs' grandfather] conveying real property to his daughters. The affiant was not requested to search the title to the two lots but merely drafted the deeds using the descriptions and information supplied him by Tommie Williams. The conveyance of property, as stated in the two deeds, carry [sic] out the expressed intent of the Grantor as requested of the affiant.

After plaintiffs' grandfather stated it was his intent for plaintiffs' mother to receive the homeplace, plaintiffs' aunt eventually withdrew her claim to the property.

Plaintiffs filed a complaint 8 February 1995 alleging negligence and breach of contract and negligent performance of contract, with plaintiffs as the intended third-party beneficiaries of the contract. Plaintiffs also sought punitive damages, alleging defendant "deliberately and intentionally gave aid to [plaintiffs' aunt] in her attempt to defeat Plaintiffs' efforts to remove the cloud on title caused by him," and defendant "willfully, intentionally and maliciously refused to act under the provisions of N.C. Gen. Stat. § 47-36.1 to correct the errors in a recorded instrument which was prepared by him." Plaintiffs further sought double damages pursuant to N.C. Gen. Stat. § 84-13, alleging defendant's actions constituted a fraudulent practice and constructive fraud.

Defendant filed a motion 6 March 1995 to dismiss the action on the grounds plaintiffs' complaint failed to state a cause of action. After a 9 November 1995 hearing, the trial court entered an order 29 November 1995 granting defendant's motion to dismiss, holding plaintiffs' action was barred by N.C. Gen. Stat. § 1-15(c), and that the complaint failed to state a claim for which relief could be granted. From this order, plaintiffs appeal.

Jordan, Price, Wall, Gray & Jones, L.L.P., by Paul T. Flick and Laura J. Wetsch, for plaintiff-appellants.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Roger A. Askew, for defendant-appellee.

McGEE, Judge.

Plaintiffs argue the trial court erred in dismissing their action based on the applicable statute of limitations and repose because defendant's "failure to correct the deed constituted a 'last act' " from which the statutory period began to run. Plaintiffs also argue the complaint sufficiently stated a cause of action against defendant for a separate claim "based upon his culpability with respect to the false affidavit itself." We find no merit to these arguments and affirm.

[1] Plaintiffs first contend defendant's "refus[al] to correct his prior error" and "utterance and delivery of his false affidavit . . . renewed and revived his liability for his prior negligence." However, plaintiffs

have cited no authority which supports their argument that defendant's filing of an allegedly false affidavit, almost fourteen years after drafting the deeds, renewed and revived defendant's liability for his original negligence, and this argument is deemed abandoned. N.C.R. App. P. 28(b)(5).

[2] We also disagree with plaintiffs' argument that defendant's refusal to correct the errors bars application of the statutes of limitations and repose. N.C. Gen. Stat. § 1-15(c), the applicable statute of limitations and repose for actions involving professional malpractice, states, in pertinent part:

> [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: . . . Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .

Since plaintiffs filed this action in 1995, clearly outside the respective three-year and four-year statutes of limitation and repose, the determinative issue on appeal is whether defendant's last act, for purposes of the statute, was the drafting of the deeds in 1980 or his alleged failure and refusal to correct the error in 1992.

This issue has already been decided by this Court in *McGahren v. Saenger*, 118 N.C. App. 649, 456 S.E.2d 852, *disc. review denied and appeal dismissed*, 340 N.C. 568, 460 S.E.2d 318 (1995). In *McGahren*, an action against an attorney for the negligent drafting of a deed, this Court held that the attorney's last act giving rise to the cause of action was the attorney's delivery of the negligently drafted deed to the plaintiffs. *McGahren*, 118 N.C. App. at 653, 456 S.E.2d at 854. However, plaintiffs contend *McGahren* is distinguishable because plaintiffs' complaint "specifically alleges a *continuing relationship* between [defendant] and the grantor," and therefore, defendant's failure to correct his error constituted a last act from which the statute of repose began to run. We find nothing in plaintiffs' complaint which distinguishes their cause of action from the plaintiffs in *McGahren*.

In *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 (1994), our Supreme Court held an attorney's duty to a client is determined by the nature of the services the attorney agreed to perform. *Hargett*, 337 N.C. at 656, 447 S.E.2d at 788. In that case, the Court determined

an action filed against an attorney for the negligent drafting of a will more than four years after the will was drafted was barred by the applicable statute of repose. *Id.* at 654, 447 S.E.2d at 787. Overruling the prior decision of this Court, which had held defendant's last act was his "failure to fulfill a continuing duty to prepare a will properly reflecting the testator's testamentary intent" and that plaintiff's cause of action did not accrue until the testator's death, the Supreme Court held:

> Under the circumstances here we conclude defendant had no such continuing duty. We hold that under the arrangement alleged in the complaint, which was a contract to prepare a will after which defendant was an attesting witness to the will, defendant's duty was simply to prepare and supervise the execution of the will. This arrangement did not impose on defendant a continuing duty thereafter to review or correct the will or to prepare another will. Absent allegations of an ongoing attorney-client relationship between testator and defendant *with regard to the will* from which such a continuing duty might arise, or allegations of facts from which such a relationship may be inferred, the allegations which are contained in the complaint are insufficient to place any continuing duty on defendant to review or correct the prepared will, or to draft another will.

Hargett, 337 N.C. at 655-56, 447 S.E.2d at 788 (emphasis added). Therefore, absent a continuing duty imposed by the contractual relationship or the nature of the services, the attorney has no continuing duty or relationship to the client. We find nothing in the complaint suggesting an on-going attorney-client relationship between defendant and the grantor with regard to the deeds.

The complaint alleges plaintiffs' grandfather "contracted with Defendant Crew, as his attorney, *to prepare* two deeds conveying the two lots . . . to his two daughters." (emphasis added). The complaint further alleges "[plaintiffs' grandfather] and defendant Crew entered into a valid and enforceable contract for the performance of professional services, namely the *preparation* of the deeds referred to hereinabove." (emphasis added). Therefore, the complaint only alleges a contract for the preparation of two deeds. "After defendant had completed these acts, he had performed his professional obligations; and his professional duty to [the grantor] was at an end." *Hargett*, 337 N.C. at 656, 447 S.E.2d at 788. Although the complaint also later alleges that "Defendant Crew had a continuing duty to properly perform the Contract pursuant to the directions and instructions given

him . . .," this allegation does not change the nature of the duty owed by defendant. In ruling on a motion under N.C.R. Civ. P. 12(b)(6), a court will not accept mere conclusory allegations on the legal effect of the events a plaintiff has set out if those allegations do not reasonably follow from the plaintiff's description of what happened. *Beasley v. National Savings Life Ins. Co.*, 75 N.C. App. 104, 106, 330 S.E.2d 207, 208 (1985), *disc. review dismissed as improvidently allowed*, 316 N.C. 372, 341 S.E.2d 338 (1986). Here, a "continuing duty to properly perform the Contract" does not reasonably follow from a contract only for the preparation of two deeds.

Nor does plaintiffs' allegation that defendant "had a close personal and professional relationship with [plaintiffs' grandfather] and his family, knew of their desires and plans for distribution of their estates and assisted in the planning and implementation of such" give rise to a continuing duty with regard to the preparation of the deeds. We first note this allegation does not allege the relationship continued past the preparation of the deeds. However, even assuming the "close personal and professional relationship" continued after defendant prepared the deeds, the complaint does not allege the deeds were prepared as part of an on-going estate plan, and this particular allegation does little more than allege a general attorney-client relationship.

In discussing a continuing relationship for professional services in the context of a medical malpractice action under the "continued course of treatment" doctrine, this Court has said the doctrine applies "if the physician continued to treat the patient *for the particular disease or condition created by the original act of negligence.*" *Stallings v. Gunter*, 99 N.C. App. 710, 714-15, 394 S.E.2d 212, 215 (emphasis added), *disc. review denied*, 327 N.C. 638, 399 S.E.2d 125 (1990). "Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine. Subsequent treatment . . . 'must be related to the original act, omission, or failure which gave rise to the cause of action.' " *Id.* at 715, 394 S.E.2d at 216 (citations omitted). In the context of an attorney's continuing duty, our Supreme Court has said:

> Just as a physician's duty to the patient is determined by the particular medical undertaking for which he was engaged, an attorney's duty to a client is likewise determined by the nature of the services he agreed to perform. An attorney who is employed to draft a will and supervise its execution *and who has no further*

> *contractual relationship with the testator with regard to the will* has no continuing duty to the testator regarding the will after the will has been executed.

Hargett, 337 N.C. at 656, 447 S.E.2d at 788 (emphasis added). Because plaintiffs have not alleged a continuing professional relationship directly related to the drafting of the two deeds, they have failed to show a continuing relationship between defendant and plaintiffs' grandfather. Therefore, defendant's last act for purposes of the statute of repose was the drafting and delivery of the deeds in 1980. As such, plaintiffs' cause of action for the negligent drafting of the deeds is barred by the statutes of limitations and repose contained in G.S. 1-15(c).

[3] Plaintiffs also argue N.C. Gen. Stat. § 47-36.1, which allows for the correction of obvious typographical or other minor errors in deeds, creates a continuing duty on the part of the drafting attorney to make corrections. However, the statute reads that errors "may be corrected," not "shall be corrected." Even assuming, *arguendo*, the error in this case could be considered a typographical or other minor error, we refuse to construe a statute which *allows* correction of errors as *requiring* corrections, especially where such a construction would create a new independent statutory duty. *See Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 783 (when giving a statute its plain meaning, the courts may not interpolate or superimpose provisions not contained within the statute), *disc. review denied and appeal dismissed*, 304 N.C. 392, 285 S.E.2d 833 (1981). As stated above, defendant's legal duty to the grantor ended upon the drafting and delivery of the deeds. Further, if we were to accept plaintiffs' argument, the statute would forever stay the applicable statutes of limitations and repose for actions involving errors in deeds or other instruments filed with the register of deeds, thereby rendering the statutes of limitations and repose without effect. *See Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981) (interpretations that would create a conflict between two or more statutes are to be avoided). Therefore, we find no merit to plaintiffs allegations that G.S. 47-36.1 creates a continuing duty to correct errors and that defendant's failure to correct the errors under the statute constituted a "breach of fiduciary duty" and a "breach of his duty to the public."

[4] Plaintiffs next argue defendant is equitably estopped from asserting the statutes of limitations and repose as a defense. We also find

no merit to this argument. Equitable estoppel arises when a party has been induced by another's acts to believe that certain facts exist, and that party "rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980). In order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant. *See Duke University v. Stainback*, 320 N.C. 337, 341, 357 S.E.2d 690, 693 (1987). Plaintiffs have not alleged any reliance upon a misrepresentation by defendant which prevented them from timely filing this action. Therefore, equitable estoppel is not available to plaintiffs.

[5] Lastly, plaintiffs argue the trial court erred in dismissing their complaint because it stated a cause of action based on defendant's "affirmative actions in preparing and submitting a false affidavit" which "[gave] rise to a cause of action independent of his initial negligence." Plaintiffs' complaint alleges defendant's actions by submitting the affidavit, refusing to correct the errors, "and his various other failures, refusals and deliberate actions hereinbefore alleged constitute fraudulent practice and constructive fraud under the provisions of N.C. Gen. Stat. § 84-13." However, plaintiffs have failed to state a cause of action for either fraud or constructive fraud.

"The elements of fraud are: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *McGahren*, 118 N.C. App. at 654, 456 S.E.2d at 855 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974)). Constructive fraud differs from actual fraud in that the intent to deceive is not an essential element. *Moore v. Trust Co.*, 30 N.C. App. 390, 392, 226 S.E.2d 833, 835 (1976). Here, the complaint itself shows plaintiffs were not deceived by defendant's failure to correct the errors or by filing his affidavit. Throughout, they believed they were entitled to the homeplace and were never convinced otherwise by any actions of the defendant. Since plaintiffs were never deceived by the misrepresentations of the defendant, an essential element of both fraud and constructive fraud is nonexistent in this case. Therefore, the trial court properly dismissed this cause of action.

We find no merit to plaintiffs' remaining assertions. For the reasons stated, the order of the trial court granting defendant's motion to dismiss is affirmed.

Affirmed.

Judges WYNN and JOHN concur.

STATE OF NORTH CAROLINA v. JAMES STEADMAN RAY

No. COA96-317

(Filed 1 April 1997)

1. Constitutional Law § 257 (NCI4th)— no evidence of locked courtroom door—no evidence witness unable to testify due to locked door—defendant not prejudiced

Assuming *arguendo* that defendant properly preserved the assignment of error that his constitutional right to a public trial was violated because a locked door prevented one of his witnesses from testifying, defendant's assignment of error was without merit because the record was unclear as to whether the door was locked and the record did not indicate why the witness was not present, what the witness would have testified to, or whether defendant was prejudiced because the witness did not testify.

Am Jur 2d, Appellate Review §§ 497, 546, 690.

2. Evidence and Witnesses § 295 (NCI4th)— assault—limitation on cross-examination of victim—prior bad acts—defendant not prejudiced

In a prosecution for assault, defendant, who claimed he shot the victim in self-defense, was not prejudiced by the trial court's limitation of his cross-examination of the victim regarding the victim's prior assault charge where the victim was acquitted on the charge and defendant was permitted to elicit testimony from the victim regarding the victim's other prior bad acts.

Am Jur 2d, Constitutional Law § 849; Evidence § 328.

Other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide. 1 ALR3d 571.

3. Evidence and Witnesses § 264 (NCI4th)— victim's character—exclusion of specific instances—absence of prejudice

It was not error for the trial court to exclude specific evidence of the victim's character in a prosecution for assault where defendant, who contended he acted in self-defense after the victim pulled a gun on him, attempted to elicit testimony from a witness as to whether the witness had knowledge of the victim pulling a gun on anyone else. The trial court permitted other evidence which reflected on the victim's character and defendant did not assert or make an offer of proof showing what the witness's response would have been.

Am Jur 2d, Assault and Battery § 105; Evidence § 373.

Other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide. 1 ALR3d 571.

Cross-examination of character witness for accused with reference to particular acts or crimes—modern state rules. 13 ALR4th 796.

Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed. 564.

4. Criminal Law § 1092 (NCI4th Rev.)— extraordinary mitigating factors—failure to find and impose intermediate punishment

The trial court did not abuse its discretion by failing to find as extraordinary mitigating factors for an aggravated assault that defendant has a support system in the community, defendant acted under strong provocation, and defendant had a medical condition that reduced his culpability; therefore, the trial court did not err by failing to impose an intermediate punishment.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide § 554.

5. Criminal Law § 1600 (NCI4th)— restitution—Medicaid—recommendation by court

The trial court did not err by recommending that defendant make restitution to Medicaid for payments made on behalf of the victim where defendant did not object or challenge the existence or amount of the Medicaid payment. The trial court can recom-

mend restitution as a condition of work release or parole, but the Secretary of the Department of Correction and the Parole Commission determines whether defendant should pay restitution as a condition or work release or parole at the time he is released.

Am Jur 2d, Criminal Law § 572.

Propriety of condition of probation which requires defendant convicted of crime violence to make reparation to injured victim. 79 ALR3d 976.

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

Appeal by defendant from judgment entered 23 August 1995 by Judge Joe Freeman Britt in Johnston County Superior Court. Heard in the Court of Appeals 8 January 1997.

Attorney General Michael F. Easley, by Assistant Attorney General J. Philip Allen, for the State.

R. Daniel Boyce for defendant-appellant.

WALKER, Judge.

On 12 February 1995, defendant was driving his truck when he noticed a signal on his CB radio. He identified the signal as one coming from a person attempting to block the signal of others. Defendant tracked the signal to a location at Smalls Chapel Church. He then tried to block the signal he had been tracking. After approximately five minutes, he was approached by Randy Moye (Moye), along with his son, Joey Moye, and his neighbor, James Lassiter (Lassiter). Defendant testified that he and Moye exchanged words, and that Moye cursed and threatened him. Defendant further testified that after this exchange, Moye reached under his coat and pulled out a gun, but the gun caught on his coat and fell to the ground. Upon seeing Moye reach for the gun on the ground, defendant pulled out his own gun and fired three shots in Moye's direction. Defendant testified that he shot Moye in self-defense because he feared for his life. Moye testified that he and defendant did not know each other before the day of the incident, that he did not threaten defendant, and that he attempted to pull his gun out only after seeing defendant had a gun.

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The trial court instructed the jury on self-defense; however, defendant was convicted of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to a minimum 17 months and a maximum 30 months in the custody of the Department of Corrections and recommended that defendant pay restitution in the amount of $82,000.00.

[1] In his first assignment of error, defendant contends that the trial court erred by locking the courtroom doors during his trial, thereby denying his right to a public trial as guaranteed by N.C. Const. art. I, § 18 and U.S. Const. amends. VI and XIV, § 1. To prove the doors were locked, defendant argues that a witness that was to testify on his behalf was not present in the courtroom upon being called to the stand. When the witness did not appear, defense counsel stated, "I don't know if maybe she's out there and they won't let her come in." (T. at 127).

We first note that defendant did not object to the doors being locked, if in fact they were locked. According to N.C.R. App. P. 10(b), "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." Because defendant did not object to the doors being locked, he has failed to preserve the question for appellate review. However, even if this assignment of error was properly before us, we would find that defendant was not denied his constitutional right to a public trial. It is unclear from the record whether the doors were in fact locked, or whether anyone was prevented from entering or exiting the courtroom. In addition, there is no indication in the record as to why the witness was not present, what she would have testified to, or whether defendant was prejudiced because she did not testify. We therefore find defendant's first assignment of error to be without merit.

[2] In his second assignment of error, defendant contends that the trial court erred by limiting defense counsel's cross-examination of Moye regarding evidence of a prior assault charge against him for which he was acquitted. Defendant argues that such evidence is admissible pursuant to N.C.R. Evid. 404(b) to establish Moye's motive, opportunity, common plan, and absence of mistake on the day of the encounter, and to support his claim that he shot Moye in self-defense.

As the State correctly points out, this assignment of error refers to pages of the transcript that contain the cross-examination of Lassiter rather than Moye. However, we elect to address this assignment of error as it was otherwise properly brought forward by defendant.

According to N.C.R. Evid. 404(b), evidence of prior bad acts is inadmissible to prove action in conformity with character. It is, however, admissible for other purposes, such as to show motive, opportunity, common plan, and absence of mistake. After Moye testified that he had been acquitted of the assault charge, the trial court sustained the State's objection. Defendant, however, failed to establish that this evidence would show motive, etc. on the part of Moye. In any event, defendant was permitted to cross-examine Moye about his history of prior bad acts, including convictions for assault and communicating threats, incidents of Moye impersonating a police officer and frequently blocking CB signals. Therefore, since defendant was permitted to elicit testimony from Moye regarding other prior bad acts, we fail to see how defendant was prejudiced by the trial court's limitation of defendant's cross-examination of Moye as to this one incident.

[3] In his third assignment of error, defendant contends that the trial court erred in refusing to allow evidence of Moye's character under N.C.R. Evid. 404(a)(2) in order to show that he was the aggressor in this altercation.

While evidence of character is generally inadmissible, N.C.R. Evid. 404(a)(2) provides that evidence of pertinent character traits of a victim offered by an accused is admissible. N.C.R. Evid. 405(b) allows for proof of character by evidence of specific instances of conduct in cases where character is an essential element of a charge, claim or defense. Where defendant argues he acted in self-defense, evidence of the victim's character may be admissible for two reasons: "to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor." *State v. Watson*, 338 N.C. 168, 187, 449 S.E.2d 694, 706 (1994), *cert. denied*, —— U.S. ——, 131 L. Ed. 2d 569, *rev'd on other grounds, State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995).

Evidence of a victim's violent character is relevant to prove that defendant's apprehension and need to use force were reasonable if defendant had knowledge of the victim's character at the time of the encounter. *State v. Shoemaker*, 80 N.C. App. 95, 101, 341 S.E.2d 603,

607, *cert. denied*, 317 N.C. 340, 346 S.E.2d 145 (1986). In the present case, defendant did not know Moye nor did he know anything about his reputation prior to the altercation. Thus, evidence of specific instances of Moye's violent character was irrelevant in regards to the reasonableness of defendant's apprehension and need to use force, and the trial court properly denied its admission on this basis.

However, evidence of specific instances of a victim's character, "known or unknown to the defendant at the time of the crime," may be relevant in establishing that the victim was the aggressor when defendant claims self-defense. *Watson*, 338 N.C. at 188, 449 S.E.2d at 706 (citations omitted). Defendant attempted to elicit such evidence by asking Lassiter "[h]ave you ever known Mr. Moye to ever pull a pistol on anyone else out there where you live?" (T. at 75).

In *Watson*, our Supreme Court stated that while evidence was excluded regarding the victim's violent character, the trial court allowed other evidence concerning his character. *Id.* Also, the Court noted that defendant failed to make an offer of proof so as to place the witness' response to the question in the record. *Id.* The Court further held: "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *Id.* (citations omitted). Likewise, here the trial court permitted other evidence which reflected on Moye's character and defendant did not assert or make an offer of proof showing what Lassiter's response would have been. Therefore, we cannot assess the significance of the evidence sought to be elicited and this assignment of error is overruled.

In his fourth assignment of error, defendant contends that the trial court abused its discretion by failing to find extraordinary mitigating factors and impose an intermediate punishment. The trial court did not find any aggravating factors but found the following four mitigating factors: (1) that defendant committed the offense under threat which was insufficient to constitute a defense but significantly reduced his culpability; (2) that defendant has been a person of good character or has had a good reputation in the community; (3) that defendant supports his family; and (4) that defendant has a positive employment history or is gainfully employed.

[4] Defendant contends that the trial court could also have found as extraordinary mitigating factors that he has a support system in the

community, that he acted under strong provocation, and that he had a medical condition that reduced his culpability. Further, the trial court could have imposed an intermediate punishment under N.C. Gen. Stat. § 15A-1340.13(g) (Cum. Supp. 1996). However, the decision to impose an intermediate punishment pursuant to this statute is within the discretion of the trial court. *Id.* In light of the evidence in this case, the trial court did not abuse its discretion by failing to impose an intermediate punishment.

[5] In his final assignment of error, defendant contends that the trial court erred in recommending that he pay restitution to Medicaid in the amount of $82,000.00 as a condition of post release supervision. He argues that the recommendation is not supported by the evidence and is beyond his ability to pay.

At defendant's sentencing hearing, Moye stated, upon inquiry by the trial court, that Medicaid paid his medical bills totalling $82,000.00. Defendant did not object or challenge the amount or existence of the payments by Medicaid. N.C. Gen. Stat. §§ 148-33.2(c), -57.1(c) (1994) provides that the trial court's order of restitution as a condition of work release or parole is a recommendation to the Secretary of the Department of Correction and the Parole Commission, and not an order binding defendant to pay restitution in the amount stated in the judgment. *State v. Wilson*, 340 N.C. 720, 725-26, 459 S.E.2d 192, 195 (1995). If the Department of Correction or the Parole Commission decides that defendant should pay restitution as a condition of work release or parole, a determination of his ability to pay will be made at that time. *See id.* Thus, the trial court did not err by recommending that defendant make restitution to Medicaid in the amount of $82,000.00.

For the above reasons, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges LEWIS and MARTIN, Mark D. concur.

AMIE LEIGH MAYE, PLAINTIFF v. GILBERT GOTTLIEB AND WIFE, NORA WILLIS GOTTLIEB, DEFENDANTS

No. COA96-502

(Filed 1 April 1997)

1. Automobiles and Other Vehicles § 637 (NCI4th)— intersection collision—warning sign—failure to reduce speed—not contributory negligence

In an action arising from a collision at an intersection at which plaintiff had a yellow flashing light and defendant had a red flashing light and a stop sign, plaintiff was not contributorily negligent for failing to decrease her speed in response to a warning sign suggesting a safe speed of 35 m.p.h. where all of the evidence established that plaintiff was driving within the applicable 45 m.p.h. speed limit at the time of the accident.

Am Jur 2d, Automobiles and Highway Traffic § 422.

2. Automobiles and Other Vehicles § 743 (NCI4th)— yellow flashing light—instruction on duties not required

In an automobile accident case arising from an intersection collision, the trial court's refusal to give defendant's requested instruction on plaintiff's duty with respect to a yellow flashing light was not error where the evidence did not support an instruction concerning any duties of plaintiff.

Am Jur 2d, Automobiles and Highway Traffic §§ 232, 233, 248, 254.

Appeal by defendants from judgment entered 25 October 1995 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 15 January 1997.

Tantum & Hamrick, by George N. Hamrick, for plaintiff-appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Mark E. Anderson and Claire A. Modlin, for defendants-appellants.

LEWIS, Judge.

This appeal arises out of an automobile accident which occurred between plaintiff and defendant Gilbert Gottlieb on 14 January 1994

at approximately 7:10 pm at the intersection of Mitchell Mill Road and Forestville Road. Defendant Nora Gottlieb was the owner of the car driven by Gilbert Gottlieb at the time of the accident. On 1 December 1994, plaintiff filed this action alleging that she was damaged as a result of Mr. Gottlieb's negligence. Defendants answered and asserted the defense of contributory negligence.

At trial, the judge ruled that plaintiff was not negligent as a matter of law and submitted only two issues to the jury: whether plaintiff was injured by the negligence of defendants and if so, how much she was entitled to recover. The jury found defendants liable and awarded plaintiff $1,200.00 in damages. Defendants appeal.

The parties stipulated to the following facts: On 14 January 1994, plaintiff was driving east on State Road 2224 ("Mitchell Mill Road") at approximately 7:10 p.m. At approximately the same time, defendant Gilbert Gottlieb, operating a vehicle owned by defendant Nora Gottlieb, was travelling south on State Road 2049 ("Forestville Road").

At trial, Trooper Robert Bowen, of the North Carolina State Highway Patrol, testified that he was called to the scene of the accident on 14 January 1994. He stated that the speed limit on Mitchell Mill Road near the Forestville Road intersection is 45 miles per hour ("m.p.h."), but that prior to the intersection there is a sign warning drivers of the upcoming intersection and suggesting a safe speed of 35 m.p.h. Trooper Bowen further testified that a yellow flashing light faces traffic on Mitchell Mill Road at the intersection, while a stop sign and a red flashing light face traffic on Forestville Road. Additionally, Trooper Bowen testified that based on his investigation, he determined Ms. Maye had been travelling 45 m.p.h. at the time of the accident.

Plaintiff testified that as she approached the intersection with Forestville Road, she saw a car to her left stopped at a stop sign. Ms. Maye further testified that she was travelling approximately 40 or 45 m.p.h. and was aware of the 35 m.p.h. warning sign. According to her testimony, when she was about 20 feet from the intersection, the car suddenly pulled out in front of her and the collision occurred. Plaintiff testified that she had no time to blow her horn, apply her brakes or swerve to avoid the collision. She stated that there was no indication as she approached that the car was about to enter the intersection.

Defendant Gilbert Gottlieb testified that he came to a complete stop that evening at the stop sign on Forestville Road. After looking in both directions and seeing no oncoming cars, he pulled into the intersection. He testified that only when he had entered the intersection did he see plaintiff's car.

[1] On appeal, defendants first argue that the trial court erred in granting a directed verdict for plaintiff on the issue of contributory negligence. They contend that the evidence presented raises an issue of fact as to plaintiff's contributory negligence. We disagree.

In reviewing a trial court's grant of a directed verdict, the evidence must be considered in the light most favorable to the nonmoving party, who should also be given the benefit of all reasonable inferences. *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). In order to avoid a directed verdict for plaintiff on contributory negligence, defendants must have presented more than a scintilla of evidence that plaintiff was negligent. *See id.* at 465, 400 S.E.2d at 93. Evidence creating a mere possibility or conjecture is not sufficient to warrant submission to the jury. *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). In considering this issue, we are mindful that contributory negligence is ordinarily a jury question rather than an issue decided as a matter of law. *See Champs Convenience Stores v. United Chemical Co.*, 329 N.C. 446, 456, 406 S.E.2d 856, 862 (1991).

All of the evidence presented establishes that plaintiff was driving within the speed limit. Defendants acknowledge this, but request that we find a jury issue as to plaintiff's contributory negligence because she was exceeding the 35 m.p.h. recommended safe speed limit for the intersection. However, such evidence alone only raises a mere possibility or conjecture that plaintiff was contributorily negligent. Defendants have provided no other evidence that plaintiff failed to use due care at the time of the accident.

We acknowledge, and both parties agree, that warning signs such as the one present at the intersection in question are advisory and not mandatory in nature. In a prior case dealing with the issue of negligence and warning signs, our Supreme Court observed:

> The purpose of the advisory signs was to warn passing motorists that there was an intersection ahead and that motorists should observe a speed limit of 35 miles per hour. They put motorists on

> notice that there might be conditions ahead, such as traffic in the intersection, which require increased caution. The warning signs and inclement weather were sufficient to enable a reasonable person to foresee that his failure to heed the warning and proceed with increased caution might produce the result which actually ensued here, or some similar result.

Childers v. Seay, 270 N.C. 721, 724, 155 S.E.2d 259, 261 (1967). The *Childers* Court therefore determined that there "was ample evidence of negligence on the part of [the motorist] to go to the jury." *Id.* We find this case distinguishable. In *Childers*, the presence of inclement weather together with the warning sign was sufficient to take the case to the jury. In our case, the only asserted evidence of Ms. Maye's negligence is her failure to decrease her speed in response to the warning sign, even though her speed remained within the legal limit at all times.

Even viewing the evidence in the light most favorable to defendants, we hold that defendants have failed to provide more that a scintilla of evidence supporting plaintiff's contributory negligence and accordingly uphold the trial court's directed verdict in favor of plaintiff on this issue. To hold otherwise would raise the warning signs to the level of mandatory speed limits.

[2] Defendants next argue that the trial court erred by refusing to instruct the jury as to plaintiff's duty with respect to the yellow flashing light. The applicable law provides: "When a defendant submits a request for specific instructions which are correct and are supported by the evidence, the trial court commits reversible error in failing to submit the substance of those instructions to the jury." *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 find no error in the trial court's refusal to give the requested instruction since the evidence does not support an instruction concerning any duties of plaintiff. The trial court correctly refused to submit the issue of contributory negligence to the jury and, therefore, the reasonableness of plaintiff's actions were not before the jury. The court had already decided that there was no evidence to support any breach of duty on her part.

No error.

Judges WALKER and MARTIN, MARK D. concur.

JOSEPH M. WARD, PLAINTIFF v. JERRY LYALL, INDIVIDUALLY AND AS AGENT AND DIRECTOR OF O'BERRY CENTER, DEFENDANT

No. COA96-551

(Filed 1 April 1997)

1. Limitations, Repose, and Laches § 145 (NCI4th)— federal action dismissed—motion to amend order—limitation period not further tolled

Although the statute of limitations for plaintiff's defamation action was tolled from the time defendant filed federal claims and a pendent state action for defamation in a federal district court until the Fourth Circuit affirmed the district court's dismissal of the federal action, the tolling period was not extended by plaintiff's filing of a motion to amend the federal court order of dismissal to allow him one year to refile his state law claim because (1) plaintiff did not seek to amend the federal court order until after he had filed the defamation action in state court, and (2) the motion to amend would not have kept his federal court action alive even if he had filed it prior to instituting the present action since plaintiff was not entitled to amend the federal order as a matter of right and the outcome of his motion was uncertain.

Am Jur 2d, Limitation of Actions §§ 306, 307.

2. Pleadings § 63 (NCI4th)— Rule 11 sanctions—summons and complaint—beyond the scope of Rule 11

It was improper for the trial court to impose Rule 11 sanctions against plaintiff for his failure to promptly serve his summons and complaint, as it did not involve the filing of a pleading or other paper and was therefore beyond the scope of Rule 11.

Am Jur 2d, Pleadings §§ 351, 355 et seq.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed. 107.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed. 556.

Appeal by plaintiff from orders entered 14 August 1995 and 15 August 1995 by Judge W. Russell Duke, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 29 January 1997.

Paul W. White and Joseph M. Ward for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Victoria L. Voight, for defendant-appellee.

LEWIS, Judge.

Plaintiff commenced this defamation action on 19 April 1994. Defendant moved to dismiss the claim and requested that the trial court sanction plaintiff for violations of Rules 4 and 11 of the North Carolina Rules of Civil Procedure. The trial court granted these motions, dismissed plaintiff's case and ordered him to pay $8,500 in monetary sanctions for Rule 11 violations. Plaintiff appeals.

A complete recitation of the facts giving rise to this appeal is unnecessary because its resolution turns solely on procedural grounds. The relevant portions of the procedural history are as follows:

On 27 September 1990, plaintiff filed an action in federal district court alleging various federal claims and a pendent state law claim for defamation arising out of actions occurring in September and October 1989. On 7 November 1991, the district court dismissed plaintiff's federal claims for lack of jurisdiction and failure to state a claim and therefore also dismissed his pendent state law claim for lack of subject matter jurisdiction. The Fourth Circuit, by decision entered 20 April 1993, affirmed.

On 19 April 1994, plaintiff filed the current action in Carteret County Superior Court alleging defamation based on the same factual allegations as were alleged in the federal action. On 28 April 1994, he moved to amend the federal court order to specifically allow him one year to refile his state law claim. This motion was determined moot by the federal district court on 6 June 1994. On 1 December 1994, defendant moved to dismiss and for sanctions in the present action. The trial court granted both motions.

[1] On appeal, plaintiff first argues that the trial court erred in granting defendant's motion to dismiss. Since the trial court correctly determined that plaintiff's claim was time-barred, we find this argument without merit.

Defamation has a one year statute of limitations. N.C. Gen. Stat. § 1-54(3) (1996). However, "filing an action in federal court which is based on state substantive law [tolls] the statute of limitations while

that action is pending." *Clark v. Velsicol Chemical Corp.*, 110 N.C. App. 803, 808, 431 S.E.2d 227, 229 (1993), *aff'd per curiam*, 336 N.C. 599, 444 S.E.2d 223 (1994).

The actions giving rise to plaintiff's alleged defamation action occurred in September and October 1989. Plaintiff filed his federal action, including the pendent state law defamation claim, on 27 September 1990. The statute of limitations was then tolled on the defamation claim until the Fourth Circuit affirmed the district court's dismissal of the federal action on 20 April 1993. However, the statute had clearly run prior to plaintiff's filing of the present action on 19 April 1994.

Plaintiff argues that the statute was still tolled at the time he filed this action because on 28 April 1994 he petitioned the federal court to amend its order to allow him one year to refile his state court claim. There are two fatal flaws in plaintiff's argument.

First, he did not seek to amend the federal court order until over a week after he had already filed the present action, over a year after the federal order was entered. Therefore, when he filed the complaint in this matter, nothing was pending before the federal courts in the prior action; the action was already dead.

Second, even if plaintiff did not have a timing problem, his motion to amend would not serve to extend the tolling period. This Court's decision in *Clark* is instructive. In that case, the plaintiff argued that his federal claim was still alive because his petition for writ of certiorari to the United States Supreme Court was still pending. *Id.* This Court held that since a petition for writ of certiorari is not an appeal of right and its outcome is uncertain, an action does not survive for purposes of tolling the statute of limitations while such a petition is pending. *Id.*, 431 S.E.2d at 229-30.

Likewise, in the present case, plaintiff was not entitled to amend the federal order as a matter of right and the outcome of his petition was uncertain. Following the reasoning set forth in *Clark*, we conclude that his petition to amend would not have kept his federal court action alive even if he had filed it prior to instituting the present state action. Therefore, the statute of limitations bars this matter and the trial court properly dismissed the complaint.

[2] Plaintiff also argues on appeal that the trial court erred in allowing defendant's motion for Rule 11 sanctions. The trial court sanctioned plaintiff under Rule 11 because he knew or should have known

that: 1) the factual allegations of his complaint were not well-founded, 2) the claim was time-barred, and 3) his failure to promptly serve the summons and complaint deprived defendant of due process.

Our review of the propriety of imposing sanctions is *de novo*. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). It is our job to 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." *Id.* If so, we must uphold the trial court's decision to impose or deny sanctions. *Id.*

After careful review of the trial court's findings and conclusions, we conclude that sanctions were properly imposed upon plaintiff for the first two of the three above-mentioned reasons. However, we determine that the trial court erred in imposing sanctions on plaintiff for his failure to promptly serve the summons and complaint.

By its terms, Rule 11 applies only to signed pleadings, motions or other papers. *See Landon v. Hunt*, 938 F.2d 450, 452-53 (3rd Cir. 1991); *see also Turner*, 325 N.C. at 164, 381 S.E.2d at 713) (recognizing that decisions under federal Rule 11 are instructive when interpreting North Carolina's rule). "Rule 11 is not a panacea intended to remedy all manners of attorney misconduct . . . ." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986), *abrogated on other grounds, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990). We hold that it was improper for the trial court to impose Rule 11 sanctions on plaintiff for his failure to promptly serve the summons and complaint, as it did not involve the filing of a pleading or other paper and was therefore beyond the scope of Rule 11.

The trial court's order states that it arrived at the appropriate monetary sanction imposed upon plaintiff by generally considering, *inter alia*, the severity of the violations and the amount necessary to deter further misconduct. Since the trial court did not impose separate sanctions for each type of misconduct, it is impossible for us to determine how much of the $8,500.00 in monetary sanctions stemmed from the trial court's improper sanctioning of plaintiff for his actions in serving the summons and complaint. For this reason, we remand this matter to the trial court for a new hearing to determine the appropriate amount of sanctions to be imposed under Rule 11.

In conclusion, we affirm the trial court's dismissal of plaintiff's action because it is barred by the statute of limitations. We also affirm the award of sanctions on all grounds enumerated by the trial court except those relating to the timing of service, which we reverse. We remand to the trial court for a hearing to determine the proper amount of sanctions.

Affirmed in part, reversed in part and remanded.

Judges WALKER and MARTIN, MARK D. concur.

HENRY CARLTON GRASTY, PLAINTIFF/APPELLEE v. NANCY GRASTY, DEFENDANT/APPELLANT

No. COA96-642

(Filed 1 April 1997)

1. Divorce and Separation § 135 (NCI4th)— equitable distribution—marital property—value—evidence unreasonable and not credible

In an equitable distribution proceeding, the trial court did not err in failing to value a business classified as marital property where the court found defendant's evidence of the value of the business to be "wholly incredible and without reasonable basis," and plaintiff did not offer any evidence of the value of the business.

Am Jur 2d, Divorce and Separation §§ 937 et seq.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

Necessity that divorce court value property before distributing it. 51 ALR4th 11.

2. Divorce and Separation § 135 (NCI4th)— equitable distribution—marital asset—no credible evidence of value—failure to appoint appraiser

The trial court did not abuse its discretion by not appointing an expert to appraise a marital asset in an equitable distribution

proceeding even though there was no credible evidence of the value of the marital asset. The decision to appoint an expert and to call the expert as a witness are matters left to the sound discretion of the trial court. N.C.G.S. § 8C-1, Rules 614(a), 706(a)

Am Jur 2d, Divorce and Separation §§ 937 et seq.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

Necessity that divorce court value property before distributing it. 51 ALR4th 11.

3. Divorce and Separation § 135 (NCI4th)— equitable distribution—marital asset—absence of valuation—not distributable

The trial court erred in distributing a business found to be a marital asset in an equitable distribution proceeding where the trial court refused to value the business since only assets which are classified as marital property and valued are subject to distribution. Any interest the parties have in the business will pass outside the Equitable Distribution Act and be determined by alternative means of property division, including other relevant statutes, the common law or private agreements.

Am Jur 2d, Divorce and Separation §§ 937 et seq.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation. 15 ALR4th 224.

Necessity that divorce court value property before distributing it. 51 ALR4th 11.

Appeal by defendant from judgment entered 19 December 1995 in Haywood County District Court by Judge Steven J. Bryant. Heard in the Court of Appeals 19 February 1997.

Patrick U. Smathers, P.A., by Patrick U. Smathers, for plaintiff-appellee.

Hyler & Lopez, by George B. Hyler Jr. and Robert J. Lopez, for defendant-appellant.

GREENE, Judge.

Nancy Grasty (defendant) appeals an equitable distribution judgment in which the trial court distributed a service station and wrecker business (Grasty Service) to Henry Grasty (plaintiff).

The plaintiff and defendant were married in December 1971, separated on 26 January 1992, and subsequently divorced in March 1993. Both plaintiff and defendant requested equitable distribution. At the equitable distribution hearing the defendant presented evidence that Grasty Service was a marital asset and based on expert testimony had a value of at least $100,000. The trial court found that Grasty Service was a marital asset and distributed the asset to the plaintiff. With respect to the value of Grasty Service the trial court entered the following finding:

> [t]he defendant attempted to establish the net fair market value of the plaintiff's interest in Grasty Service through expert testimony which the court found to be wholly incredible and without reasonable basis and therefore failed to establish by the greater weight of the evidence the value of the plaintiff's interest in the business as of the date of the parties' separation[; and] plaintiff offered no value for [Grasty Service].

The issues are whether the trial court erred (I) in failing to value Grasty Service based on the evidence presented; and (II) in failing to appoint an expert to value Grasty Service.

The defendant argues that in this equitable distribution proceeding the trial court was required to determine the value of the plaintiff's interest in Grasty Service and that in the absence of evidence presented by the parties, the trial court must "appoint an expert or invoke other inherent powers, or seek out other evidence on which to base a valuation."

I

[1] This Court has repeatedly held that the trial court has an obligation to "make specific findings regarding the value" of any property classified as marital, including any business owned by one of the parties to a marriage. *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272 (dental practice), *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985); *see e.g., Draughon v. Draughon*, 82 N.C. App. 738, 741, 347 S.E.2d 871, 873 (1986) (landscaping business), *disc. rev. denied*,

319 N.C. 103, 353 S.E.2d 107 (1987); *Byrd v. Owens*, 86 N.C. App. 418, 421, 358 S.E.2d 102, 105 (1987) (computer distributing business). This obligation, however, exists only when there is credible evidence supporting the value of the asset. *Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83-84 (1993) (trial court did not err in failing to place a value on pension where no evidence presented as to value of pension); *Byrd*, 86 N.C. App. at 424, 358 S.E.2d at 106 (personal guarantees must be valued "if the defendant presents sufficient evidence as to their value"); *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990) (requirement that court value property "exist[s] only when evidence is presented to the trial court which supports the claimed . . . valuation"); 1 Michael Asimow, et al., *Valuation and Distribution of Marital Property* § 19.02[2], at 14-16 (1996) ("it is the responsibility of the parties to present sufficient evidence regarding valuation").

The credibility of the evidence in an equitable distribution trial is for the trial court. *Hunt v. Hunt*, 85 N.C. App. 484, 491, 355 S.E.2d 519, 523 (1987) (argument that trial court "erred in not giving sufficient weight to the testimony of" expert rejected on grounds that credibility of witness was for the trial court). The trial court, as the finder of fact in an equitable distribution case, *Kiser v. Kiser*, 325 N.C. 502, 511, 385 S.E.2d 487, 492 (1989) (no right to jury trial in equitable distribution action), has "the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Brown v. Brown*, 264 N.C. 485, 488, 141 S.E.2d 875, 877 (1965); *Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994) (trial court judge is "sole arbiter of credibility and may reject the testimony of any witness in whole or in part").

In this case the defendant offered evidence as to the value of Grasty Service and the trial court found it to be "wholly incredible and without reasonable basis." Because the defendant failed to present credible evidence as to the value of Grasty Service, the trial court did not err in failing to value that asset.

II

[2] We also reject the argument of the defendant that in the absence of credible evidence as to the value of a marital asset the trial court is required to appoint an expert to appraise the asset. Our Rules of Evidence provide that the trial court "may" appoint an expert to value

an asset in an equitable distribution proceeding, N.C.G.S. § 8C-1, Rule 706(a) (1992); *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272, and call that expert as a witness in the trial. N.C.G.S. § 8C-1, Rule 706(a); N.C.G.S. § 8C-1, Rule 614(a) (1992) (court may call witness). Courts, however, "rarely call witnesses, and rightly so" because it "is hard for judges to maintain impartiality while becoming an active participant in summoning witnesses." Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 335, at 542-46 (2d ed. 1994) (hereinafter *Federal Evidence*). Furthermore, the calling of a witness by the trial court "interferes with the presentation of evidence by the parties, depriving them of a portion of the control which the adversary system normally confers upon them." *Federal Evidence* § 366, at 737. In any event, the decision to appoint an expert and to call that expert as a witness are matters left to the sound discretion of the trial court. *Federal Evidence* § 367, at 741; *see State v. Brown*, 306 N.C. 151, 175-76, 293 S.E.2d 569, 585, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982) (within judge's discretion to appoint expert). In this case there is nothing to suggest that the trial court abused its discretion in not appointing an expert to value Grasty Service. The trial court was certainly not required, as argued by the defendant, to appoint an expert.

[3] Because only those assets and debts that are classified as marital property and valued are subject to distribution under the Equitable Distribution Act (Act), *Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E.2d 765, 767, *disc. rev. denied*, 315 N.C. 182, 337 S.E.2d 856 (1985); *see Miller*, 97 N.C. App. at 79, 387 S.E.2d at 183, and because the trial court (on this record) properly refused to assign a value to Grasty Service, plaintiff's interest in Grasty Service is not subject to distribution under the Act. The trial court therefore erred in distributing Grasty Service in this equitable distribution proceeding. Accordingly, we remand to the trial court for the entry of a new equitable distribution judgment based on this record (without the taking of new evidence). *See Miller*, 97 N.C. App. at 80, 387 S.E.2d at 184 (parties have had ample opportunity to present evidence and will not be given a second opportunity). Any interest the parties have in Grasty Service will necessarily pass outside the Act and be determined by alternative means of property division, including other relevant statutes, the common law or private agreements. *Hagler v. Hagler*, 319 N.C. 287, 292, 354 S.E.2d 228, 233 (1987) (equitable distribution is one means of property division); *see Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E.2d 793 (1979).

We have reviewed the defendant's remaining arguments and determine without discussion that there was no error with regard to each.

Affirmed in part and remanded.

Judges WALKER and McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 MARCH 1997

ALLEN v. DURHAM PUBLIC SCHOOLS No. 96-744	Durham (96CV01567)	Dismissed
BAILEY v. BAILEY No. 96-405	Forsyth (95CVD3971) (93CVD1605)	Affirmed Affirmed
BAUCOM v. CHARLOTTE-MECKLENBURG BD. OF EDUC. No. 96-694	Mecklenburg (94CVS4861)	Reversed and Remanded
BELL v. HEALTHHAVEN NURSING CENTER No. 96-969	Ind. Comm. (268556)	Affirmed
BENTLEY v. MGM TRANSPORT CORP. No. 96-538	Ind. Comm. (315565)	Afirmed in part, part, vacated and remanded in part
BOOE v. PASSERALLO No. 96-967	Forsyth (95CVS3476)	Affirmed
BRIDGES v. TATE No. 96-168	Durham (92CVS01662)	No Error
CAMERON v. ESTATE OF RICHARDSON No. 96-622	Wilson (5CVS1553)	Dismissed
COLDWELL BANKER ALAMANCE REALTY v. HUFFMAN No. 95-1154	Alamance (93CVS1617)	No error in part and reversed and remanded in part for a new trial on defendant's counterclaim of breach of fiduciary duty.
EDDINGTON v. CHARLOTTE-MECKLENBURG BD. OF EDUC. No. 96-561	Mecklenburg (95CVS3449)	Reversed
EDWARDS v. WEST No. 96-261	Cumberland (94CVS3954)	Dismissed
FOUSHEE v. NESTE RESINS CORP. No. 95-1104	Chatham (93CVD506)	Affirmed in part; Reversed in part

FRANKLIN v. TONEY No. 96-706	Burke (95CVS258)	Affirmed
HEFTER v. CORNET, INC. No. 96-406	Wake (94CVS09173)	Affirmed in part, dismissed in part
HELMS v. HELMS No. 95-1383	Rowan (95CVD1700)	Affirmed
IN RE TAYLOR No. 96-935	Bladen (95CVS750)	Appeal Dismissed
JOYNER v. STAR DELIVERY & TRANSFER No. 96-465	Forsyth (95CVS5620)	Affirmed
KHERA v. BERRY No. 96-1158	Wake (95CVS4153)	Dismissed
LOWERY v. PHILLIPS No. 96-678	Forsyth (95CVS4180)	Affirmed
MEARES v. COLONY DODGE, INC. No. 95-1275	Davidson (94CVS693)	Affirmed
NORRIS v. NORRIS No. 96-504	Harnett (95CVD368)	Affirmed in part, reversed in part and remanded
NYE v. ROGERS No. 96-338	Wake (91CVS13156)	Affirmed
RECREECH, INC. v. SWARINGEN No. 96-1033	Pasquotank (87CVD437)	Affirmed
ROBINSON v. POWELL No. 96-285	Catawba (94CVS334)	Vacated and remanded for dismissal for lack of jurisdiction
SHIELDS v. STORIE No. 96-1119	Caldwell (95CVS5)	No Error
SPEARS v. BILTMORE SQUARE ASSOC. No. 96-220	Buncombe (94CVS2959)	Affirmed
STATE v. ANDERSON No. 96-1137	Cumberland (95CRS8506)	No Error

STATE v. ANDREWS-BEY No. 96-1174	Wake (95CRS36831)	Appeal Dismissed
STATE v. BATES No. 96-1132	Yadkin (95CRS1091) (95CRS1092) (96CRS1045)	No Error
STATE v. BREWINGTON No. 96-1144	Wayne (95CRS14148)	No Error
STATE v. BRINSON No. 96-301	Hertford (95CRS989) (95CRS990)	No Error
STATE v. BRINSON No. 96-1048	Edgecombe (95CRS7861)	No Error
STATE v. CARTER No. 96-1170	Stokes (96CRS3518)	Remanded
STATE v. CAUDILL No. 96-879	Wilkes (93CRS3780) (93CRS3781) (93CRS3783) (93CRS3784) (93CRS3786) (93CRS3787)	No Error
STATE v. CAVINESS No. 96-1143	Union (95CRS13244)	No Error
STATE v. CHEATHAM No. 96-562	Durham (94CRS19871) (94CRS19872)	No Error
STATE v. COLE No. 96-612	Wayne (95CRS1313)	No Error
STATE v. DAVIS No. 96-1225	Guilford (94CRS9213) (94CRS20109)	Judgment vacated. Remanded for resentencing.
STATE v. EDWARDS No. 96-1058	Mecklenburg (95CRS22181) (95CRS22186) (95CRS22189) (95CRS22194) (95CRS22200)	No Error
STATE v. ELLEDGE No. 96-1127	Watauga (94CRS2547)	Appeal Dismissed

STATE v. FARRISH No. 96-548	Pitt (94CRS1878) (94CRS1879) (94CRS1880) (94CRS12768) (94CRS12769)	No Error
STATE v. GALLOWAY No. 96-920	Durham (95CRS21516) (95CRS29635)	No Error
STATE v. GARRETT No. 96-954	Edgecombe (95CRS11940)	No Error
STATE v. GRAHAM No. 96-1063	Mecklenburg (95CRS40381)	No Error
STATE v. HAWK No. 96-1079	Robeson (95CRS7202) (95CRS7203) (95CRS7204)	No Error
STATE v. HINTON No. 96-921	Durham (95CRS1400) (95CRS1401)	No Error
STATE v. HOLMAN No. 96-1156	Alleghany (94CRS958)	Appeal Dismissed
STATE v. JOHNSON No. 96-1012	Cabarrus (96CRS731) (95CRS3133)	No Error
STATE v. LANEY No. 96-1123	Caldwell (94CRS9157)	No Error
STATE v. LOCKHART No. 96-1050	Union (96CRS00381)	No Error
STATE v. MADEIRA No. 96-1010	Pasquotank (95CRS3511)	No Error
STATE v. MOORE No. 96-1016	Pamlico (95CRS901)	Vacated and remanded
STATE v. O'QUINN No. 96-1256	Forsyth (95CRS14387) (95CRS35039) (95CRS35041) (95CRS35042) (95CRS35043)	No Error
STATE v. PARNELL No. 96-1084	Randolph (94CRS13960)	No Error

STATE v. PENNELL No. 96-1074	Alexander (94CRS2977) (94CRS2978) (94CRS2979) (94CRS2980) (94CRS2981) (94CRS2982) (94CRS3249) (94CRS3378)	Affirmed
STATE v. POWELL No. 96-431	Edgecombe (95CRS3724)	New Trial
STATE v. RANDOLPH No. 96-971	Mecklenburg (95CR64133)	No prejudicial error
STATE v. ROARY No. 96-1018	Stanly (94CRS2508)	Affirmed
STATE v. SMITH No. 96-704	Lee (95CRS11013) (95CRS11014) (95CRS11015) (95CRS10896) (95CRS10897) (95CRS7675)	No Error
STATE v. STEELE No. 96-1157	Randolph (93CRS15521) (93CRS15522) (93CRS15523) (93CRS15747) (93CRS15748)	No Error
STATE v. WALKER No. 96-1089	Gaston (95CRS11698) (95CRS24198)	No Error
STATE v. WILLOUGHBY No. 96-1082	Alamance (95CRS21052) (95CRS21053)	No Error
STATE v. WRIGHT No. 96-1056	Durham (95CRS1411) (95CRS1412)	Reversed

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BARBER v. MARTIN No. 96-1006	Moore (94CVS01204)	Affirmed
BROWN v. TOWN OF RICHLANDS No. 96-526	Onslow (89CVS24)	Reversed and Remanded

COLLINS v. COLLINS No. 96-470	Guilford (95CVS8469)	Dismissed
DAVIS v. MEGA FORCE TEMPORARIES No. 96-635	Ind. Comm. (229328)	Reversed and Remanded
DEAL v. INVESTORS TITLE INS. CO. No. 96-372	Catawba (93CVS2401)	Reversed and Remanded
DWYER v. THURBER No. 95-1306	Durham (94CVS02137)	Affirmed
HANDSHAW v. WACHOVIA BANK & TRUST CO. No. 96-549	Pitt (93CVS332)	Affirmed
HERRING v. MURRAY CRANE SERVICE No. 96-1150	Ind. Comm. (315175)	Affirmed
JERNIGAN v. McLAMB'S LP GAS & SUPPLY CO. No. 96-181-2	Ind. Comm. (083470)	Reversed and Remanded
MATTHEWS v. FRANKLIN No. 96-790	Northampton (94CVS195)	Affirmed
McLEOD v. SOUTHLAND LIFE INS. CO. No. 96-697	Scotland (93CVS926)	Affirmed
MONROE v. KING No. 96-516	Cabarrus (95CVS0997)	Affirmed
NADEAU v. WILKES SENIOR VILLAGE No. 96-1159	Ind. Comm. (268556)	Affirmed
O'CARROLL v. ROBERTS INDUSTRIAL CONTRACTORS No. 96-1152	Wake (92CVS12664)	Dismissed
SHIPP v. BALLARD No. 95-1330	Carteret (92CVS339)	Affirmed
SOLESBEE v. THOMPSON No. 96-452	Polk (93CVS179)	Reversed in part, Affirmed in part, and Remanded
STATE v. BROWN No. 96-1138	Onslow (94CRS5277)	No Error

STATE v. CHATMAN No. 96-1117	Robeson (94CRS23889)	No Error
STATE v. JONES No. 96-453	Halifax (94CRS10194) (94CRS10195) (94CRS10196) (94CRS10197) (94CRS10198) (94CRS9232) (94CRS9365) (94CRS9366)	No Error
STATE v. MASON No. 96-1248	Cabarrus (96CRS180) (96CRS733)	No Error
STATE v. MOORE No. 96-673	Rowan (95CRS8532) (95CRS8533) (95CRS8534)	No Error
STATE v. WILSON No. 96-1107	Warren (91CRS1239) (91CRS1240)	No Error
STATE v. ZAMORA No. 96-842	Wake (94CRS88960)	No Error
TEXTRAM, INC. v. TRITEX INTERNATIONAL, LTD. No. 96-559	Mecklenburg (95CVS14109)	Affirmed
TIEDE v. ROBUCK HOMES, INC. No. 96-945	Ind. Comm. (832447)	Affirmed

APPENDIXES

ORDER ADOPTING AMENDMENT
TO THE GENERAL RULES OF PRACTICE
FOR THE SUPERIOR AND DISTRICT COURTS

ORDER ADOPTING AMENDMENTS TO
THE CODE OF JUDICIAL CONDUCT

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the deletion of the current subsection (b) to Rule 5 and the adoption of a new subsection (b) to Rule 5 to read as follows:

5. Form of Pleadings

(b) All papers filed in civil actions, special proceedings and estates shall include as the first page of the filing a cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts. The Clerk of Superior Court shall not reject the filing of any paper that does not include the required cover sheet. Instead, the clerk shall file the paper, notify the filing party of the omission and grant the filing party a reasonable time not to exceed five (5) days within which to file the required cover sheet. Until such time as the party files the required cover sheet, the court shall take no further action other than dismissal in the case.

Adopted by the Court in Conference this 25th day of June, 1997. The amendment shall be effective 1 August 1997 and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution by mail to each superior court judge in the State.

Orr, J.
For the Court

Order Delaying Implementation of the Order Adopting Amendment to General Rules of Practice for the Superior and District Courts

The Court, having met in Conference, hereby delays the implementation of the above "Order Adopting Amendment to General Rules of Practice for the Superior and District Courts" until 1 October 1997.

Adopted by the Court in Conference this 24th day of July, 1997. This order shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution by mail to each superior court judge in the State.

Orr, J.
For the Court

ORDER ADOPTING
AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

The Code of Judicial Conduct first published in 283 N.C. at 779-80, as amended from time to time thereafter, is hereby amended by the addition of a preamble thereto which shall read as follows:

PREAMBLE

A violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or willful misconduct in office, or otherwise as grounds for disciplinary proceedings pursuant to Article 30 of Chapter 7A of the General Statutes of North Carolina. No other code or proposed code of judicial conduct shall be relied upon in the interpretation and application of this Code of Judicial Conduct.

Canon 2B of the said Code of Judicial Conduct is hereby amended so that, as amended, it reads as follows:

B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. A judge may, based on personal knowledge, serve as a personal reference or provide a letter of recommendation. He should not testify voluntarily as a character witness.

Canon 2 of the said Code of Judicial Conduct is hereby amended by adding a section C to read as follows:

C. A judge should not hold membership in any organization that practices unlawful discrimination on the basis of race, gender, religion or national origin.

Canon 3A(6) of the said Code of Judicial Conduct is hereby amended so that, as amended, it reads as follows:

(6) A judge should abstain from public comment about a pending or impending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina Law and should encourage similar abstention on the part of court personnel subject to his direction and con-

trol. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the proceedings of the Court.

Canon 7 of the said Code of Judicial Conduct is hereby amended so that, as amended, it reads as follows:

CANON 7

A Judge Should Refrain from

Political Activity Inappropriate

to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political party or any subdivision thereof. For example, he may not attend a political convention on any level as a delegate, nor may he preside or serve as an officer. He may attend any political party meeting, provided he does not violate any other canon, particularly 7A(1)(b) or (c).

(b) make speeches in support of a political party or candidate for public office or publicly endorse a candidate for public office.

(c) solicit funds for a political organization or candidate other than as permitted under canon 7B(2).

(d) make financial contributions to any candidate for public office, including a candidate for a judgeship, unless the candidate is a member of the judge's or judicial candidate's family.

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a nonjudicial office, except that he may continue to hold his judicial office while being a candidate for election to

or serving as a delegate in a state constitutional convention if he is otherwise permitted by law to do so.

(4) The foregoing provisions of canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates:

(a) should maintain the dignity appropriate to the judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; nor misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not solicit campaign funds but may establish committees of responsible persons to secure and manage the expenditure of such funds. Such committees are not prohibited from soliciting campaign contributions from anyone not otherwise prohibited by law from making such contributions or from soliciting public support from anyone. A candidate is not prohibited from soliciting public support from anyone. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Adopted by the Supreme Court in conference this 25th day of May, 1997, to become effective on 1 September 1997.

Orr, J.
For the Court

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

§ 11 (NCI4th). Abatement on ground of pendency of prior action; actions arising out of domestic relationships

Plaintiff's Nash County claim for specific performance of a separation agreement abated because there was a pending action between the same parties for the same cause in Hertford County where plaintiff counterclaimed in defendant's divorce action in Hertford County for enforcement of the separation agreement, defendant filed a reply seeking affirmative relief, and plaintiff's notice of dismissal was ineffective because it was filed without defendant's consent. **Lafferty v. Lafferty,** 611.

ACTIONS AND PROCEEDINGS

§ 10 (NCI4th). Requirement for controversy between parties; mootness

Plaintiff condemnee's action seeking to compel disclosure of appraisals and other records associated with the condemnation of her land pursuant to the Public Records Act was moot where defendants offered plaintiff the opportunity to inspect the requested records. **Shella v. Moon,** 607.

ADMINISTRATIVE LAW AND PROCEDURE

§ 10 (NCI4th). Agency powers and duties to adopt or promulgate rules or regulations

The adoption and implementation by the Criminal Justice Education and Training Standards Commission of rules used in this case to revoke petitioner's law enforcement officer certification were not in excess of the statutory authority granted to the Commission. **Mullins v. N.C. Crim. Justice Educ. and Train. Stds. Comm.,** 339.

§ 46 (NCI4th). Adjudication or other resolution of dispute or "contested" case; settlement or agreement of parties

Failure of the State Board of Dental Examiners to attempt to resolve a patient's complaint against a dentist through informal settlement procedures did not prevent the dispute from becoming a contested case within the jurisdiction of the Board. **Homoly v. N.C. State Bd. of Dental Examiners,** 127.

ADOPTION OR PLACEMENT FOR ADOPTION

§ 57 (NCI4th). Placement of children for adoption; control and authority over child placing, generally

Where legal and physical custody of a child vested in the DSS upon termination of the parental rights of her parents, the DSS was authorized to place the child for adoption, and the trial court had no authority to interfere with the DSS's decision to remove the child from the current foster home and to place her in another foster home for possible adoption. **In re Asbury,** 143.

The trial court should not have entertained the guardian ad litem's request for relief from the DSS's alleged abuse of discretion in removing a child from one foster home to another for possible adoption where no adoption petition had been filed. **Ibid.**

ADVERSE POSSESSION

§ 27 (NCI4th). Commencement and tolling of period of possession generally

Respondent is entitled to undivided ownership of the subject property by adverse possession where petitioner instituted a special proceeding for partition in 1973, respondent denied that petitioner had any rights in the property whatsoever, and respondent conducted his affairs with regard to the property from the date he filed his answer in 1973 until the date of this action as if it were his own. **Beck v. Beck,** 402.

APPEAL AND ERROR

§ 112 (NCI4th). Appealability of particular orders; orders denying motion to dismiss; jurisdiction over person or property of defendant, or subject matter, generally

An interested party has the right of immediate appeal from an adverse ruling as to jurisdiction over the person or property of defendant, but such appeal is limited to whether our statutes permit our courts to entertain the action and whether that violates due process. **Saxon v. Smith,** 163.

The denial of a motion to dismiss based on sovereign immunity is immediately appealable. **Stone v. N.C. Dept. of Labor,** 288; **Hunt v. N.C. Dept. of Labor,** 293.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

The appellate court will not consider plaintiffs' contention that certain testimony was irrelevant where plaintiffs' objection at trial was based on discovery matters and plaintiffs' counsel informed the trial court that no relevancy question existed. **Holt v. Williamson,** 305.

Defendant did not properly preserve for appeal his objection to an arresting police officer's opinion testimony where another officer subsequently provided the same testimony without objection. **State v. Willis,** 537.

§ 155 (NCI4th). Preserving question for appeal; effect of failure to make motion, objection, or request; criminal actions

Defendant waived appellate review of an issue as to whether the trial court erred by finding certain mitigating factors in one judgment but failing to do so in other judgments where defendant made no objection at trial and presented no argument as to how the alleged error amounted to plain error or is preserved by rule or law. **State v. Evans,** 301.

§ 156 (NCI4th). Preserving question for appeal; effect of failure to make motion, objection, or request; civil actions

Plaintiff's governmental/proprietary function argument was dismissed where plaintiff did not raise the issue in the trial court. **Pharr v. Worley,** 136.

§ 170 (NCI4th). Mootness of questions involving child custody

A requirement in an order arising from a visitation dispute that the children be enrolled in public school rather than home schooled was not a moot question where a subsequent consent order had allowed the home schooling as long as the mother cooperated with the father's visitation. **Elrod v. Elrod,** 407.

APPEAL AND ERROR—Continued

ATTORNEYS AT LAW

AUTOMOBILES AND OTHER VEHICLES

CONSTITUTIONAL LAW—Continued

which are owned, operated and managed by entities including religious bodies. **In re Springmoor, Inc.**, 184.

§ 103 (NCI4th). Prohibition against taking of property; generally; remedy for unlawful taking

The State met its burden of proving that plaintiff's takings claim, which arose from the denial of permits to place fill material on a peninsula in Topsail Sound, lacks an essential element for purposes of summary judgment by establishing that practical alternatives exist to plaintiff's proposed construction plan. **King v. State of North Carolina**, 379.

§ 119 (NCI4th). State and federal aspects of religious freedom generally

A statute which exempts from property tax homes for the sick, aged, and infirm which are owned, operated, and managed by a religious body violated the constitutional prohibition against establishment of religion. **In re Springmoor, Inc.**, 184.

§ 199 (NCI4th). Former jeopardy; particular combinations of charges; kidnapping and robbery

The trial court's enhancement of defendant's sentence for kidnapping for use of a firearm and imposition of a consecutive sentence for armed robbery did not impose multiple punishments for the same conduct in violation of defendant's right against double jeopardy. **State v. Evans**, 301.

§ 228 (NCI4th). Former jeopardy; new trial after appeal generally

The trial court's finding of the heinous, atrocious, or cruel aggravating factor at a resentencing of defendant for second-degree murder after the Court of Appeals had ruled that the evidence at the original sentencing hearing was insufficient to support this aggravating factor did not violate defendant's double jeopardy rights. **State v. Mason**, 216.

§ 257 (NCI4th). Right to fair and public trial; exclusion of public

Defendant's right to a public trial was not violated on the ground a locked door prevented one of his witnesses from testifying where the record was unclear as to whether the courtroom door was locked, and the record did not indicate why the witness was not present and what testimony the witness would have given. **State v. Ray**, 721.

§ 309 (NCI4th). Effectiveness of assistance; counsel's abandonment of client's interest

The Court of Appeals could not address defendant's assignment of error that he received ineffective assistance of counsel in his trial for first-degree rape and first-degree kidnapping because his counsel conceded his guilt of two lesser offenses where the Court could not determine from the record on appeal whether these statements by defense counsel were made without defendant's consent. **State v. Ware**, 695.

CORPORATIONS

§ 208 (NCI4th). Claims against dissolved corporations; claims as consequence of entire asset purchase

The purchaser of all or substantially all the assets of a corporation is generally not liable for the debts of the old corporation, but this rule is subject to certain excep-

COURTS—Continued

§ 15.2 (NCI4th). Grounds for personal jurisdiction; actions involving injury to person or property

The trial court did not err in an action for libel and slander, malicious prosecution, abuse of process, and intentional infliction of emotional distress arising from a dispute over the purchase of a collectible gun and the publication of a newsletter by denying defendant's motion to dismiss for lack of jurisdiction. **Saxon v. Smith,** 163.

§ 19 (NCI4th). Stay of proceeding to permit trial in foreign jurisdiction

There was no abuse of discretion where a trial court denied a motion to stay a North Carolina action pending resolution of a Virginia complaint. **Saxon v. Smith,** 163.

CRIMINAL LAW

§ 433 (NCI4th Rev.). Argument of counsel; defendant's failure to testify; comment by prosecution

The prosecutor's statements to the jury that defendant had the same subpoena powers as the State and that they could infer from defendant's failure to call witnesses that such individuals would have nothing to add did not constitute an indirect reference to defendant's decision not to testify. **State v. Banks,** 681.

§ 478 (NCI4th Rev.). Conduct of counsel during trial; questioning of defendant, witnesses

The trial court's instruction cured any error related to the prosecutor's improper reference during cross-examination of defendant to the fact that defendant had been represented by several different attorneys. **State v. Fletcher,** 505.

§ 695 (NCI4th Rev.). Tender of written instructions; request for instructions

The trial court did not err by failing to instruct the jury on the definition of "impairing substance" where defendant made only an oral request for such an instruction. **State v. Pyatt,** 147.

§ 849 (NCI4th Rev.). Instructions on defense witnesses generally

The trial court did not commit plain error by instructing the jury that it should scrutinize defendant's testimony carefully based on his interest in the outcome of the case. **State v. Fletcher,** 505.

§ 990 (NCI4th Rev.). Effect of arrest of judgment

The trial court could properly sentence defendant for armed robbery, even though a different judge had previously arrested judgment on that charge, when defendant's death sentence on a related first-degree murder charge was set aside and a sentence of life imprisonment was imposed. **State v. Quick,** 654.

§ 1063 (NCI4th Rev.). Sentence hearing generally

Defendant was not prejudiced by any error at his sentencing proceeding when the judge sentenced defendant on an arrested judgment for a robbery conviction without calendaring or otherwise notifying defendant of the hearing where the hearing took place immediately after defendant was sentenced to life in prison on a first-degree murder charge, and the evidence supporting the only aggravating factor concerning a prior conviction was the same as that heard with regard to sentencing for the murder conviction. **State v. Quick,** 654.

CRIMINAL LAW—Continued

§ 1092 (NCI4th Rev.). Structured Sentencing Act; deviation for extraordinary mitigation

The trial court did not abuse its discretion by failing to find extraordinary mitigating factors and to impose an intermediate punishment for an aggravated assault. **State v. Ray,** 721.

§ 1096 (NCI4th Rev.). Structured Sentencing Act; enhanced sentence; presence of firearm

The trial court's enhancement of defendant's sentence for kidnapping for use of a firearm and imposition of a consecutive sentence for armed robbery did not impose multiple punishments for the same conduct in violation of defendant's right against double jeopardy. **State v. Evans,** 301.

The trial court erred in enhancing defendant's sentence for voluntary manslaughter, a Class E felony, because he was armed with a firearm since defendant's use of the firearm was used to prove an element of the offense. **State v. Smith,** 562.

§ 1097 (NCI4th Rev.). Structured Sentencing Act; mitigated sentences; factors

The trial court did not err by failing to find factors in mitigation for sentencing where defendant was sentenced to a term within the presumptive range under the Structured Sentencing Act. **State v. Caldwell,** 161.

§ 1110 (NCI4th Rev.). Structured Sentencing Act; consideration of aggravating and mitigating factors generally; discretion of trial court

The trial court did not abuse its discretion by sentencing defendant to fourteen additional years based solely on one prior misdemeanor conviction where the trial court found one mitigating factor and one aggravating factor. **State v. Fletcher,** 505.

§ 1156 (NCI4th Rev.) Fair Sentencing Act; nonstatutory aggravating factors; course of criminal conduct

The sentencing court did not consider dismissed charges as a nonstatutory aggravating factor in sentencing defendant who had pled guilty to murder, burglary and kidnapping charges. **State v. Monserrate,** 22.

§ 1178 (NCI4th). Fair Sentencing Act; statutory aggravating factors; especially heinous, atrocious, or cruel offense; cases involving death of victim generally

The evidence presented at a resentencing hearing for second-degree murder was sufficient to support the trial court's finding of the especially heinous, atrocious, or cruel aggravating factor. **State v. Mason,** 216.

§ 1214 (NCI4th Rev.). Aggravating factors under Fair Sentencing Act; what constitutes a prior conviction

It was improper for the trial court to take judicial notice of defendant's prior conviction for purposes of enhancing his sentence where the judicial notice was of defendant's pardon of forgiveness. **State v. Clifton,** 471.

§ 1246 (NCI4th Rev.). Fair Sentencing Act; statutory mitigating factors; passive participant generally

The sentencing court's failure to find as a mitigating factor for kidnapping and burglary that defendant played a minor role or was a passive participant was not error. **State v. Monserrate,** 22.

DIVORCE AND SEPARATION—Continued

§ 144 (NCI4th). Distribution of martial property; distribution factors generally

The trial court properly considered as a distributional factor the contributions plaintiff husband made of his separate property to the acquisition of the residence titled in the entireties. **Collins v. Collins,** 113.

§ 145 (NCI4th). Distribution of marital property; distribution factors; income and earning potential

The trial court in an equitable distribution case erred by failing to consider evidence that plaintiff husband was in good health and employed and that defendant wife was not in good health and was unemployed. **Collins v. Collins,** 113.

§ 400 (NCI4th). Child support; parents' ability to support child; consideration of party's actual income

The trial court in a child support action erred by ordering that defendant father respond to discovery requests only as to property owned individually and subject to his exclusive control and by limiting defendant's responses regarding his inheritance or trust interests to those items subject to his ownership and control. **Shaw v. Cameron,** 522.

§ 551 (NCI4th). Counsel fees and costs; child custody; sufficiency of evidence to support award generally

The trial court did not abuse its discretion in charging as costs of a child custody case to be paid by plaintiff father the fees of a guardian ad litem appointed to represent the interest of the child. **Van Every v. McGuire,** 578.

§ 552 (NCI4th). Counsel fees and costs; child custody; determination of party's ability to pay

The evidence in a child custody proceeding did not support the court's finding that the mother expended her full income on food and other household expenses, and the trial court erred in considering the relative estates of the parties in assessing the mother's ability to employ adequate counsel and her entitlement to counsel fees. **Van Every v. McGuire,** 578.

§ 566 (NCI4th). Registration of foreign support order

Defendant timely objected to the registration of a German domestic support agreement where he was served with notice of registration on 2 July, filed a motion to vacate on 10 July, and filed an amended motion to vacate on 24 July in which he first argued that the settlement agreement was not an order of the court. He was not required to state his grounds for objecting to the registration of the order. **Lang v. Lang,** 573.

The trial court did not err by allowing the registration of a German divorce decree and settlement agreement where defendant contended that the agreement was not a "judgment, decree, or order of support" as contemplated by URESA. **Ibid.**

Issues regarding enforcement of a German support order which defendant contended would be more appropriately addressed by the German courts were not addressed by the Court of Appeals where plaintiff had registered the order but had not sought enforcement. **Ibid.**

EMINENT DOMAIN

§ 29 (NCI4th). Nature of estate acquired or sought

The trial court's judgments vesting fee simple title in plaintiff were vacated where there was nothing in the facts found by the court which would justify taking the property in fee simple rather than acquiring an easement. It is an abuse of discretion for a condemning authority to condemn a greater estate in land than necessary. **City of Charlotte v. Cook,** 205.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 45 (NCI4th). Dredging, filling, or altering bodies of water; permits

The trial court did not err in an action arising from the denial of permits to place fill material on a peninsula in Topsail Sound by treating facts found in the judicial review proceeding as binding for purposes of this action where the prior findings had been upheld on appeal. **King v. State of North Carolina,** 379.

In an action arising from the denial of permits to place fill material on a peninsula in a sound, the State met its burden of establishing that its denial of plaintiff's Section 401 certification was not an unreasonable exercise of police power. **Ibid.**

ESTOPPEL

§ 20 (NCI4th). Conduct of party asserting estoppel; reliance

Equitable estoppel did not bar defendant attorney from asserting statutes of limitations and repose as defenses in a legal malpractice action based on defendant's drafting of deeds where plaintiffs did not allege that misrepresentations by defendant prevented plaintiffs from timely filing an action against defendant. **Jordan v. Crew,** 712.

EVIDENCE AND WITNESSES

§ 84 (NCI4th). Relation of evidence to facts in issue

The trial court correctly determined that plaintiff's refusal to meet with a psychologist who was a defendant in the underlying action was relevant to a Rule 11 motion. **Renner v. Hawk,** 483.

§ 148 (NCI4th). Existence of liability insurance

The trial court did not abuse its discretion by granting an allegedly negligent doctor's *motion to suppress evidence* that the doctor and two of his expert witnesses shared a common malpractice carrier. **Warren v. Jackson,** 96.

§ 161 (NCI4th). Settlement negotiations

The trial court did not err when imposing Rule 11 sanctions by considering statements made by the attorney where she contended that her statements were made during compromise negotiations. **Renner v. Hawk,** 483.

§ 264 (NCI4th). Character or reputation of persons other than witness; victim

It was not error for the trial court to exclude specific evidence of the victim's character in a prosecution for assault where defendant, who contended he acted in self-defense after the victim pulled a gun on him, attempted to elicit testimony as to whether the witness had knowledge of the victim pulling a gun on anyone else. **State v. Ray,** 721.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 906 (NCI4th). Other particular evidence as hearsay; testimony as to what someone else had said

The admission of hearsay testimony by a shooting victim's relative that he told defendant that he had heard that defendant told someone he was going to shoot up the victim's trailer house was harmless error where the testimony was admitted to establish premeditation and deliberation and defendant was convicted only of voluntary manslaughter. **State v. Smith,** 562.

§ 1020 (NCI4th). Admissions or declarations against interest; to show boundary lines

Respondent was not prejudiced by the trial court's exclusion of a former landowner's declaration against interest as to the location of a boundary line. **Jones v. Arehart,** 89.

§ 1294 (NCI4th). Confessions and other inculpatory statements; fraud, deception, or trickery generally

The trial court erred in a first-degree murder prosecution of a sixteen-year-old defendant by denying him the opportunity to cross-examine a police officer as to specific acts in a prior investigation where defendant sought to reveal that the detective had deceived at least one other person in an effort to obtain a confession. **State v. Baldwin,** 530.

§ 1426 (NCI4th). Propriety of admitting matters relating to real evidence which has been destroyed by government

A rape defendant's due process rights were not violated by the police department's destruction of a rape kit where the exculpatory value of DNA testing of seminal material in the kit was highly speculative. **State v. Banks,** 681.

§ 1457 (NCI4th). Establishment of chain of custody; blood samples

The trial court properly excluded blood grouping test results as evidence that plaintiff's husband was not the father of her child in an action to establish that defendant was the father of the child where the test report did not meet the prerequisites for admission under G.S. 8-50.1(b)(1) and no competent evidence established the chain of custody of the blood sample. **Catawba County ex rel. Kenworthy v. Khatod,** 131.

§ 1757 (NCI4th). Experiments and tests; generally

The trial court in a second-degree murder prosecution properly admitted the results of blood splatter experiments where the experiments were relevant. **State v. Clifton,** 471.

§ 1759 (NCI4th). Experiments and tests; discretion of trial court

The trial court did not abuse its discretion in admitting expert testimony on a visibility experiment conducted by the defense during a reconstruction of an automobile accident where some differences existed between the experiment and the actual circumstances surrounding the accident. **Jones v. Rochelle,** 82.

§ 1767 (NCI4th). Experiments and tests; similarity of circumstances or conditions generally

The trial court in a second-degree murder prosecution properly admitted the results of experiments that demonstrated that it was probable that defendant was in close proximity to her husband at the time he was shot because of back splatter blood stains. **State v. Clifton,** 471.

EVIDENCE AND WITNESSES—Continued

EXECUTORS AND ADMINISTRATORS

§ 40 (NCI4th). Personal representatives; general duties

An attorney who was the administrator d.b.n. of decedent's estate had a fiduciary duty to decedent's illegitimate son even though the son was not an heir where the attorney deposited funds of a trust established for the son's benefit into the estate account and disbursed those funds when he had been put on notice that the son was the trust beneficiary. **Melvin v. Home Federal Savings & Loan Assn.**, 660.

§ 45 (NCI4th). Personal representatives; liabilities generally

The trial court's instructions in an action for breach of fiduciary duty by the attorney and administrator d.b.n. of an estate did not mislead the jury even though they did not include an instruction on proximate cause. **Melvin v. Home Federal Savings & Loan Assn.**, 660.

FIDUCIARIES

§ 2 (NCI4th). Evidence of fiduciary relationship

A fiduciary relationship existed between plaintiff and defendant where defendant served as attorney for the estate of plaintiff's father, was appointed administrator of the estate, and became successor trustee of a trust in favor of plaintiff as beneficiary. **Melvin v. Home Federal Savings & Loan Assn.**, 660.

FRAUD, DECEIT AND MISREPRESENTATION

§ 28 (NCI4th). Complaint; detrimental reliance

The trial court properly dismissed plaintiffs' claims for fraud against the attorney who drafted deeds for plaintiffs' grandfather based on the attorney's refusal to correct mistakes in the deeds and his submission of an allegedly false affidavit concerning the grantor's intention where the complaint showed that plaintiffs were not deceived by the attorney's actions. **Jordan v. Crew**, 712.

GAMES, AMUSEMENTS, AND EXHIBITIONS

§ 6 (NCI4th). *Amusement devices; inspections and tests*

A breach of the duty owed under a rule promulgated by the Commissioner of Labor imposing a duty upon the Department of Labor to inspect amusement devices may give rise to an action for negligence against the Department of Labor. **Hunt v. N.C. Dept. of Labor**, 293.

Plaintiff go-cart rider stated a claim against the Department of Labor under the Tort Claims Act for negligent inspection of the seat belt of a go-cart. **Ibid.**

HIGHWAYS, STREETS, AND ROADS

§ 11 (NCI4th). Streets and highways in and around municipalities generally

The trial court did not err in an action arising from an automobile accident in granting summary judgment in favor of defendant-city where plaintiff alleged negligence in the placement of a street sign but defendant had no legal responsibility for the area where the alleged negligence occurred. **Eakes v. City of Durham**, 551.

INTENTIONAL INFLICTION OF MENTAL DISTRESS

§ 2.1 (NCI4th). Sufficiency of evidence, generally

Testimony by plaintiff's experts that alleged harassment "could" or "might" have triggered plaintiff's severe emotional distress was sufficient to show that the harassment caused the emotional distress where the experts' testimony was supported by additional evidence. **Poole v. Copland, Inc.,** 235.

§ 3.1 (NCI4th). Damages

In an action for intentional infliction of emotional distress by sexual harassment at work, the trial court did not err by submitting separate damages issues to the jury as to defendant employee and defendant employer where plaintiff sought recovery against the employer under theories of negligent retention and ratification, but the court should also have submitted separate damages issues for ratification and negligent retention by the employer. **Poole v. Copland, Inc.,** 235.

§ 3.2 (NCI4th). Instructions

The "thin skull" rule can be applied to mental as well as physical injury cases, and the trial court did not err by giving an instruction defining severe emotional distress as including exacerbation of a preexisting dissociative disorder. **Poole v. Copland, Inc.,** 235.

Where the trial court instructed the jury in an action based on sexual harassment that severe emotional distress includes exacerbation of a preexisting dissociative disorder, the court should also have given a peculiar susceptibility proximate cause instruction on the issue of liability requiring the jury to find that the alleged sexual harassment could reasonably be expected to injure a person of ordinary mental condition. **Ibid.**

JUDGES, JUSTICES, AND MAGISTRATES

§ 26 (NCI4th). Disqualification from proceedings generally

The trial judge did not err in failing to recuse himself from a suppression hearing seeking to have a search warrant declared invalid where the judge had issued the search warrant. **State v. Monserrate,** 22.

JUDGMENTS

§ 207 (NCI4th). Essential elements of res judicata; identity of issues

The Industrial Commission did not err by concluding that plaintiff was not collaterally estopped from bringing a negligence claim under the State Tort Claims Act arising from being placed in seclusion and restraints by defendant's employees where summary judgment was granted for defendants in a prior action arising from the same incident. **Alt v. John Umstead Hospital,** 193.

§ 274 (NCI4th). Determination of whether collateral estoppel applies to specific issues

The trial court correctly excluded testimony about the commercial reasonableness of plaintiffs' retention of knitting machines used as collateral where the parties had entered into a consent judgment which was silent as to any finding that plaintiff should have sold the knitting machines at any time prior to the judgment and provided for the subsequent sale of the machines. The consent judgment was a final judgment as to the issue of commercial reasonableness of the retention and sale of the machines up to the date of its entry. **NationsBank of N.C. v. American Doubloon Corp.,** 494.

LIMITATIONS, REPOSE, AND LACHES—Continued

§ 19 (NCI4th). Emotional distress

The trial court erred in dismissing on the pleadings plaintiff's claims for negligent and intentional infliction of emotional distress based on a plea in bar of the statute of limitations. **Russell v. Adams,** 637.

§ 24 (NCI4th). Medical malpractice; continued course of treatment

The continuing course of treatment doctrine applied to a malpractice claim against a psychiatrist where plaintiff began his treatment in 1980, the doctor-patient relationship terminated in 1988, and although the sessions after 1986 primarily dealt with plaintiff's newly diagnosed HIV status, defendant continued to treat plaintiff after 1986 for conditions that plaintiff alleged were caused by defendant's negligence before 1986. **Cobo v. Raba,** 320.

§ 26 (NCI4th). Attorney and accountant malpractice

The three-year statute of limitations and four-year statute of repose barred plaintiffs' claim against defendant attorney for negligently drafting deeds for plaintiffs' grandfather fourteen years earlier where plaintiffs failed to show a continuing relationship between defendant and plaintiffs' grandfather. **Jordan v. Crew,** 712.

§ 29 (NCI4th). Improvements to real property generally

The trial court did not err in an action arising from the structural collapse of a house by submitting the statute of limitations issue to the jury where there was evidence that the damage to plaintiffs' home did not occur more than three years prior to the date the action was instituted. **Markham v. Nationwide Mut. Fire Ins. Co.,** 443.

§ 119 (NCI4th). *Postponement or suspension of statute;* tolling; disability or incapacity; cumulative disabilities

The trial court erred in an action arising from a relationship between a School of the Arts professor and a student by dismissing plaintiff's complaint on the ground it was not filed within the three-year statute of limitations where plaintiff alleged that his mental illness rendered him incompetent and therefore tolled the statute of limitations, and defendants had sufficient notice from the allegations in plaintiff's complaint that he was prevented from filing his claims due to mental disability. **Soderlund v. N.C. School of the Arts,** 386.

§ 145 (NCI4th). Commencement of new action after failure of original suit; original action filed in federal court

Although the statute of limitations for plaintiff's defamation action was tolled from the time defendant filed federal claims and a pendent state action for defamation in a federal district court until the Fourth Circuit affirmed the district court's dismissal of the federal action, the tolling period was not extended by plaintiff's filing of a motion to amend the federal court order of dismissal to allow him one year to refile his state claim. **Ward v. Lyall,** 732.

MORTGAGES AND DEEDS OF TRUST

§ 119 (NCI4th). Restriction of deficiency judgments respecting purchase-money mortgages and deeds of trust

Where plaintiff failed to perfect a security interest in personal property transferred as part of the sale of business property, the anti-deficiency statute barred plaintiff from bringing an action against the purchaser or the guarantors for the

NEGLIGENCE—Continued

NEGOTIABLE INSTRUMENTS AND OTHER NEGOTIABLE PAPER

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

PLEADINGS—Continued

Plaintiffs' conduct in bringing an action to determine the validity of a county's purchase of property for the purpose of transferring it to the State as an inducement to build a prison on the site did not merit Rule 11 sanctions against plaintiffs. **Carter v. Stanly County,** 628.

It was improper for the trial court to impose Rule 11 sanctions against plaintiff for his failure to promptly serve his summons and complaint. **Ward v. Lyall,** 732.

PUBLIC OFFICERS AND EMPLOYEES

§ 53 (NCI4th). Leave policies

In an action arising from the dismissal of an employee who was unable to return to work after she had exhausted her leave time, the State Personnel Commission committed no error of law in determining 25 NCAC 1D.0519 to be applicable. **Beauchesne v. University of N.C. at Chapel Hill,** 457.

In an action arising from petitioner's discharge from a secretarial position at the University of North Carolina at Chapel Hill after exhausting her sick and vacation leave, her application for unpaid leave did not qualify as an alternative proposal. **Ibid.**

The State Personnel Commission properly ruled that petitioner did not have a right of appeal regarding failure to process in a timely manner a shared leave application. **Ibid.**

§ 68 (NCI4th). Personal liability; civil liability

A high school assistant softball coach did not have governmental immunity from liability for acts of negligence because she is an employee of defendant board of education and not an officer, but plaintiff high school softball player's contributory negligence barred her claim against the assistant coach for injuries received while practicing on a rough playing field. **Daniel v. City of Morganton,** 47.

PUBLIC WORKS AND CONTRACTS

§ 21 (NCI4th). Informal bidding permitted for certain contracts

The State Personnel Commission properly found that plaintiff, the director of the Rockingham County DSS, failed to comply with the bidding and public record requirements of G.S. 143-131 when he purchased $9,600 worth of imaging equipment and software, without informal bids, and arranged to have the seller provide two separate invoices so the purchase appeared to be valued at less than $5,000. **Fuqua v. Rockingham County Bd. of Soc. Serv.,** 66.

§ 47 (NCI4th). Minimum number of bids for public contracts

The trial court erred by granting summary judgment in favor of the Board of Education and by denying plaintiff's motion for a preliminary injunction in an action seeking declaratory and injunctive relief arising from electrical bids for renovation of the media centers at two elementary schools. The statutory discretion accorded local boards or governing bodies is not without limitation and the evidence raises a genuine issue of material fact as to the propriety of the exercise of the Board's discretion. **Ronald G. Hinson Electric, Inc. v. Union County Bd. of Educ.,** 373.

§ 63 (NCI4th). Employee grievances and grievance procedures generally

Plaintiff was properly dismissed as the director of the Rockingham County DSS for personal misconduct without notice where plaintiff violated the purchasing requirements of G.S. 14-131 and county purchasing procedures. **Fuqua v. Rockingham County Bd. of Soc. Serv.,** 66.

RECORDS OF INSTRUMENTS, DOCUMENTS, OR THINGS

§ 4 (NCI4th). Disclosure by public agency of confidential information or trade secrets initially disclosed to agency

A summary judgment for plaintiff newspaper which ordered disclosure of an HMO's price list by defendant hospital was affirmed. **Wilmington Star-News v. New Hanover Regional Medical Center,** 174.

§ 14 (NCI4th). Inspection of and access to public records generally

Where plaintiff condemnee did not appeal the trial judge's ruling in a condemnation proceeding that appraisals and other records sought by plaintiff were not discoverable, plaintiff could not then seek the same records in an action seeking an order compelling the disclosure of public records pursuant to G.S. 132-9. **Shella v. Moon,** 607.

REGISTRATION AND PROBATE

§ 83 (NCI4th). Irregular registration; minor or clerical errors

Assuming that the statute permitting the correction of obvious typographical or other minor errors in deeds was applicable in this attorney malpractice case, the statute did not create a continuing duty on the part of the drafting attorney to make corrections and defendant attorney's failure to correct errors pursuant to the statute did not constitute a breach of his duties. **Jordan v. Crew,** 712.

ROBBERY

§ 72 (NCI4th). Robbery with firearms or other dangerous weapons; sufficiency of evidence to show force or intimidation preceded or was concomitant with taking

The evidence was sufficient to show that defendant Hooks' use of a handgun was inseparable from the taking of merchandise from a store so as to support defendants' conviction of armed robbery where it tended to show that after leaving a store with merchandise the defendants had stolen, defendant Hooks brandished a gun at store personnel in the store's parking lot to thwart the efforts of store personnel to retain lawful possession of the store merchandise. **State v. Barnes,** 75.

§ 138 (NCI4th). Lesser included offenses of robbery with firearm; larceny

The trial court in an armed robbery case did not err by denying defendants' requests to instruct the jury on the lesser included offenses of misdemeanor larceny and assault. **State v. Barnes,** 75.

SCHOOLS

§ 172 (NCI4th). Liability of school, board of education, and school personnel for negligence; liability insurance; waiver of tort immunity

A board of education was not liable for injuries suffered by a student during the school's softball practice where insurance procured by the board specifically excluded liability for injuries to any person injured while participating or practicing in a contest or exhibition sponsored by the board. **Daniel v. City of Morganton,** 47.

SCHOOLS—Continued

§ 182 (NCI4th). Liability of school, board of education and school personnel for negligence; contributory negligence of student

Although an assistant softball coach was negligent by holding practice on a rough playing field and advising student players that it would improve their game if they practiced on the rough field, plaintiff's claim against the assistant coach for injuries received when she was struck by a ball that took an erratic hop was barred by plaintiff's contributory negligence where plaintiff knew that other players had been hit by balls taking erratic hops on the field and considered the field unsafe before her injury occurred. **Daniel v. City of Morganton,** 47.

§ 210 (NCI4th). Sufficiency of evidence; negligence, generally

Defendant board of education did not have a duty to warn plaintiff of the condition of a rough playing field on which plaintiff was practicing softball with her high school team where plaintiff, an invitee, was aware of the dangerous condition of the field prior to her injuries. **Daniel v. City of Morganton,** 47.

SEARCHES AND SEIZURES

§ 35 (NCI4th). Probable cause for search of vehicle; observation made after stop of vehicle for traffic offense

The seizure of 19.2 grams of cocaine from defendant was not the result of an illegal stop where the officer had authority to stop a vehicle for the purpose of issuing a seat belt citation. **State v. Hamilton,** 396.

Where an officer had probable cause to believe that defendant passenger had committed the infraction of riding in the front seat of a vehicle without wearing a seat belt, the officer could properly request that defendant exit the vehicle, and cocaine discovered during a search of defendant after he exited the vehicle was lawfully seized. **Ibid.**

§ 48 (NCI4th). Observation of objects in plain view; reasonable belief that item is contraband or evidence of a crime

There was no invasion of defendant's privacy beyond that authorized by an officer's pat-down search of defendant for weapons during a traffic stop where the officer felt a hard object in defendant's crotch area which was not a part of his anatomy, and the officer immediately concluded that the object was narcotics based on his experience and training, defendant's nervousness, and defendant's response that he did not know what the object was. **State v. Pearson,** 676.

§ 80 (NCI4th). Investigatory stop; reasonable suspicion of criminal activity

The trial court did not err in concluding that police officers had reasonable suspicion to make an investigatory stop of defendant after he left a suspected drug house just before a search warrant was executed where defendant took evasive action when he knew he was being followed. **State v. Willis,** 537.

The trial court did not err in allowing the introduction of crack cocaine seized during an investigatory stop where the arresting officers suspected defendant was associated with drug trafficking; the detective's search was limited to defendant's jacket pocket and was proportionate to the exigent circumstances which occurred. **Ibid.**

SEARCHES AND SEIZURES—Continued

§ 82 (NCI4th). Stop and frisk procedures; reasonable suspicion that person may be armed

A pat-down search of defendant passenger during a routine traffic stop was lawful where defendant's hand began to reach toward his left side just before he exited the vehicle, and the officer had cause to believe that defendant was reaching for a weapon. **State v. Hamilton,** 396.

Officers had a reasonably articulable suspicion that defendant might be armed and dangerous so that the officers could make a pat-down search of defendant for weapons during a routine traffic stop. **State v. Pearson,** 676.

§ 100 (NCI4th). Affidavits containing erroneous, inaccurate, or false information

The trial court erred by excluding the deposition of an informant, now deceased, in a hearing on defendant's motion to suppress evidence seized from defendant's trailer pursuant to a search warrant where there were discrepancies between the informant's statements in the deposition and statements attributed to him in an SBI agent's affidavit in support of his application for the warrant, but the exclusion of the deposition was harmless error, even if the discrepancies were included in the affidavit as a result of exaggeration, reckless disregard, or bad faith, where the affidavit's remaining content was sufficient to establish probable cause. **State v. Monserrate,** 22.

SECURED TRANSACTIONS

§ 30 (NCI4th). Security interest; requirement that lender possess collateral or debtor has signed security agreement

Plaintiff secured creditors did not have a security interest in the debtor's after-acquired property where the security agreement did not include after-acquired collateral, although the financing statement included after-acquired equipment. **Dowell v. D.R. Kincaid Chair Co.,** 557.

§ 34 (NCI4th). Required contents of security agreements; sufficiency of description

Plaintiff seller had no security interest in personal property transferred as part of the sale of business property where the parties never executed a security agreement, and a UCC Financing statement and the purchase contract together were insufficient to constitute a security agreement. **Crocker v. Delta Group, Inc.,** 583.

§ 118 (NCI4th). Disposition of collateral; requirement of commercial reasonableness

The trial court did not err in an action arising from the sale of knitting machines used as collateral by failing to find that plaintiff was barred from obtaining a deficiency judgment where there was no support for defendant's argument that plaintiff's actions bar all rights to his deficiency judgment or suggest an intent to retain the collateral. **NationsBank of N.C. v. American Doubloon Corp.,** 494.

§ 133 (NCI4th). Acceptance of collateral as discharge of obligation

The trial court did not err by not allowing defendant guarantors to argue that plaintiff's unexcused delay in selling collateral constituted an implied retention of the collateral. **NationsBank of N.C. v. American Doubloon Corp.,** 494.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 2 (NCI4th). Hiring and discharge from employment

Rules of the Criminal Justice Education and Training Standards Commission used in this case to revoke petitioner's law enforcement officer certification were not in violation of G.S. 150B-19(1) in that the Commission had to interpret and implement the sections of the General Statutes which establish felony offenses in concluding that there was sufficient evidence that petitioner had committed acts necessary to satisfy the elements of felonious larceny and felonious breaking or entering. **Mullins v. N.C. Crim. Justice Educ. and Train. Stds. Comm.**, 339.

STATE

§ 31 (NCI4th). Basis of liability under State Tort Claims Act; defenses or exceptions; negligent acts generally

The public duty doctrine is inapplicable in suits brought against State agencies under the Tort Claims Act. **Hunt v. N.C. Dept. of Labor,** 293; **Stone v. N.C. Dept. of Labor,** 288.

§ 46 (NCI4th). State Tort Claims Act; pleadings; contents of affidavit

Plaintiffs stated a claim against the Department of Labor under the Tort Claims Act for deaths and injuries suffered in a fire at a food processing plant based upon failure to inspect the plant for workplace safety violations. **Stone v. N.C. Dept. of Labor,** 288.

TAXATION

§ 28 (NCI4th). Exemptions from taxation; religious use

A statute which exempts from property tax homes for the sick, aged, and infirm which are owned, operated, and managed by a religious body violates the constitutional prohibition against establishment of religion. **In re Springmoor, Inc.,** 184.

§ 211 (NCI4th). Taxpayers' remedies; notice of additional taxes due; taxpayer's application for hearing

The trial court had no jurisdiction to hear plaintiffs' claim challenging a controlled substance jeopardy tax assessment on constitutional grounds where plaintiffs were given written notice of their right to request a hearing before the Secretary of Revenue but failed to request a hearing. **Salas v. McGee,** 255.

§ 217 (NCI4th). Payment of tax under protest as prerequisite to civil action for refund

The trial court had no jurisdiction to hear plaintiffs' claim challenging a controlled substance jeopardy tax assessment on constitutional grounds where plaintiffs failed to contest the tax assessment by first paying the tax and then seeking a refund from the Department of Revenue and failed to request a hearing before the Secretary of Revenue. **Salas v. McGee,** 255.

TRIAL

§ 38 (NCI4th). Summary judgment generally

Summary judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

The Industrial Commission erred by denying defendant employer's request to modify disability payments required by a Form 21 agreement on the basis that defendant had not shown that plaintiff employee had earned any wages in a tax preparation business that he owned because plaintiff's continued entitlement to compensation benefits must be based on his post-injury earning capacity rather than on his wages. **Ibid.**

§ 246 (NCI4th). Recovery for scheduled injuries; injury to other organs or body parts

The Industrial Commission properly found that plaintiff's permanent loss of his senses of taste and smell was compensable as a single injury. **Bess v. Tyson Foods, Inc.,** 698.

§ 252 (NCI4th). Determination of total temporary disability in particular cases

Despite evidence that plaintiff, a roofer, ran errands, went to breakfast with his wife, and washed his car, the Industrial Commission's determination that plaintiff was still totally disabled was supported by the evidence. **Brafford v. Brafford's Construction Co.,** 643.

§ 254 (NCI4th). When total temporary disability period ends

The employee has the benefit of a presumption of continuing total disability arising from a Form 21 agreement, and the burden is on the employer to rebut that presumption. **McGee v. Estes Express Lines,** 298.

§ 259 (NCI4th). Determination of partial disability in particular cases

The Industrial Commission properly awarded plaintiff temporary partial disability benefits from the time he became unable to continue his employment with defendants due to his lung disease until he obtained employment at wages equal to or greater than those which he was earning at the time of his injury, even though his weekly income was approximately the same during the interval due to his working more hours. **Harris v. North American Products,** 349.

§ 285 (NCI4th). Scheduled and unscheduled injuries arising out of same accident generally

The Industrial Commission's award effectively denied plaintiff benefits to which he may be entitled under G.S. 97-29 or G.S. 97-30 where the Commission awarded permanent disability compensation solely for plaintiff's scheduled injury to his hand under G.S. 97-31, plaintiff also suffered psychological injuries, and the Commission failed to assess whether G.S. 97-29 or G.S. 97-30 would provide him a more munificent remedy. **McLean v. Eaton Corp.,** 391.

§ 297 (NCI4th). Refusal to accept suitable employment

The Industrial Commission erred by determining that plaintiff's refusal to accept a job offered by defendant employer was unjustified without making additional findings regarding the impact plaintiff's psychological injuries had on his wage-earning capacity. **McLean v. Eaton Corp.,** 391.

§ 387 (NCI4th). Evidence; hearsay

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff's average weekly wage was $455.18 where defendant alleged that this amount was derived from plaintiff's unauthenticated and incorrectly admitted

ZONING—Continued

§ 90 (NCI4th). Validity of zoning ordinances; taking of property without just compensation

Plaintiffs' claim that defendant city's rezoning ordinance constituted a taking without just compensation was unripe and properly dismissed by the trial court where plaintiffs did not allege that they had applied for a development permit or a variance. **Messer v. Town of Chapel Hill,** 47.

§ 103 (NCI4th). Amendment procedures for zoning regulations; notice and hearing requirements generally

A newspaper advertisement for a zoning amendment hearing stating that the county commissioners intended to add "government owned buildings, facilities and institutions" to the list of permitted uses in certain zoning districts was a sufficient notification of the county's plan to amend its zoning ordinance to allow purchased property to accommodate a state prison. **Carter v. Stanly County,** 628.

§ 117 (NCI4th). Judicial review of zoning matters; requirement of exhaustion of administrative remedies

Plaintiff's argument that the courts should not require them to exhaust their administrative remedies prior to bringing an action challenging the validity of a rezoning ordinance because of statute of limitations considerations was without merit where plaintiffs were able to file their suit within the statutory time frame. **Messer v. Town of Chapel Hill,** 47.

WORD AND PHRASE INDEX

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